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Peigi Wilson
AUTEUR DE LA THÈSE / AUTHOR OF THESIS

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J. Benidickson
DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

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S. Thériault

Gary W. Slater
Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

INTERCONNECTIONS:

THE SYMBIOSIS OF

HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION

An Argument for First Nation Environmental Governance

Peigi Louise Wilson

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Synopsis

In its review of international law, court decisions and federal legislation and policy, this paper confirms that the Crown is not meeting international standards of respect for the connection between Indigenous peoples and the land, is consistently in breach of the Constitution and recommendations from the Canadian Courts to reconcile the rights of Indigenous peoples with the sovereignty of the Crown, excludes First Nation peoples from environmental decision making, and rejects a fundamental principle of most First Nation peoples' traditional cultures; the interconnectedness of all things. This attack on First Nation peoples' inherent rights to self-determination and self-government undermines their capacity to sustain their traditional cultures, which in turn frustrates the preservation of biological diversity. This paper recommends the inclusion of First Nation governments, as equals to the Crown, in environmental governance, thereby facilitating the exercise of traditional laws of respect for the land as a means to help sustain biological diversity.

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Introduction

The land and the people are connected. Protection of one requires protection of the other. This connection between humanity and the land is recognized in elements of international law. The United Nations has adopted standards for the protection of both the environment and human rights.[1] Canada has adopted a wide variety of domestic laws to preserve the environment and legislation specifically geared to the protection of biological diversity.[2] Canada has also adopted an amendment to the Constitution[3] recognizing the rights of Indigenous peoples[4] in Canada, which the Courts have begun to interpret and enforce.[5] Internationally renowned scientists,[6] philosophers,[7] and social

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[1] See for example, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 UN GAOR, 61st Sess., Agenda Item 68, UN Doc. A/RES/61/295, (2007) (UNDRIP); *Agenda 21*, United Nations Conference on Environment and Development, Resolution 1 Annex, UN Doc. A/conf.151/26/Rev.1 (vol. 1) (1993); *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79 (CBD); *Ramsar, Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, 2 February 1971, 996 U.N.T.S. 245, Can. T.S. 1981 No. 9 (Ramsar Convention).

[2] For example, the *Species at Risk Act,* S.C., 2002, c.29. (SARA)

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, section 35.

[4] Canada voted against UNDRIP. By continuing to refer to Indigenous peoples in Canada as "Aboriginal peoples" there is the potential to infer, however erroneously, that 'Aboriginal peoples' in Canada are not 'Indigenous peoples' and therefore UNDRIP does not apply. While it is common in Canada to refer to Indigenous peoples as "Aboriginal peoples", the term Indigenous peoples is preferred herein. The use of the term "Aboriginal" will be retained when used in quotes from other authors or to refer to the Canadian legal concept of "Aboriginal rights". The term 'Indigenous peoples' is a collective term and is used in this paper to refer to the collective of Inuit, Métis and First Nation peoples. When speaking solely of First Nation peoples the term 'First Nation' will be used herein. Although this paper concentrates on First Nation peoples, Métis and Inuit peoples have much the same experience.

[5] See for example: *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 (Sparrow); *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 (Delgamuukw); *Haida Nation* v. *British Colombia (Minister of Forests),* [2004] 3 S.C.R. 511 (Haida).

[6] See for example: Peter Knudtson, and David Suzuki, *Wisdom of the Elders,* (Toronto: Stoddart, 1992); Wade Davis, *Light at the Edge of the World: A Journey Through the Realm of Vanishing Cultures* (Washington: National Geographic Society, 2001); Fritjof Capra, *The Tao of Physics: An Exploration of the Parallels between Modern Physics and Eastern Mysticism (25th Anniversary Edition)* (New York: Random House Inc, 2000) and Fritjof Capra, *The Web of Life,* (New York: Random House, 1997).

[7] John Raulston Saul, *A Fair Country: Telling Truths About Canada,* (Toronto: Viking Canada, 2008), His Holiness the Dalai Lama, *The Universe in a Single Atom: The Convergence of Science and Spirituality,* (New York: Morgan Road Books, 2005).

scientists[8] have found proof of this connection in their research. Most First Nation peoples'[9] traditional laws embrace this notion of interconnectedness.[10] Yet this interconnection has been ignored in recent Canadian history as evidenced by the decline in both biological[11] and cultural diversity[12] in Canada. The decline of indigenous biological diversity is mirrored in the decline of First Nation peoples.

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[8] Dennis Martinez, *Traditional Environmental Knowledge*, (Moscow: University of Idaho, undated), online: University of Idaho <http://www.uidaho.edu/e-journal/pan_eco/dennis.html>; Gary Nabhan, and Sara St. Antoine, "The Loss of Floral and Faunal Story: The Extinction of Experience" in Stephen R. Kellert and Edward O. Wilson, eds., *The Biophilia Hypothesis*, (Washington: Island Press, 1993); Thomas C. Blackburn and Kat Anderson, "Introduction: Managing the Domesticated Environment" in Thomas C. Blackburn and Kat Anderson, eds., *Before the Wilderness: Environmental Management by Native Californians* (Menlo Park: Ballena Press, 1993). Nancy J. Turner, Marianne Boelscher Ignace, and Ronald Ignace, "Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia" in *Ecological Applications*, Vol. 10(5) pp. 1275-1295 (Washington: Ecological Society of America, 2000); Gerry Mander, *In the Absence of the Sacred,* (San Francisco: Sierra Club Books, 1991); United Nations Environment Programme, Darrell Addison Posey, ed., *Cultural and Spiritual Values of Biodiversity*, (London: UNEP, 1999); Geoffrey York, *The Dispossessed* (London: Vintage U.K., 1990).

[9] The terms 'First Nation', 'Aboriginal' and 'Indigenous peoples' will be capitalized throughout the text when used by the author. When citing a quotation from someone else, the term will be capitalized or not depending on the original source.

[10] See for example: James (Sakej) Youngblood Henderson, Marjorie Benson, and Isobel Findlay, *Aboriginal Tenure in the Constitution of Canada*, (Scarborough: Carswell, 2000); John Borrows, "Stewardship and the First Nations Governance Act", (2003-2004) 29 Queen's L.J. 103; Andrew Chapeskie, *Laws of the Land: Aboriginal Customary Law, State Law and Sustainable Resource Management in Canada's North*, (LL.M Thesis, University of Ottawa, Faculty of Law, 1992) (Ottawa: National Library of Canada, 1992); Rebecca Tsosie, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge", (1996) 21 Vermont Law Review 225. United Nations Environment Programme, *supra* note 8. The author also has personal knowledge of this from discussions with First Nation Elders from across the country over the past ten years.

[11] 'Biological diversity' refers to those elements of the planet that are corporeal; "of a material nature, tangible": Walter Avis, etc., *Gage Canadian Dictionary*, (Toronto: Gage Learning Corp, 1983), p. 265. In the CBD 'biological diversity' is defined as the "variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems." CBD, *supra* note 1 at Article 2.

[12] 'Culture' means: "the arts and other manifestations of human intellectual achievement regarded collectively; the customs, civilization, and achievements of a particular time or people". R. E. Allen, ed. *The Concise Oxford Dictionary of Current English 8th Ed.*, (Oxford: Clarendon Press, 1990) at p. 282. "Cultural" means "of, or relating to the cultivation of the mind or manners, [especially] through artistic or intellectual activity." Allen, *Ibid.* at p. 282. The term diversity is defined in the *Oxford English Dictionary* as meaning, "being diverse; variety". R. E. Allen, *Ibid.* at p. 342. Therefore, "cultural diversity" refers to the diverse manifestations of human intellectual achievement of a particular people.

There is evidence of systemic disrespect for First Nation peoples in Canadian federal law and policy.[13] The Crown denies First Nation peoples their rights to self-determination and self-government. Moreover, the Crown rejects basic principles of First Nation peoples' traditional laws.[14] By these acts, the Crown undermines the capacity[15] and opportunity[16] of First Nation peoples and governments to sustain their cultures,[17] particularly the retention and practice of First Nation peoples' traditional environmental

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[13] See United Nations Environment Program, Secretariat for the Convention On Biological Diversity, *Composite Report On The Status And Trends Regarding The Knowledge, Innovations And Practices of Indigenous And Local Communities, Revision of the Second Phase of the Composite Report: North America*, for the Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions of the Convention On Biological Diversity, 5th Sess., UN Doc. UNEP/CBD/WG8J/5/INF/7 (Montreal: Secretariat for the Convention On Biological Diversity, 2007): online: Secretariat for the Convention On Biological Diversity <http://www.cbd.int/doc/meetings/tk/wg8j-05/information/wg8j-05-inf-07-en.doc>.

[14] See for example the treatment at trial of Stephen Augustine's testimony in *R.* v. *Marshall* (2001), 191 N.S.R. (2d) 323; [2001] 2 C.N.L.R. 256, discussed in John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006), pp. 23-27.

[15] The term 'capacity' here largely means 'economic independence', but includes other elements. For example, the Assembly of First Nations (AFN), *Environmental Stewardship Action Plan, 2005* describes 'capacity' to include 1) a sustainable financial base; 2) human resources; 3) tools and infrastructure; and 4) information and research capacity. "Capacity requires stable and predictable funding arrangements and revenue generating opportunities. Funding arrangements sufficient to meet the needs and responsibilities arising from the recognition of First Nations jurisdiction are required. Revenue generating opportunities tied to the sustainable use of natural resources will increase local capacity". AFN, *Environmental Stewardship Action Plan, 2005*, (Ottawa: AFN, 2005), pp. 3-4.

[16] 'Opportunity' is defined here to include jurisdiction and participation in decision making. These are all synonyms for power, as are self-determination and self-government. See AFN, *Ibid.*

17 There is a tendency to use the term 'traditional knowledge' when discussing Indigenous cultures. There is no agreed upon definition and the term is controversial. See for example Bosire Maragia, "The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge all that is Needed?" (2006) 18 Georgetown Int'l Envtl. Law Review 197.
Some belittle First Nation peoples' ideas, philosophies, arts, laws, forms of governance, and so on. There has been a tendency to suggest traditional knowledge is historic in nature, to compare and contrast it unfavourably with 'western science', and to suggest that respect for this knowledge is merely romanticism. For the latest example of this perspective see Margaret Wente, "What Dick Pound said was really dumb – and also true", *Globe and Mail*, (Toronto: Globe and Mail, October 24, 2008), online: Globe and Mail, <http://www.theglobeandmail.com/servlet/story/RTGAM.20081024.wcowent25/BNStory/specialComment/home>; and Frances Widdowson and Albert Howard, *Aboriginal "Traditional Knowledge" and Canadian Public Policy: Ten Years of Listening to the Silence*, Presentation for the Annual Meeting of the Canadian Political Science Association York University, Toronto, Ontario (2006). Therefore, in this present paper, the term 'traditional knowledge' is rejected in favour of the term 'culture' when referring to First Nation peoples' philosophies, laws, and perspectives on environmental governance.

laws and systems of governance.[18] This jeopardizes the relationship between the people and indigenous biological diversity, sending both into decline.

This is a threat not only to Indigenous peoples, but to all Canadians. No one is immune from serious environmental threats. Canada's rejection of First Nation peoples and governments undermines Canada's efforts to sustain the environment on which we all depend. This rejection continues at our collective peril, as there are signs of looming critical malfunctions in the ecosystems that support humanity.[19]

Respect for traditional First Nation peoples' environmental laws and the inclusion of First Nation governments in environmental decision making would be at the core of any cultural revival for First Nations and result in a concomitant improvement in the retention of biological diversity. A new approach to environmental governance that builds on traditional First Nation laws and the reconciliation between First Nation peoples and the Crown will help ensure our collective environmental security for generations to come. While self-determination and self-government are both the right and aspiration of First Nation peoples, it is ultimately in the best interest of all Canadians to accommodate First Nation governments in the constitutional framework. For by sustaining the great depth of cultural diversity that exists in Canada, we collectively hold a greater chance of

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[18] "Governance" means to exercise a "directing or restraining influence" (Avis, *supra* note 11 at p. 507). "Environmental governance" in this paper means to exercise a 'directing or restraining influence' on humanity's interaction with the land.

[19] See for example, Tim Flannery, *The Weather Makers*, (Toronto: Harper Collins Canada, 2006). See also the work of the United Nations Environment Programme generally and particularly the work of the Intergovernmental Committee on Climate Change.

preserving local biological diversity. With greater diversity of ideas and species at hand, we will all be better placed to withstand future environmental shocks.[20]

The continued practice of traditional environmental governance by First Nation peoples is both a right and a mechanism to sustain biological diversity. This paper will confirm the link between biological and cultural diversity. It will then present evidence of Canada's failure to respect First Nation peoples' human rights and support First Nation governments in their efforts to sustain their cultures. This accelerates the decline of the biological diversity on which these cultures rely.

The first chapter explores an element of most First Nation peoples' traditional laws - the concept of interconnectedness. Examples of First Nation peoples' traditional legal systems will be presented. This chapter then reviews a wide range of literature from anthropology to philosophy to confirm a widely held perspective on the interconnection of all things. At the close of the chapter, an argument is made that respect for both the connection amongst peoples and between humanity and the land is essential if we are to secure our collective best interests.

The current status of biological and cultural diversity in Canada will be assessed in Chapter two. The Canadian government has confirmed a decline in biological diversity.[21]

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[20] Thomas Homer Dixon has identified an "ingenuity gap" which threatens our collective capacity to address global challenges. The loss of potential sources of ideas, i.e., from Aboriginal cultures, only widens the gap. See Thomas Homer Dixon, *The Ingenuity Gap: Can We Solve the Problems of the Future?* (Toronto: Random House, 2001).

[21] See Environment Canada, *Wild Species 2005: The General Status of Species in Canada*, (Ottawa: Environment Canada, 2006), online: Environment Canada <http://www.wildspecies.ca/wildspecies2005/GS2005_site_e.pdf>

The decline of First Nation peoples' cultural diversity is evidenced by the decline in First Nation languages.[22] This chapter provides indisputable evidence of a decline in both biological and cultural diversity in Canada. Also discussed here is the importance of language as both an indicator of a decline in cultural diversity and as a mechanism to explore, explain, and experience diverse world views. The loss of First Nation languages constitutes a diminishment of humanity and its capacity to survive. It also frustrates the capacity of First Nation peoples to explain and share traditional world views.

Standards for the recognition of First Nation peoples' rights and interests established in international instruments will be reviewed in Chapter three. Environmental and human rights instruments will be the focus of this chapter, but there will also be some discussion of the negotiation of an international regime on access to and sharing the benefits of Indigenous cultural knowledge and expression (ABS). Collectively, these international agreements define inherent rights to self-determination and self-government, make commitments to protect cultural heritage, and demonstrate respect for the connection between Indigenous cultures and the *in situ* retention of biological diversity. As Canada has agreed to be bound by many of these instruments, Canadian domestic law will be judged against standards therein.

Chapter four outlines findings of the Supreme Court of Canada on conservation and on the recognition and exercise of First Nation peoples' rights. There are signs the Court is

[22] See for example Task Force on Aboriginal Languages and Cultures, Towards a New Beginning, A Foundational Report for a Strategy to Revitalize Aboriginals, Inuit, and Métis Languages and Cultures, (Ottawa: Minister of Canadian Heritage,2005), online: Canadian Heritage, <http://www.aboriginallanguagestaskforce.ca/rpt/part3_e.html>.

alert to the connection between biological and cultural diversity and is prepared to consider international law in interpreting domestic legislation. The Courts have made significant strides in describing and recognizing First Nation peoples' rights. But there remains great uncertainty about how these rights will ultimately be realized and whether the implementation of these rights will take into account the connection between the land and the people.

Various federal environmental and Indigenous related laws and policies will be examined in Chapter five.[23] This chapter will review various laws dealing with Indigenous governance including the *Indian Act,*[24] the *First Nations Land Management Act*[25] (FNLMA), and the *Federal Policy Guide, Aboriginal Self Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* [26] (Inherent Rights Policy). Environmental legislation to be

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[23] It is understood that provinces hold constitutional authority to address issues related to the environment such as those under section 92A of the Constitution Act, 1982, *supra* note 3. For example, 92A. (1) states "In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy...", *Constitution Act, 1867,* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. There is simply not room in this paper to examine the totality of legislation in Canada that impacts on the retention of First Nation cultures. In addition to federal laws, a review of provincial and territorial laws and policies such as hunting and fishing regulations, mining or timber regulations, and land use and zoning laws, will have to be conducted to consider the full impact on First Nation peoples' jurisdiction and capacity to exercise their Indigenous rights to self-determination and self-government. As the primary relationship between First Nation peoples and the Crown is via the federal government, this paper will confine itself to federal law and policy, and only some of those with most immediate impact on First Nation peoples' rights to environmental self-government.

[24] *Indian Act,* R.S.C., c. I-6.

[25] *First Nations Land Management Act,* 1999, S.C. c. 24. (FNLMA)

[26] Indian and Northern Affairs Canada, *Federal Policy Guide, Aboriginal Self Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Ottawa: Indian and Northern Affairs Canada, 1995), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html#PartI>. (Inherent Rights Policy).

reviewed includes the *Species at Risk Act*[27] (SARA), the *Canadian Environmental Protection Act, 1999* [28] (CEPA'99), the *Canadian Environmental Assessment Act* [29] (CEAA), and the *Canada National Marine Conservation Areas Act*[30] (MCAA). The analysis will focus on the degree to which these laws and policies:

- respect traditional First Nation peoples' cultures;
- respect rights to self-determination and self-government; and
- include First Nation governments in environmental governance.

This review will highlight the myriad ways the Crown imposes its will on First Nation peoples and excludes them from environmental decision making. It will also demonstrate the Crown's rejection of a fundamental principle of most First Nation peoples' traditional cultures about the connection between the land and the people. In rejecting this principle, the Crown turns its back not only on First Nation peoples, but on the Supreme Court of Canada, international law, and 'western science', ultimately to the detriment of all Canadians.

The final chapter will examine how Canada might resolve this disconnect between First Nation peoples and the land by establishing a new relationship between First Nation peoples and the Crown. It will focus on the reconciliation of legal and governing systems. Reconciliation requires an act of political will on the part of the federal Crown. The adoption of the concept of interconnectedness as a principle of legal theory and as a model for governing both ourselves and human interactions with the environment is

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[27] SARA, *supra* note 2.
[28] *Canadian Environmental Protection Act, (1999)* S.C., 1999, c.33. (CEPA'99)
[29] *Canadian Environmental Assessment Act* S.C., 1992, c.37 (CEAA)
[30] *Canada National Marine Conservation Areas Protection Act*, S.C., 2002, c.18. (MCAA)

recommended as a means to reconcile Indigenous peoples' and other Canadians' rights and interests and to enhance our collective efforts to sustain biological diversity. It is recognized that this constitutes a major shift in federal law and policy and has wide ranging ramifications, the totality of which cannot be fully explored here. Instead, the final chapter offers some initial thoughts on the challenges to existing law and governance structures brought to bear by recognizing First Nation peoples' inherent rights to environmental self-government.

This paper concludes that respect for the environment and human rights must go hand in hand or neither can thrive. The accommodation of human diversity is essential to sustain biological diversity. Federal law and policy must be modified to facilitate the retention of cultural diversity through the exercise of environmental governance by First Nation peoples and by the exercise by First Nation peoples of their traditional environmental laws. The paper points to the many ways and means that current federal law and policy undermines the capacity and jurisdiction of First Nation peoples to exercise their traditional laws and customs regarding human interaction with the environment. This in turn fuels a further decline of biological diversity in a negative feedback loop. Including First Nation peoples in environmental decision making and recognizing their moral and legal rights to sustain their traditional relationship with the land will facilitate reconciliation between First Nation peoples and other Canadians and help to address the decline of biological diversity that threatens us all. While this paper will focus on the rights and interests of First Nation peoples, it is also at all times and to an equal degree, a paper on respect for all humanity and protection of the land on which we all rely.

Chapter One

Interconnections

The interconnectedness of all things is a fundamental element of many First Nation peoples' traditional beliefs in recognition of the reliance of humanity on the natural world for its survival, as well as the necessary relationships among various elements of the natural world to sustain the web of life. First Nation peoples are not alone in this perception of the world, however, as it is shared by many non-Indigenous peoples as well.

This chapter explores the concept of interconnectedness. The first portion of the chapter examines the concept from the perspective of First Nation peoples. It describes how the ecosystem influences indigenous cultures, affecting everything from traditional foods, to agricultural practices, to law and governance. This chapter provides a very general overview of many First Nation peoples' traditional perspectives or world views. It also briefly describes some First Nation peoples' traditional laws respecting the connection between themselves and the land. Like a tinted filter changes the way one sees colour, this chapter provides evidence that the concept of interconnectedness permeates most First Nation peoples' traditional cultures.

The next portion of the chapter examines the concept of interconnectedness from the perspectives of western scientists, philosophers, and the international community. What will be described herein is the paradigm shift experienced in western science in the early

20th century.[31] It describes a perspective of the world very similar to traditional First Nation perspectives. This will be a brief and superficial examination of the similarities. This paper is not a detailed comparison of the intricacies of physics, philosophy, or First Nation laws.[32] It is instead a superficial examination of the similarities in order to demonstrate the commonalities between peoples and cultures and thereby encourage collective action to address a common threat. The review of international and domestic environmental and Indigenous law which follows in later chapters demonstrates that this notion of an interrelationship among peoples and between people and land is being adopted by some institutions but not others, notably the current Canadian administration.

This chapter concludes that the accommodation of human diversity is essential to sustain biological diversity. It is not enough to protect the land. The people that rely on indigenous biological diversity to sustain their cultures must also be respected. Laws which deny inherent human rights are as much a challenge to the retention of cultural and biological diversity as those which undermine environmental integrity directly. Thus it is not simply environmental laws that will need review and amendment, but all laws and governing structures which undermine cultural diversity and hence biological diversity.

Traditional cultures are tied in substantial ways to the physical environment in which they initially arose. This connection of humanity to the land is exposed through our cultures. What we eat, how we dress, what our houses are like, and our philosophies, among other factors, is all part of our cultures. Historically and in large part still today,

[31] See His Holiness the Dalai Lama, *supra* note 7.
[32] There is neither room herein, nor is the author equipped to undertake such a study. To do so will take the work of many minds and is recommended at the close of this paper.

our foods, clothes, houses, agricultural practices, and so on, are determined and affected by the ecosystem in which we live. Human cultures have evolved through a connection to a particular geographic space, built upon the environments in which our ancestors were rooted. Local biological diversity gives rise to local cultures. In a positive feedback loop, through the exercise of traditional local cultures the local biological diversity is enhanced.

> On the one hand, it is through cultural practices that a significant part of the world's biodiversity is created and maintained, both domestic and wild, and from the level of genes, species and ecosystems to entire landscapes. On the other hand, cultural diversity relies in its turn upon key elements and events in the natural world to maintain entire assemblages of social, cultural, economic and political expression.[33]

Biological diversity and traditional cultures have locality[34] and affect each other. For example, our perception of 'maple syrup' can only have arisen in the mid east of North America, because this is the indigenous habitat of the sugar maple. There is no traditional concept of 'maple syrup' in Thai culture or in Ethiopian culture, just as there is no traditional knowledge of 'coconut' or 'coffee' in First Nation cultures. Neither coconut nor coffee is indigenous to Canada. Biological diversity obviously has locality,

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[33] United Nations Environment Program, *Environment and Cultural Diversity,* Note by the Executive Director of UNEP to the Twenty-third session of the Governing Council/Global Ministerial Environment Forum, UN Doc.UNEP/GC.23/INF/23 (Nairobi: UNEP, 2005), at para. 51, online: UNEP <http://www.unep.org/GC/GC23/documents/GC23-INF23.doc>.

[34] 'Locality' means "a district or neighbourhood; the site or scene of something [especially] in relation to its surroundings and the position of a thing; the place where it is", Allen, *supra* note 12 at p. 695.

just as the cultures that arose from that biological diversity have locality – curry in Thailand, coffee in Ethiopia, maple syrup in eastern Canada. In fact, they have the same locality as the biological diversity which spawned it.

First Nation peoples' traditional understandings about how to thrive in this land arises from their experience with the local biological diversity. In a quote attributed to an unnamed Ojibway Elder, an example of this connection is provided in describing differences in traditional agricultural practices between the Ojibway and non-Indigenous peoples:

> White man makes a farm to grow hay to feed his animals. He also grows vegetables for food. Indians also feed their animals, only in a different way. Around the middle of April, the Indian trapper looks around to find a bare spot, mostly up on the rocks where the snow goes first, where there is still a lot of snow at the bottom of the hill. They set a match to this bare spot and only burn where it is dry and bare, so there's no dangers of a big forest fire because the fire stops when it reaches snow.
>
> Two years later you would find a big patch of blue berries in amongst the bushes. And you would see all the hungry animals of all kinds feeding on those blueberries – fox, wolves, black bear, partridge, squirrels, chipmunks, and all kinds of other birds. No doubt they were happy to find those berries. It was the trapper that got it for them by setting the fire.
>
> That is what I mean when I say Indians feed their animals too. The berries were for our own benefit too. As we would preserve them for our winter use. After a

> few years, young trees would grow on that burnt place. Then the rabbits would get to feed from those young bushes. In later years, the little trees would get bigger. Then the moose and deer get to feed from it. So you see, the setting of these small fires can go a long way to feeding many animals.[35]

Agricultural practices are one means of ordering a society, and in this case the connection between the indigenous biological diversity and local cultures is obvious. First Nation peoples' relationship with the land, that is, their cultural perceptions of their connection to the land, is expressed not only in traditional agricultural practices, but in traditional systems of governance as well.

Law and governance are rarely thought of as having locality. They are not considered to have arisen from or be tied to a particular ecosystem. Ideas such as democracy, or consensus based decision-making, or laws about protecting the environment are widely deemed to be transportable. After all, ideas are easily transferred from person to person and between peoples. Many different peoples can hold similar ideas, even sharing ideas across what are often perceived to be 'cultural' divides. As incorporeal elements, there is no place where ideas are at, other than in the minds of the people that hold those ideas. They are as portable as the people that hold them. Elements of culture, such as philosophies of governance do not appear to be reliant on local biological diversity. From maple trees to maple syrup is an easy transition; but from maple trees to consensus based decision-making seems a stretch. Yet this is exactly what is being argued here. Both biological and cultural diversity have locality. First Nation peoples, through their

[35] Andrew Chapeskie, *supra* note 10, at p. 76.

experience of their traditional lands, have built elaborate societies complete with laws and governing structures.[36] These traditional laws and governing structures are as much a result of the biological diversity of this land as is maple syrup or salmon.[37]

We know this from descriptions of the connection between ideas and the land through the voice of Indigenous people. John Borrows, an Ojibway legal scholar, notes, First Nation peoples "developed spiritual, political, and social conventions to guide their relationships with each other, and with the natural environment. These customs and conventions became the foundation for many complex systems of government and law."[38] He writes about how the connection to the land influences Anishinabek governance.

> The Anishinabek Ojibway of the Great Lakes have strong teachings relating to *bimeekumaugaewin* that are relevant to governance. These ideas of acknowledgement, accomplishment, accountability and approbation are embedded in their creation epic and associated stories. Ojibway stories about *bimeekumaugaewin* speak of how the world was created and how beings came to live on the earth. They tell of how Ojibway ancestors depended on the earth, plants and animals for their sustenance and survival once they arrived. The Ojibway's acknowledgement of a Creator and an appreciation of their reliance on

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[36] See for example, Henderson, *supra* note 10; Borrows, *supra* note 10; Julian T. Inglis, ed., *Traditional Ecological Knowledge: Concepts and Cases*. International Program on Traditional Ecological Knowledge. (Ottawa: International Development Research Centre, 1993); Fikret Berkes, Johan Colding, and Carl Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management" in *Ecological Applications*, Vol. 10(5), pp. 1251-1262.

[37] See for example, John Borrows, *Indigenous Legal Traditions in Canada supra* note 14, pp. 13-74. Further proof can be had through conversation with First Nation Elders.

[38] John Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy", 47 Univ. of Toronto L.J. 417, at pp. 430-431.

their relationship to the world is the first principle of *bimeekumaugaewin* within Ojibway society. As these stories progress, the second principle of *bimeekumaugaewin* emerges: how to accomplish the Creator's vision in setting life in motion. The stories convey the manner in which plants, animals and humans should relate to and respect one another. They contain important teachings about the preparation that is necessary for living a good life. And they talk of principles that must be followed so that all the orders of creation can live together in peace and friendship. The stories continue on to explore the third principle of *bimeekumaugaewin*: accountability. Ceremonies are often performed in conjunction with these stories to communicate to the Creator and acknowledge before others how one's duties and responsibilities have been performed. Dancing, feasting and singing sometimes accompany these rituals. Finally, the stories finish by talking about the consequences of living in accordance with or contrary to these principles. Stories about *Mandamin, Gowkopshee, Animoosh, Pauguk, Pitchee, Nanabush*, and hundreds of other characters communicate the notion that every being will face the consequences of their actions. The idea of approbation received for proper performance of duty, or disapprobation flowing from failure to fulfill a responsibility, complete the Ojibway circle of *bimeekumaugaewin*. These concepts are much older than Canada, and have much to teach about how First Nations should govern themselves today. [39]

[39] Borrows, *supra* note 10 at p. 103.

Sakej Henderson, *et al*, explore the Mi'kmaq sense of connection to the earth.[40] The authors describe how the Mi'kmaq view of their space influences Mi'kmaq law and governance.

> Shared knowledge about maintaining a particular space penetrates Aboriginal law and manifests shared values, beliefs, traditions and customary behaviours. The law and teachings not only determine what is physically available to the families – what they can use – but also regulate their choices about the rate of resource use, and whether to modify their resources to increase the availability of useful resources. Aboriginal law allocates among allied families and friends the responsibility for managing their resources, and creates a customary transnational trading code with other nations and peoples to increase choices and resources. [41]

Connections between people and the land from a traditional First Nation perspective are multitudinous and complex.[42] Many First Nation peoples traditionally view themselves as part of the land. Speaking of the Mi'kmaq, Henderson notes, "Their notion of self does not end with their flesh, but continues with the reach of their senses into the land itself. Their notion of the space is more than vision: it includes the other non-visual senses. Thus they can speak of the land as their flesh; they are the environments."[43]

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[40] Henderson, *supra* note 10 at pp. 406-419.
[41] *Ibid.* at p. 412.
[42] For an example of this complexity see AFN, *Incorporating First Nations Health Perspectives And Traditional Knowledge Into Health Risk Assessment Models* (Ottawa: AFN, 2005), online, AFN <http://www.ie.uottawa.ca/English/Reports/AFN_AHRAM_II_FCM_%20Final%20Report28July2005_PM.pdf>.
[43] Henderson, *supra* note 10 p. 409.

First Nation peoples often speak of their relationship with the land as one of "reciprocity and kinship"[44]. As with other relationships, there is give and take; rights and responsibilities.[45] It is a relationship of stewardship, "the assumption of responsibility for something given".[46] First Nation traditional philosophies understand there to be a symbiotic relationship between humanity and the natural environment, a relationship celebrated and honoured in their traditional cultures, including in their laws and systems of governance.[47]

There is wide diversity in First Nation cultures across Canada, so generalizations about First Nation cultures must be approached with caution. That said, there does appear to be wide spread agreement between traditional world views held by First Nation peoples about a profound and over arching connection between themselves and their lands. This notion of the land and people being one is a cornerstone of most First Nation peoples' traditional cultures. It is often expressed as recognition of the interconnectedness of all things. Although a singular idea, the ways First Nation peoples have incorporated and expressed this notion of interconnectedness in their traditional cultures is highly diverse. As Henderson, *et al* note:

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[44] Tsosie, *supra* note 10.

[45] "As such, Yukon [F]irst [N]ations citizens not only see that we have rights to the land, but we also have responsibilities and obligations owed to the land and to the environment flowing from that relationship. We believe that if we take care of the land, it will take care of us." House of Commons, Parliamentary Committee on Environment and Sustainable Development, (8 May 2001) at 0915 (Daryn R., Leas, Lawyer, Council of Yukon First Nations). On behalf of the Tlingit, Tagish, Han, Gwitchin, and Southern and Northern Tutchone First Nations, online: Parliament of Canada, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=54904&Lang=1&PARLSES=371&JNT=0&COM=213.

[46] Borrows, *supra* note 10, at pp. 103-4.

[47] See for example Knudtson and Suzuki, *supra,* note 6.

> No uniform or universal Aboriginal perspective on Aboriginal knowledge exists in Canada. Yet such diversity is the foundation for understanding Aboriginal laws, tenures, and rights in the Constitution of Canada. These Aboriginal systems of knowledge are the only foundation for knowing a *sui generis* Aboriginal law and its tenure. They define the nature of a group's attachment to the land, the uses and the limitations on uses of the land and the Aboriginal practices, customs and traditions.[48]

First Nation governments[49] arose in and are typically defined by a particular locality. First Nation peoples generally share in common a traditional perception of their intimate connection to and reliance on the land. There is a symbiotic relationship between biological and cultural diversity. They are intertwined, one supporting the other. The connection between the land and the people is a fundamental element of First Nation peoples' traditional laws.

Yet, First Nation peoples are not alone in this understanding of the world. Evidence of the connection between indigenous biological and cultural diversity has been demonstrated in social science research as the following examples prove. They show how indigenous biological diversity relies on the exercise of traditional cultures to flourish.

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[48] Henderson, *supra* note 10, at p. 401-402.

[49] The term 'First Nation governments' will be used throughout the paper in a generic sense to mean those duly selected, by whatever process is deemed appropriate by their communities, to speak to the interests of the community. They are those internally constituted and recognized authorities representing First Nation peoples' collective interests.

> Many (although not all) plant communities require disturbance to thrive. So, in the act of using plants, they are enhanced and conserved.
>
> There are hundreds of examples of this in T.E.K. [traditional ecological knowledge]. Every time a fire was set, corms and roots dug, the plumpest seeds collected and sown uneaten, baby beavers counted to calculate the seasonal quota, a stem-tip broken deliberately in the taking of fruits and nuts, the strongest deer let out of encircling fires during communal hunts, a tree pruned to encourage straight shoots for baskets, a fishing weir constructed which let more fish through upriver than were harvested--every time humans used the land, the land was made healthier.[50]

Or consider this example from California:

> [T]he vertical structure, spatial extent, and species composition of the various plant communities that early European visitors to California found so remarkably fecund were largely maintained and regenerated over time as a result of constant, purposive human intervention. When that intervention ceased, a process of environmental change began that led to a gradual decline in the number, range and diversity of many of the native species and habitat types that once flourished here. When elders today are asked why the rich resource base and fertile landscape that they remember as having existed in the past has changed so drastically, they are apt to respond by saying simply "No one is gathering anymore". The idea that human use ensures an abundance of plant and animal life appears to have been an ancient one in the minds of native people.[51]

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[50] Martinez, *supra* note 8. See also note 17 regarding the term 'traditional knowledge'.
[51] See also: Blackburn, *supra* note 8, at p.19.

Social scientists have demonstrated that where there is interference with the exercise of traditional First Nation peoples' cultures, biological diversity falls into decline. Luisa Maffi, cofounder and president of Terralingua: Partnerships for Linguistic and Cultural Diversity notes, "Due to its place-specific and subsistence-related nature, [Indigenous] ecological knowledge is at especially high risk of being lost, as people are removed from their traditional environments or become alienated from traditional ways of life and lose their close links with nature."[52] The loss of a specific plant or animal hampers retention of knowledge about that species. Without the object the traditional words, ceremonies or values associated with that object becomes meaningless. This has been referred to as an "extinction of experience".[53]

> The disappearance of traditional ceremonial plants has hampered the retention of specific rituals. The Elders are unable to perform certain ceremonies due to the loss of particular species in their territory as a result of environmental destruction. As such, they are unable to pass on these rituals, many of which are teachings about the human connection to the Earth and respect for the Earth. The loss of these ceremonies hampers the teaching of these lessons, thereby reducing the knowledge and language..., which in turn fuels environmental destruction.[54]

A negative feedback loop is created as traditional First Nation cultures fall into decline. The current National Chief of the Assembly of First Nations (AFN) explained to the

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[52] Luisa Maffi, "Language and the environment", in UNEP, *supra* note 8 at p. 30.
[53] Nabhan, *supra,* note 8.
[54] F.S. Molina, 1998 "Wa huya ania ama vutti yo'oriwa – the wilderness world is respected greatly: The Yoeme (Yaqui) truth from the Yoeme communities of Arizona and Sonora, Mexico", cited in Luisa Maffi, "Language and the environment", in UNEP, *supra* note 8.

Parliamentary Standing Committee on the Environment and Sustainable Development how this operates in the context of climate change.

> Our traditions are different from those of other Canadians. We tend to live connected closer to the land, reliant as we are on the land for our food and medicines and spiritual and cultural inspiration. Our traditional social structures revolve around our relation to the land. Environmental practices that are unsustainable or irresponsible are problematic for all creation, but they are felt sooner and more profoundly in our communities. For example, the loss of a caribou herd, a mainstay of first nations' diet in northern Quebec, constitutes a crisis in food security for the first nations, but may have little impact on a non-aboriginal Canadian.
>
> Along with the loss of food comes the loss of self-sufficiency, loss of opportunity to pursue our traditional way of life and to share our traditions with the younger generation. Our way of life is threatened when we are faced with lost prospects of cultural expression and enrichment as a result of the impact of climate change on settlement patterns, sources of food and medicines, and spiritual sites.
>
> This in turn adds to the severe social, economic, and cultural pressures on first nations, as we struggle with the profound changes we have already experienced. The loss of opportunities for cultural expression in turn triggers social problems,

> as we lose hope for the future. Environmental degradation therefore often has a more direct and negative impact on our people.[55]

Darrell Posey, an anthropologist and biologist undertook the collection of stories from Indigenous peoples around the globe about their connection with the land.[56] This massive volume provides ample evidence of the connection Indigenous peoples have to their local environments. In this volume, Indigenous peoples from Asia, Africa, Latin America and Europe describe similar relationships with their lands.

It is presumed here that First Nation traditional philosophies about caring for the earth are valuable and to be emulated. This is not a harkening back to simpler times or romanticizing traditional knowledge.[57] First Nation traditional philosophies will be sorely tested by the social and environmental circumstances in which we find ourselves in the early 21st century. The impracticality of adopting First Nation traditional cultures *holus bolus* is evident, for example, in the impossibility of feeding the current population of Canada on the basis of traditional First Nation agricultural practices. However, there is wisdom in the traditional cultures of First Nation peoples. Their fundamental understanding of humanity's reliance on the earth imbues their laws and governing structures. These traditional laws and governing structures have been refined over eons, and once allowed First Nation peoples and their cultures to flourish.

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[55] See, House of Commons, Parliamentary Standing Committee on the Environment and Sustainable Development (12 April 2005), at 1200, (National Chief Phil Fontaine) online: Parliament of Canada, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1753997&Language=E&Mode=1&Parl=39&Ses=2#Int-1218134>.

[56] UNEP, *supra* note 8.

[57] See Maragia, *supra* note 17.

But it is not simply Indigenous peoples that recognize the interconnections between all things. Western scientists too have found proof of these connections in their work. In the early 20th century, physicists such as Einstein, Heisenberg, Bohr and Schrödinger were challenging the ideas of Descartes and Newton.[58] Their conclusions have caused a paradigm shift in scientific thought, but not yet, as will be demonstrated in the chapters to come, in the consciousness of the Crown. As expressed by His Holiness the Dalai Lama:

> One of the most inspiring things about science is the change our understanding of the world undergoes in the light of new findings. The discipline of physics is still struggling with the implications of the paradigm shift it underwent as a result of the rise of relativity and quantum mechanics at the turn of the twentieth century. Scientists as well as philosophers have to live constantly with conflicting models of reality – the Newtonian model, assuming a mechanical and predictable universe, and relativity and quantum mechanics, assuming a more chaotic cosmos. The implications of the second model for our understanding of the world are still not entirely clear.[59]

David Suzuki, a geneticist trained in the philosophies of Descartes and Newton, describes his increasing awareness of traditional Indigenous perspectives and the challenge this brought to bear on his own culture and education.[60] In an account similar to that of Posey, David Suzuki and Peter Knudtson, a biologist, provide further undeniable evidence that Indigenous cultures from around the globe have understood for eons

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[58] See Capra, *supra* note 6.
[59] His Holiness the Dalai Lama, *supra* note 7, at p. 43.
[60] Knudtson, *supra* note 6, at p. xxii.

something 'western science' is just coming to understand – the connectedness of all things.[61]

Proof of the connections between the earth and humanity are being confirmed in different scientific disciplines. For example, a very recent study has linked changes in human health to changes in the climate.[62] Fritjof Capra, a physicist, systems theorist and philosopher has come to conclude that the description of the world provided by modern physics theories leads to a recognition of the interconnectedness of all things. Like Suzuki, this has fostered a commitment to environmental protection in Capra's personal and professional life.[63]

Another internationally renowned philosopher, John Raulston Saul, has recently reviewed some of the ways that First Nation cultures have influenced governance in Canada, despite strong colonialist tendencies expressed by the Crown.[64] Raulston Saul describes traditional First Nation perspectives which turn on the "non-Judeo-Christian, non-rational, non-linear, idea of limitation and balance between people and place and a circular view of society that assumes inclusion and being careful."[65] He describes how the notion of environmentalism arose from Indigenous perspectives about humanity's relationship with the land.

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[61] *Ibid.*
[62] Michael Oliveira, *Kidney stones may become more common with climate change: study* (Canadian Press, 14 July 2008), online: Canadian Press, http://health.lifestyle.yahoo.ca/channel_health_news_details.asp?news_id=15770&news_channel_id=1055&channel_id=1055
[63] Capra has begun the Centre for Ecoliteracy, 'dedicated to education for sustainable living". See, Centre for Ecoliteracy, online, Centre for Ecoliteracy, <http://www.ecoliteracy.org/ >.
[64] Raulston Saul, *supra* note 7,
[65] *Ibid,* at p. 297.

> [T]here is nothing romantic about the indigenous idea of nature. It is a philosophy in which humans are a part of nature, not a species chosen to master it. This is now the central concept of most scientists, whether they are looking at climate, water or species. In today's language, the indigenous idea of what is now called environmentalism produced the concept of minimal impairment.[66]

Raulston Saul also argues that Indigenous peoples have influenced Canada's military strategy as peace keepers, and Canada's social conscience as one of 'inclusive egalitarianism'.[67]

There is clearly wide agreement both amongst First Nation peoples and between Indigenous peoples and modern non-Indigenous researchers and thinkers. The only way to explain how botanists, anthropologists, philosophers, physics theorists, First Nation peoples, and His Holiness the Dalai Lama can be in such agreement is because they have individually, through their personal examination of the world around them via the medium of their various studies, hit on the same truth. Humanity and the land and all peoples are connected, from the smallest particle to our largest collective.

Later chapters in this paper show how this understanding has yet to be fully seized by Canadian or international law makers. For now, this chapter turns to an examination of the connection between human rights and environmental protection.

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[66] *Ibid,* at p. 81.
[67] *Ibid,* at pp. 89-97.

Cherie Metcalf, a legal scholar, has defined two models at play in international law which embrace elements of this concept of interconnectedness. The first is the 'cultural integrity model'.[68] This model acknowledges links between Indigenous cultures and the health of the environment on which these cultures rely. It requires states to support Indigenous rights through consultation and compensation and to allow Indigenous peoples to benefit from natural resources.[69] Metcalf points to examples of this approach in international environmental agreements and notes it is also under discussion in the development of an international ABS regime. As will be seen in later chapters, Canada follows this model in some instances, for example in the requirements for consultation established at common law.[70]

Metcalf notes, and it is agreed, that the cultural integrity model is likely insufficient to secure the rights of Indigenous peoples.[71] This approach may lead to procedural participation of Indigenous peoples and the possible adoption of their holistic world view. But the degree of participation and adoption of their perspective ultimately depends on the good will of the state. This approach may not allow for the development of Indigenous practices[72] and fails to secure substantive involvement of Indigenous peoples in environmental decision making.[73] This concept does not address the fundamental power imbalance between the state and Indigenous peoples. Without the right to

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[68] Cherie Metcalf, "Indigenous Rights and the Environment: Evolving International Law", (2003-2004), 35 Ottawa L. Rev. 101.
[69] *Ibid.* at pp. 22-34.
[70] See for example Sparrow, *supra* note 5 and Haida, *supra* note 5.
[71] *Ibid.* See also, Peigi Wilson, *The Hoop Dance: Uranium Mining, Aboriginal Consultation, and the Mining Act of Ontario*, (2007) unpublished.
[72] See John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster* (Toronto: University of Toronto Press, 1998).
[73] Metcalf, *supra* note 68 at pp. 52-58. Such a model fails at the domestic level as well, as will be seen in the chapters which follow.

determine their own interactions with the environment and the opportunity to diplomatically influence the decisions of others, Indigenous peoples are unable to secure their cultures.

Metcalf describes a second model, the self-determination model, found in human rights instruments such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). Canada follows this model in part as well, as evidenced by section 35 of the Constitution and the reconciliation of First Nation peoples' and the Crown called for by the Supreme Court of Canada. This model acknowledges that Indigenous peoples have the right to self expression through their relationship with the environment. But, this expression is not tied to a cultural link with the environment.[74] Instead, these human rights instruments acknowledge that rights of Indigenous peoples exist regardless of culture or relationship with the environment. The self-determination model provides stronger guarantees to Indigenous peoples, including rights to land and rights to self-government.[75]

The implications of this model on international law are substantial, argues Metcalf. This model would require Indigenous peoples to be included as "equivalent to state" parties in international legal instruments, to have the capacity to enter into international environmental agreements independently, and adopt international environmental legal norms domestically.[76] This approach challenges current international arrangements, but

[74] *Ibid.*
[75] *Ibid.* at paras. 66-69.
[76] *Ibid.* at paras. 70-74.

provides greater guarantees that the rights and interests of Indigenous peoples will be respected.[77]

In domestic application, this second model implies a redistribution of power between the Crown and First Nation peoples. What form this redistribution might ultimately take ranges from Indigenous nation sovereignty and complete political division from Canada to some form of accommodation within the Canadian federation. The ultimate form of their relationship is a matter for discussion between the Crown and First Nation governments. How the redistribution takes place is also important, for there are also many ways this can be achieved. This redistribution can take place peacefully through diplomatic means or through war and violence. War and violence are not the solutions as they are themselves disrespectful of the environment and human rights. The negotiation of power sharing can, and in fact at international law must, be achieved diplomatically. The Canadian courts too have recommended negotiation as the manner in which to achieve reconciliation between the Crown and First Nation peoples.[78]

The redistribution of power from the Crown to First Nation peoples sounds like a tall order from the perspective of a colonialist government. Governments are notorious for rarely giving up power once seized. Yet this is exactly what is required in order to allow First Nation peoples the capacity and opportunity to exercise self-determination and self-government. While Canada is being asked to give up some power, a power many argue

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[77] *Ibid.* at paras. 75-89.
[78] See for example comments by Chief Justice Lamer and Justice LaForest in *Delgamuukw*, *supra* note 5 at paras. 186 and 207 respectively.

was illegitimately seized in the first place, this paper argues that it is in Canada's long term best interest to do so. Without diversity, there is no life.

Of course models are just aids to understanding reality, they are not reality. While Metcalf presents convincing examples of the 'cultural integrity' model at international law, when it comes to domestic application the author is unaware of any examples of States benignly exercising power on behalf of an Indigenous people and depressingly too many which do not. Even if a state was dedicated to this objective, they still would be inadvertently suppressing exactly what is being recommended here – the celebration of diversity. Just like biological diversity, ideas can go extinct and traditional culture that is not exercised is in danger of being lost, such as the knowledge and practice of traditional laws.

Likewise, the 'self-determination' model is neither descriptive of reality nor sufficient to achieve the end sought – the survival of indigenous biological diversity. No state is entirely self-contained. The very fact that diplomacy and international law exist is because states must find ways to share the earth with other nations. 'Self-determination' often means compromise in the interest of others.

Furthermore, while self-determination would guarantee that First Nation peoples will once again enjoy their inherent rights, there is no guarantee that modern day First Nation governments will exercise these rights based on the principles of their traditional laws.

There is nothing inherent about traditional law; it is not passed on genetically like the colour of one's skin. Ideas are not hide-bound to a race of people. First Nation peoples are as likely as any other race of people to adopt the perspective to which they are most often exposed. Assimilation has wrought great change in First Nation communities. Some First Nation peoples may choose to live by traditional laws, while others may choose a more environmentally destructive path. As such, the recognition of human rights alone is insufficient to win the protection of biological diversity if First Nation governments do not themselves support the revival and practice of traditional laws. Neither respect for human rights nor protection of the environment alone will ensure the protection of biological diversity. These must go hand in hand. There must be respect for both the land and the people by all governments. Respect for the land is demonstrated by preserving the environmental means to sustain cultural diversity. Respect for people is demonstrated by respecting human rights, such as rights to self-determination and self-government. The land and the people are connected. The protection of one is only found through protection of the other.

This chapter has explored the concept of interconnectedness found in traditional First Nation laws and in the research and theories of other people. It has been concluded here that the retention of biological diversity can only be guaranteed if governments respect the interconnection of human rights and environmental protection.

The next chapter provides proof that the indigenous biological and cultural diversity in Canada is in decline. Later chapters point to failings in Canadian law and policy which have fostered this decline.

Chapter Two

Status of Biological and Cultural Diversity in Canada

This chapter examines the status of biological diversity and First Nation cultures in Canada. It is possible to conclude from this evidence that both are in decline. This paper argues that there are causal linkages between the two. One such linkage is found in the diversity of First Nation languages. The extinction of many of these languages frustrates the retention of traditional law and constitutes the loss of potentially valuable ideas to address modern environmental and social problems. As a consequence, it makes it impossible to reconcile First Nation and non-Indigenous laws and legal systems, undermines the retention of cultural diversity and hastens the decline of biological diversity, to the detriment of us all.

Status of Biological Diversity

In 1962, Rachel Carson wrote *Silent Spring*[79], warning of the impact of chemicals on the bird population. Carson alerted the general population to the pending loss of biological diversity and the impact of such a loss. We see some positive results of our collective efforts to preserve plant and animal diversity 45 years later. However, we have also lost some species entirely and many others remain at risk. Negative impacts on species continue to threaten greater losses over time. Species culturally significant to First Nation peoples are among those at risk.

[79] Rachel Carson, *Silent Spring,* (Boston: Houghton Mifflin, 1962).

The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) has the unenviable task of determining the status of biological diversity in Canada. In 2000, Environment Canada published COSEWIC's first nation wide wild species at risk assessment.[80] This report was intended to serve as a baseline from which to examine the status over time for the species assessed therein.

The report, *Wild Species 2000: The General Status of Species in Canada*, examined the status of amphibians, birds, reptiles, mammals, freshwater fishes, ferns, and orchids.[81] Over 1,600 species were assessed, which accounts for an estimated 2% of the over 70,000 total described species in Canada.[82] The report noted that

> the majority (about 65%) of Canada's wild species are *Secure* at all geographic scales. However, across species groups, the proportion of *Secure* species is highly variable - ranging from a low of 40% for marine and terrestrial reptiles to a high of 67% for marine and terrestrial mammals. Five percent of species are known to be *At Risk* and another *5% May Be At Risk* [emphasis in the original].[83]

Many species such as butterflies could not be adequately assessed because there was simply not enough known about them.

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[80] COSEWIC divides species into categories based on the health of each species. These categories include: *Extirpated/Extinct, At Risk, May Be At Risk, Sensitive, Secure, Undetermined, Not Assessed, Exotic,* or *Accidental.* Species "at risk" are deemed to be threatened or endangered. Those that "may be at risk" have not yet been assessed by COSEWIC. Species deemed to be 'sensitive' "are not believed to be at risk of immediate extirpation or extinction but may require special attention or protection to prevent them from becoming at risk." Environment Canada, *Wild Species 2000: The General Status of Species in Canada*, (Ottawa: Environment Canada, 2001) p. 10, online: Environment Canada <http://dsp-psd.pwgsc.gc.ca/Collection/CW70-7-2000E.pdf.>.

[81] *Ibid.*

[82] *Ibid.*, at p. 5.

[83] *Ibid.*

A second report was published by Environment Canada in 2007, *Wild Species 2005*. A total of 7732 species across all types of ecosystems were assessed for this report; still only 11% of all described species in Canada. Crayfish, odonates (dragon flies and the like), tiger beetles, vascular plants, marine fishes, and freshwater mussels were assessed for the first time. Numbers released by Environment Canada in 2005 show 30 species are extirpated, five extinct, 206 are at risk, 634 may be at risk, and 657 are considered sensitive and thus may require extraordinary attention or protection to prevent their decline. [84]

Of the species assessed in 2000 and reassessed in 2005, eleven plant species moved into a higher risk category, six moved to lower risk and one is now extirpated (no longer existing in its traditional territory). The status of freshwater fishes has improved somewhat since 2000, but the status of a majority of fish species remains un-assessed or undetermined.[85] Freshwater mussels are at risk, with only 37% of this species considered secure. Of the amphibians assessed in 2000 and again in 2005, half moved to a higher level of risk in 2005 and half moved to a lower level of risk.[86] The status of reptiles remained unchanged; the majority are either rated sensitive or at risk.[87] The status of birds and mammals remains relatively unchanged since 2000, with the status of most mammals remaining the same, some birds moving to a higher level of risk, and a similar number of birds moving to a lower level of risk.[88]

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[84] Environment Canada, *supra* note 21, at p. 4.
[85] *Ibid.*, at p. 68-69.
[86] *Ibid.*, at p. 81.
[87] *Ibid.*, at pp. 84 and 87.
[88] *Ibid.*, at pp. 99 and 115.

Environment Canada notes that there may be a number of reasons why the status of a particular species has changed and that not all changes are a result of "true biological change".[89] The Report states, the "majority of changes in Canada rank were due to changes in process (40%), or to new or updated COSEWIC assessments (33%); only 6% of changes were wholly or partly due to biological change since 2000."[90] Approximately one-third of the changes noted from 2000 to 2005 involved species moving into a higher level of risk, approximately one-third of the changes moved species to a lower level of risk and another third moved species into or out of the undetermined, not assessed, accidental or extirpated categories.[91]

The next full assessment is not due until 2010, but as of October 2008, four mammals, two birds, four reptiles, one amphibian, two fishes, three arthropods, two molluscs, two vascular plants and one moss are extirpated. Of those species listed as endangered, 17 are mammals, 25 are birds, eight are reptiles, six are amphibians, 20 are fishes, 14 are arthropods, 12 are molluscs, 78 are vascular plants, six are mosses, and two are lichens.[92] Many others are threatened or are of special concern.[93]

Threats to the biological diversity in Canada include habitat loss and degradation, over-harvesting, and the introduction of exotic species. Habitat loss is the result of land clearing and changes to waterways that reduce the amount of land or water habitat

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[89] *Ibid.*, at p. 3.
[90] *Ibid.*
[91] *Ibid.*
[92] Environment Canada, *Species at Risk List on the SARA Public Registry*, listing dated October 8, 2008, online: Environment Canada, <http://www.sararegistry.gc.ca/species/schedules_e.cfm?id=1>.
[93] *Ibid.*

available to support the species present. Usually this involves the direct manipulation of the landscape by humans. Habitat loss can happen on a large scale, for example land clearing for farming, forestry, or housing developments or draining swamps, diverting water channels or building dams. Habitat degradation may also arise from the introduction of deleterious substances directly or indirectly into the environment. Pollution of water ways or the spreading of chemical pesticides on farm lands constitutes habitat degradation for some species. Hunting, fishing and collecting for food, medicine, sport, and commercial resale also have an impact on wild species. Over-harvesting favoured species has led to the extirpation of some species from their traditional territories. Finally, the introduction of species not native to the territory, so-called exotic or invasive species, is a serious concern:

> As predators, parasites, and competitors of native species *Exotics* are considered one of the greatest emerging challenges for biodiversity conservation. Importantly, freshwater fish make up the majority of *Exotics* species recorded in this report – 21 species in total – many of which have the potential to cause ecological disturbance in aquatic communities.[94]

Humanity cannot avoid the negative impact of the loss of biological diversity. We risk losing many valuable tangible and intangible elements of the natural world as biological diversity declines. We risk losing, for example food, medicine, fibers, clean water, fresh air and building materials. Rachel Carson lamented the loss of bird song, but we risk losing too the songs of frogs and insects. We lose tastes and smells from the wild. We are cut off from sights which stir our senses; some pleasurable – towering forests, a field

[94] Environment Canada, *supra* note 21, at pg. 5.

of meadow flowers on a summer day; some not so pleasurable – a bee sting or bloodsuckers between our toes. These may seem inconsequential losses, ones that can be replaced with manufactured substitutes, or not, if it is a species about which few humans care. However, from the perspective of interconnectedness, all species are connected to some other element of the environment. The loss of one species has a ripple effect on the environment around it. As the losses mount, we risk our collective capacity to sustain the human species as a part of the biological diversity of the earth.

First Nation peoples have expressed concern for many years about the loss of species on which their traditional cultures rely for food, medicine, clothing, shelter, and for spiritual purposes. First Nation peoples as early as the 1800's, for example the Ojibway, Cree, Dakota and Lakota, began reporting on the dwindling herds of moose, deer and bison. Reliant as they were on these species as a mainstay of their diets, First Nation peoples suffered malnutrition and starvation as a result of the declines of these species.[95]

Since the adoption of the federal *Species at Risk Act*, First Nation peoples have participated formally in the development of assessment reports on species. They assisted in preparing the *Wild Species 2005* Report, and their contribution was acknowledged. The report recognizes the importance of two species assessed to First Nation peoples' traditional cultures – tamarack and rockfish.[96] The fact is, however, many of the species

[95] See for example, Office of the Treaty Commissioner, *Frequently asked Questions,* (Saskatoon: Office of the Treaty Commissioner, 2008), online: Office of the Treaty Commissioner, http://www.otc.ca/ABOUT_TREATIES/FAQs/#2.
[96] Environment Canada, *supra* note 21, at pp. 28 and 65.

assessed are important to First Nation peoples and the Aboriginal Subcommittee on Traditional Knowledge is pushing for attention to others.

Status of First Nation Cultures

The review conducted for the Secretariat of the *Convention on Biological Diversity* on the status of traditional knowledge in North America noted the challenge of making categorical statements about the status of traditional knowledge.[97] Determining the state of health of traditional knowledge is not like counting the number of species that might be present in a particular area. Knowledge is transient, it cannot be counted. Additionally, there is great diversity in the retention of traditional knowledge and practices amongst First Nation communities depending on many different factors. The status of First Nation cultures is highly localized.

To monitor the status of cultural diversity over time, the Parties to the *Convention on Biological Diversity* (CBD) have adopted traditional languages as a key indicator of the health of cultural diversity. Language serves this purpose well for a number of reasons. Our connection with the world around us is expressed through our language. Our beliefs and philosophies are expressed in our languages. We translate these ideas into practice. In the course of so doing, we interact with the world around us, people and the land. Our

[97] UNEP, Secretariat for the Convention On Biological Diversity, *Composite Report On The Status And Trends Regarding The Knowledge, Innovations And Practices Of Indigenous And Local Communities: North America,* for the Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions of the Convention On Biological Diversity, third session, UNEP/CBD/WG8J/3/INF/8 (Montreal: Secretariat for the Convention On Biological Diversity, 2003): online: Secretariat for the Convention On Biological Diversity < http://www.cbd.int/doc/meetings/tk/wg8j-03/information/wg8j-03-inf-08-en.doc>.

ideas about how to interact come from our perceptions of them. We choose how to engage based on what is important in our cultures. We know what is important in different cultures because of the ideas expressed through diverse languages. The Canadian Task Force on Aboriginal Languages noted,

> The philosophy and culture of a people are embedded in their language and given expression by it. Language is the vehicle for a network of cultural values that operate under the level of consciousness and shape each speaker's awareness, sense of personal identity and relationships with others and with the universe itself.[98]

The Task Force on Aboriginal Languages identified several cultural distinctions expressed in Indigenous languages. A deep connection with the land,[99] and different perspectives on time[100] and governance[101] are expressed in Indigenous languages.

Luisa Maffi has written extensively on the connection between language, culture and biological diversity.

> Language plays a key role in all aspects of human life everywhere. It is central to our conceptualization of the world, and for interpreting, understanding and changing it. Initially the language(s) we learn give us the categories to conceive our natural and social world. If an object, process or relationship has been

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[98] Task Force on Aboriginal Languages and Cultures, *supra* note 22.
[99] *Ibid.*, at pp. 22-24.
[100] *Ibid.*, at p. 24.
[101] *Ibid.*, at pp. 25-26.

> important in the life of our people, it gets named, and by learning that word we also learn what is vital for us to know in our natural and social environment.[102]

Jose Kusagak, past President of the Inuit Tapiriit Kanatami, provides an example that goes to the heart of the topic of this paper. Speaking about the conundrum presented to the Inuit world view in the *Species at Risk Act*, Kusagak expressed the challenge the Inuit faced in trying to translate into Inuktitut the concept of the 'environment' as separate from humanity.

> Traditionally, there was no definition of *avitiliriniq* in Inuktitut. It was all one, the Inuit being part of the ecosystem. So there was no Inuit and then the environment. When it came to negotiations, we had to bow to the western world trying to define what "environment" is, outside of the human, the oneself. So we struggled through all that, and we came up with a word, *avitiliriniq*, which means anything outside of the human form. But at the same time, when we're talking about the environment in Inuktitut, we always include ourselves as part of the environment. Thus, the Inuit are part of the ecosystem, and it has been proven a number of times.[103]

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[102] Luisa Maffi, "Linguistic Diversity, Introduction", in UNEP, *supra* note 8 at p. 21.

[103] House of Commons, Parliamentary Standing Committee on the Environment and Sustainable Development (25 April 2002) at 1040 (ITK President Jose Kusagak) online; Parliament of Canada http://cmte.parl.gc.ca/Content/HOC/committee/371/envi/evidence/ev521305/enviev68-e.htm#Int-212078.

The loss of First Nation languages undermines the health of First Nation communities. For example, the loss of language is an indicator of youth suicide. As the traditional language falls into decline, youth suicide climbs.[104]

> In Canada, and, more specifically, in the province of British Columbia (BC), Aboriginal youth suicide rates vary substantially from one community to another. The results reported demonstrate that... youth suicide rates effectively dropped to zero in those few communities in which at least half the band members reported a conversational knowledge of their own "Native" language.[105]

Youth suicide is a scourge of First Nation communities with rates at five to seven times the national average.[106]

The loss of traditional languages fuels the 'extinction of experience'. As words for places and ideas are lost, the unique relationship between the people and the land is weakened. The decline of traditional First Nation languages signals the potential loss of these cultural distinctions. The loss of ideas from the human lexicon undermines our collective capacity to survive.

There is uncertainty about how many languages and dialects were traditionally spoken in Canada.[107] Estimates range up to almost 80 different First Nation languages in Canada

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[104] Darcy Hallett, Michael J. Chandler, Christopher E. Lalonde, "Aboriginal language knowledge and youth suicide" Cognitive Development 22 (2007) 392–399. In this study they reported that language retention was the best cultural indicator for predicting youth suicide.
[105] *Ibid.* at p. 392.
[106] Health Canada, First Nations, Inuit and Aboriginal Health, *Suicide Prevention,* (Ottawa: Health Canada, 2006), online: Health Canada, http://www.hc-sc.gc.ca/fniah-spnia/promotion/suicide/index-eng.php.
[107] *Ibid.,* at p. 2.

prior to contact,[108] 61 of which were still spoken in 2005.[109] Of all these languages, only Cree and Ojibway are considered viable but even they are in decline.[110] Some, such as the language of the Beothuk, Wyandot and Pentlatch are already extinct.[111] Others including Abenaki, Bella Coola, Haida, Haisla, Han, Kutenai, Munsee, Salish, Sechelt, Tagish, Tahltan, Tuscarora, and Squamish are in jeopardy of going extinct.[112] Many of these are languages of the First Nation peoples of the west coast, once the most culturally diverse part of Canada. Many others have only a few hundred speakers. According to the Task Force on Aboriginal Languages and Cultures "all languages, including those considered viable, are losing ground and are endangered."[113] A tremendous effort will have to be made in the next decade to preserve these languages.

It is clear from the facts that both biological and cultural diversity in Canada are experiencing a decline, the decline of one mirrored in and fuelling the decline of the other. The international community has recognized the connection between Indigenous peoples and the land and the United Nations encourages member states to respect both the inherent rights of First Nation peoples and to support the retention of indigenous cultural diversity to aid the retention of *in situ* biological diversity. The next chapter provides an overview of relevant international agreements, which serve as minimum standards to be achieved. In later chapters domestic law and policy will be reviewed to determine the degree to which Canada meets these standards.

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[108] Raymond G. Gordon, Jr., (ed.), *Ethnologue: Languages of the World, Fifteenth edition* (Dallas: SIL International, 2005), online SIL International <http://www.ethnologue.com/>.
[109] Task Force on Aboriginal Languages and Cultures, *supra* note 22 at p. 2.
[110] *Ibid.* Note that Inuktitut is also considered viable.
[111] Gordon, *supra* note 108 at p. 392.
[112] *Ibid.*
[113] Task Force on Aboriginal Languages and Cultures, *supra* note 22 at p. 3.

Chapter three

International Environmental and Human Rights Standards

International law establishes standards of environmental protection and respect for human rights to which member states are expected to conform. International environmental agreements recognize the connection between Indigenous peoples and their traditional territories, and encourage states to help sustain this relationship by respecting Indigenous cultures. International human rights instruments confirm that rights of Indigenous peoples include rights to self-determination, and encourage states to accord Indigenous peoples their rights to self-government.

International Environmental Instruments

"The indivisibility of Indigenous peoples cultures and their ecological environment is now an accepted tenet of international law."[114] This is evident in a range of international agreements including *Agenda 21*[115], the CBD,[116] the *Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat*[117] (Ramsar Convention) and the *Convention between the United States and Great Britain for the Protection of Migratory Birds*[118]. Some elements of international law encourage the participation of Indigenous peoples in environmental governance.

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[114] Patricia Fry, "A Social Biosphere: Environmental Impact, the Innu and their Environment", University of Toronto Faculty of Law Review, Vol. 56, No. 2, 1998, 178 -221, at p. 194.
[115] United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/conf.151/26/Rev.1 (vol. 1) (1993).
[116] CBD *supra* note 1.
[117] Ramsar Convention, *supra* note 1.
[118] 39 U.S. Stat. 1702, T.I.A.S. No. 628.

Agenda 21

One of the first places to look for standards of behaviour vis-à-vis First Nation peoples and protection of the environment is *Agenda 21*. This instrument provides direction on the achievement of sustainable development. An entire chapter is dedicated to the interests of Indigenous peoples. Chapter 26, Article 26.1 stipulates:

> Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.[119]

This instrument recommends a series of objectives and processes for achieving such. Recommendations include the:

> [e]stablishment of a process to empower indigenous people and their communities through measures that include:...[r]ecognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be

[119] Agenda 21, *supra* note 1, at para 26.1.

> socially and culturally inappropriate; [r]ecognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development; ...
>
> Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them ...[; and]
>
> Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.[120]

Agenda 21 recommends granting Indigenous peoples "greater control over their lands, self-management of their resources, [and] participation in development decisions affecting them".[121] More specifically, states are encouraged to "[c]onsider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights".[122] Governments are also encouraged to,

> [d]evelop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their

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[120] *Ibid.*, at para 26.3.
[121] *Ibid.*, at para 26.4.
[122] *Ibid.*, at para 26.4.

> values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them...[123]

Agenda 21 is entirely voluntary, however. While it sets admirable goals, there is no obligation set out in this document for states to actually implement policies that support these goals. Hence, while Agenda 21 helps to define objectives, it does not actually advance environmental protection or respect for Indigenous peoples' human rights at the domestic level.

Convention on Biological Diversity (CBD)

The CBD recognizes the importance of biological diversity to our collective well being. It also acknowledges the connection between Indigenous peoples and the land and encourages states to protect the cultural interests of Indigenous peoples as a means to safeguard biological diversity.

The Preamble to the CBD makes explicit the reliance by humanity on biological diversity. It notes the importance of conserving and sustaining biological diversity for food, health and other needs of humanity and the growing world population, and for promoting world peace. [124] The Preamble notes the Parties to the Convention are, "[c]onscious of the intrinsic value of biological diversity and of the ecological, genetic,

[123] *Ibid.*, at para 26.6.
[124] CBD, *supra* note 1, Preamble.

social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components" [125]. The CBD parties are "conscious of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere" and "that the conservation of biological diversity is a common concern of humankind".[126] The Parties:

> recogniz[e] the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[127]

This sentiment is articulated further in Article 8(j) of the Convention. This Article declares that States shall endeavour to,

> ...respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices...[128]

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[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.* at Article 8(j).

However, while the Convention acknowledges the link between biological and cultural diversity, Article 8(j) commences with the caveat that any obligations to respect or protect Indigenous cultures is subject to the national legislation of the State.[129] While acknowledging the connection between biological and cultural diversity in this Article, States are free to adopt this standard or not as they see fit. The implementation of this Article at the domestic level is entirely optional. While states agree that respect for Indigenous cultures will help preserve *in situ* biological diversity, they do not agree here to acknowledge the inherent human rights of Indigenous peoples and thereby agree to actually facilitate the retention of Indigenous cultures.

As an element of the effort to support consideration of cultural and social impacts of development, the CBD has developed the *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (Akwé: Kon Guidelines).[130] The guidelines are intended as a tool to support the retention of biological diversity.[131] These Guidelines outline ways and means to improve the participation of Indigenous peoples in assessment processes and to ensure their perspectives are taken into consideration in making final decisions.[132] The introduction to the Akwé: Kon Guidelines states:

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[129] *Ibid.*
[130] UNEP, CBD, COP, 7th Sess., Dec. VII/16, UN Doc. UNEP/CBD/COP/6/16 (2004).
[131] *Ibid.*
[132] *Ibid.*.

> Most indigenous and local communities live in areas where the vast majority of the world's genetic resources are found. They have used biological diversity in a sustainable way for thousands of years and their cultures and knowledge are deeply rooted in the environment on which they depend. As a result, developments proposed to take place on lands and waters traditionally occupied by indigenous and local communities have been a source of concern to these communities because of the potential long-term negative impacts on their livelihoods and traditional knowledge.[133]

States have been subsequently encouraged to adopt these Guidelines as a means to reduce the loss of biological diversity, one of the objectives of the Millennium Goals.[134]

> The Akwé Kon Voluntary Guidelines are a tangible tool in keeping with the greater emphasis now placed by Parties to the Convention on practical results based on the identification and pursuit of outcome-oriented targets with a view to achieving, by 2010, a significant reduction in the current rate of loss of biological diversity, as set out in the Strategic Plan of the Convention and endorsed by the World Summit on Sustainable Development, held in Johannesburg in 2002. As indigenous and local communities are guardians of a significant part of the planet's terrestrial biodiversity, implementation of the Voluntary Guidelines could

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[133] *Ibid.*, at p. 1.
[134] United Nations, *Millennium Development Goals*, (New York: UN, 2004), online: United Nations, http://www.un.org/millenniumgoals/environ.shtml.

contribute to the 2010 target of achieving a significant reduction in the current rate of biodiversity loss.[135]

As the title suggests, these are very clearly voluntary guidelines and are not binding on State Parties.[136] Therefore, while we can look to the CBD for support for improved relations with First Nation peoples for the purpose of protecting biological diversity, the standards set are not mandatory. The CBD recognizes the value of engaging Indigenous peoples in national efforts to protect biological diversity *in situ*, yet ultimately this abandons Indigenous peoples to the political whims of the state in which they reside.

Ramsar Convention on the Protection of Wetlands

The Ramsar Convention is one of few other international environmental instruments that speak directly to the interests of Indigenous peoples and establishes work plans inclusive of Indigenous peoples. In fact, the theme for the 2008 Conference of the Parties for the Ramsar Convention was "Healthy Wetlands, Healthy People"[137]; clearly an acknowledgement of the linkages between the land and humanity.

The parties to the Ramsar Convention have adopted several resolutions on the connection between wetlands and cultural protection. These include, Resolution VIII.19 *Guiding*

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[135] *Ibid.*

[136] Canada has not adopted these standards at the national level. However, the *Yukon Environmental and Socio-economic Assessment Act* 2003, c. 7Y-2.2 [Assented to May 13th, 2003] requires consideration of socio-economic effects on the Yukon First Nations. In this legislation 'socio-economic effects' includes impacts on economies, health, culture, traditions, lifestyles and heritage resources.

[137] UNEP, Ramsar Convention, 38th Meeting of the Standing Committee, online : UNEP, http://www.ramsar.org/.

principles for taking into account the cultural values of wetlands for the effective management of sites[138]; Resolution VII.8 *Guidelines for establishing and strengthening local communities' and indigenous peoples' participation in the management of wetlands*[139]; and Resolution VIII.14, *New Guidelines for management planning for Ramsar sites and other wetlands*[140]. Most recently at the 9th Conference of the Parties (COP), States Parties adopted resolution IX.21 dealing with the cultural value of wetlands. This resolution, "ENCOURAGES Contracting Parties to incorporate cultural values in wetland policies and strategies, as well as in wetland management plans, and to communicate the results, thus contributing to the development of comprehensive and integrated approaches [emphasis in the original]."[141]

Cultural characteristics associated with Ramsar sites include:

> i) sites which provide a model of wetland wise use, demonstrating the application of traditional knowledge and methods of management and use that maintain the ecological character of the wetland;
>
> ii) sites which have exceptional cultural traditions or records of former civilizations that have influenced the ecological character of the wetland;
>
> iii) sites where the ecological character of the wetland depends on the interaction with local communities or indigenous peoples; [and]

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[138] UNEP, Ramsar Convention, COP, 8th Sess., Resolution VIII.19, UN Doc. UNEP/Ramsar/COP/8/19. online: UNEP, http://www.ramsar.org/res/key_res_viii_19_e.doc.
[139] UNEP, Ramsar Convention, COP, 7th Sess., Resolution VII.8, UN Doc. UNEP/Ramsar/COP/7/8. online: UNEP, http://www.ramsar.org/res/key_res_vii.08e.htm
[140] UNEP, Ramsar Convention, COP, 8th Sess., Resolution VIII.14, UN Doc. UNEP/Ramsar/COP/8/14, online: UNEP, http://www.ramsar.org/res/key_res_viii_14_e.doc
[141] UNEP, Ramsar Convention, COP. 9th Sess., Resolution IX.21, Article 13 UN Doc. UNEP/Ramsar/COP/9/21, online: UNEP, http://www.ramsar.org/res/key_res_ix_21_e.htm.

iv) sites where relevant non-material values such as sacred sites are present and their existence is strongly linked with the maintenance of the ecological character of the wetland...[142]

Canada has identified Ramsar sites and has made efforts to protect these sites.[143] As with the CBD, however, the provisions of the Ramsar Convention addressing the connection between wetlands and Indigenous peoples are crafted as recommendations, and are not considered to be mandatory elements of the regime. This instrument, like Agenda 21 and the CBD contains no commitments by states to actually implement these provisions.

Convention between the United States and Great Britain for the Protection of Migratory Birds

The bilateral *Convention between the United States and Great Britain for the Protection of Migratory Birds* was adopted 16 August 1916. The *Parksville Protocol*[144] adopted in 2000 updated the Convention, in part to acknowledge the connection between First Nation peoples and the environment, such as the reliance on migratory birds for food and

[142] *Ibid,* Article 15.
[143] There are 32 designated Ramsar sites in Canada. See, Natural Resources Canada, *Atlas of Canada,*(Ottawa: NRCan, 2004) online: NRCan, http://atlas.nrcan.gc.ca/site/english/learningresources/theme_modules/wetlands/index.html.
[144] *Protocol between the Government of Canada and the Government of the United States of America amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States,* (14 December 1995), C.T.S. 1999 No. 34, (entry into force, 08 October 1999).

other purposes. This instrument accommodates in some small measure the changes to the Canadian Constitution in 1982.[145] Article II of the Protocol stipulates that the:

> The High Contracting Powers agree that, to ensure the long-term conservation of migratory birds, migratory bird populations shall be managed in accord with the following conservation principles: ... Use of aboriginal and indigenous knowledge, institutions and practices...[146]

The Regulatory Impact Benefit Statement which accompanies the Order adopting the Protocol into Canadian law highlights the need for change to accommodate First Nation peoples' rights.[147] The 2005 Report of the Canadian Wildlife Service notes subsequent

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[145] "AWARE that changes to the Convention are required to ensure conformity with the aboriginal and treaty rights of the Aboriginal peoples of Canada...". Canada, 'Order Amending the Migratory Birds Convention Act, 1994' *Canada Gazette*, Vol. 134, No. 12 — June 7, 2000, Registration SOR/2000-189 17 May, 2000 , at Preamble online: Justice Canada, http://gazetteducanada.gc.ca/partII/2000/20000607/html/sor189-e.html.

[146] This Article continues,

> Notwithstanding the closed season provisions in paragraph 1 and the prohibition on the taking of eggs in Article V, and respecting aboriginal and indigenous knowledge and institutions:
> (*a*) In the case of Canada, subject to existing aboriginal and treaty rights of the Aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*, and the regulatory and conservation regimes defined in the relevant treaties, land claims agreements, self-government agreements, and co-management agreements with Aboriginal peoples of Canada:
> (i) Migratory birds and their eggs may be harvested throughout the year by Aboriginal peoples of Canada having aboriginal or treaty rights, and down and inedible by-products may be sold, but the birds and eggs so taken shall be offered for barter, exchange, trade or sale only within or between Aboriginal communities as provided for in the relevant treaties, land claims agreements, self-government agreements, or co-management agreements made with Aboriginal peoples of Canada; and
> (ii) Migratory game and non-game birds and their eggs may be taken throughout the year for food by qualified non-aboriginal residents in areas of northern Canada where the relevant treaties, land claims agreements, self-government agreements, or co-management agreements made with Aboriginal peoples of Canada recognize that the Aboriginal peoples may so permit. The dates of the fall season for the taking of migratory game birds by qualified residents of Yukon and the Northwest Territories may be varied by law or regulation by the proper authorities. The birds or eggs taken pursuant to this sub-paragraph (ii) shall not be sold or offered for sale.

Ibid, at Art. II.

[147] *Ibid,* The Regulatory Impact Analysis Statement that accompanies the Order states,

> The Protocol removes inconsistencies between the Convention and aboriginal and treaty rights protected under section 35 of the *Constitution Act, 1982*. The closed season on migratory game birds and the year-round prohibitions on other migratory birds conflict with traditional spring and early summer harvesting of birds by Aboriginal peoples. This has been a consistent irritant in relations between the federal government and Aboriginal groups, consequently the amendments in

changes to Canadian law to accommodate the Protocol. For example, Indigenous peoples have the right to carry arms in Migratory Bird Sanctuaries.[148] Even though the changes were introduced to recognize self-government agreements in Canada, as will be seen in following chapters these self-government agreements themselves deny First Nation peoples the right to self-determination and self-government. This instrument does not change the status quo in the power relationship between Canada, the United States and Indigenous peoples.

Of particular importance in international law is the growing recognition of cultural diversity as a means to support the retention of biological diversity. Agenda 21, the CBD, the Ramsar Convention and the Parksville Protocol are examples of international environmental agreements that promote an understanding of the connection between Indigenous peoples and the land. However, this paper argues that these instruments are insufficient as they fail to also recognize the interconnectedness between peoples and do not accord Indigenous peoples their human rights. This is not to suggest that these instruments are fundamentally inadequate. Far from it, as they have fostered actions around the globe that are important to the protection of the environment. Honourable states prepared to acknowledge and support the implementation of the rights of

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the Protocol have long been requested by Aboriginal peoples. As a result of the Supreme Court of Canada decision in *Sparrow v. The Queen* (1990), an interim enforcement policy was established by Environment Canada in 1991 that allows the discretion of the enforcement officer on charging an Aboriginal person with harvesting migratory birds or their eggs during the closed season, if the harvest is for domestic use and conservation of healthy populations of migratory birds is not threatened. The Protocol reaffirms that the priority is the conservation and preservation of migratory birds. It also confirms the continuation of traditional harvesting by Aboriginal people; enables the development of new partnerships for migratory bird conservation through co-management agreements; and provides a mechanism for input by Aboriginal communities into the continental management regime for migratory birds.

[148] Environment Canada, *Environment Canada's Protected Areas, 2005 Annual Report*, (Ottawa, EC, 2006) at p. 2, online: EC, http://dsp-psd.pwgsc.gc.ca/Collection/CW70-13-2005E.pdf.

Indigenous peoples should look to Agenda 21 and the various voluntary guidelines established under the CBD and Ramsar for clear guidance on how they might further joint respect for the land and for human rights.

Protection of Cultural Diversity

There is another area of international law which needs consideration in addressing the retention of cultural diversity. This is the protection of cultural expressions. Through the auspices of the United Nations Education, Social and Cultural Organization (UNESCO) State parties have already adopted one instrument on access to and benefit from traditional cultures (ABS). In addition, a number of agreements are under development addressing ABS with negotiations underway at the CBD, and the World Intellectual Property Organization (WIPO).

Convention On The Protection And Promotion Of The Diversity Of Cultural Expressions[149]

The UNESCO *Convention On The Protection And Promotion Of The Diversity Of Cultural Expressions* (Convention on Cultural Expressions) is one of the few completed instruments of international law protecting cultural diversity. It defines 'cultural diversity' as "the manifold ways in which the cultures of groups and societies find

[149] *Convention On The Protection And Promotion Of The Diversity Of Cultural Expressions* 2005, 20 October 2005, U.N. Doc. 2005-138, (entry into force, 18 March 2007, acceptance by Canada, 28 November 2005).

expression."[150] It encourages respect for cultural diversity by acknowledging its contribution to peace and security, sustainable development, social cohesion, and for the realization of human rights.[151] This Convention specifically recognizes the value of Indigenous traditional knowledge as an element of cultural diversity and respects its contribution to sustainable development.[152] A series of principles to be observed by the member states are identified in the document.

The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and Indigenous peoples. Measures in the Convention on Cultural Expressions include establishing favourable conditions for Indigenous peoples to be able to create, produce, and disseminate their cultures and to receive the benefit thereof.[153] Canada accepted to be bound by this treaty in November 2005, but there has been little action on the part of the current regime to honour this convention.

A Regime on Access and Benefit Sharing

In addition to this instrument, Canada and other states are in the process of negotiating the development of an international regime of ABS agreements. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IC) at WIPO has developed draft provisions on Traditional Cultural

[150] *Ibid,* at Article 4(1).
[151] *Ibid.,* at Preamble.
[152] *Ibid.,* at Preamble.
[153] *Ibid.* at Article 7(1)(a).

Expressions/Folklore and Traditional Knowledge, but these have not yet been adopted.[154] Under the CBD, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*[155] have been adopted.

The objective of the Bonn Guidelines is to facilitate the development of state law and policy, as well as private contracts, addressing ABS. The guidelines set out the roles and responsibilities of national authorities, recommend steps in the ABS process, and suggestions for incentives, dispute resolution, monitoring and reporting. These guidelines are voluntary.

If States go ahead with their plans for an ABS regime, the final outcome could have a tremendous impact on the capacity of First Nation peoples to protect their traditional cultures. The regime developed can either serve as a means to support the retention of Indigenous cultures or serve short term economic desires. Much depends on the good will of states to engage Indigenous peoples in the development of this regime.

The good will of states is suspect, however. For example, the IC has discussed the participation of Indigenous peoples in their deliberations. [156] Canada supported the participation of Indigenous peoples in principle, and recognized their input could help

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[154] WIPO, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, *Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge,* 9th Sess., Geneva, 28 April 2006, UN Docs. WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/4, . http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html.

[155] UNEP, CBD, COP, 6th Sess., UN Doc. UNEP/CBD/COP/6/20 (2002), Dec. VI/24.

[156] See for example, WIPO, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, Report, 7th Sess., Geneva, November 1 to 5, 2004, UN Doc. WIPO/GRTKF/IC/7/15 paras. 26 – 63
http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_15.pdf

advance the work of the IC.[157] Canada has also financially supported the participation of Indigenous peoples at WIPO meetings.[158] However, at the meetings, the Indigenous peoples are literally relegated to the back of the room and have an opportunity to interject only after the State parties have completed their deliberations.

Domestically, Canada has done little to facilitate the involvement of First Nation peoples in the development of law and policy in this area. For example, the Federal/Provincial/ Territorial Working Group on Access and Benefit-Sharing hosted by Environment Canada has produced a scoping document outlining policy questions and issues dealing with ABS.[159] With respect to the protection of traditional knowledge the Working Group raises the following concerns:

- Who is/are the traditional knowledge holder(s)? Is it the community, individuals within the community, families within a group?
- Should the protection of traditional knowledge also apply to other knowledge holders, including fishermen, farmers, and local communities?
- Should a board of Aboriginal representatives be created as a mechanism to enforce compliance with PIC [prior informed consent] and ABS principles when there is traditional knowledge involved?

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[157] *Ibid.*, at para 34.
[158] *Ibid.*
[159] Environment Canada, Federal/Provincial/Territorial Working Group on Access and Benefit Sharing of Genetic Resources, *ABS Policies in Canada: Scoping the Questions and Issues* (Ottawa, EC, 2005). Approved by Federal/Provincial/Territorial Ministers Responsible for Forests, Wildlife, Endangered Species and Fisheries and Aquaculture November 2005.

- How can the relationship between customary and statutory law contribute to ABS?[160]

These are valid questions. The problem is the Working Group consists solely of federal and provincial government officials except for two representatives from Nunavut Arctic College.[161] There are no representatives of Inuit, Métis or First Nation peoples on this Working Group. Their perspective is entirely missing. How does Canada expect to arrive at reasonable answers to these questions without the involvement of Indigenous peoples?

It is not possible to examine the ABS regime in detail here. There is considerable work on this topic elsewhere.[162] It is sufficient to note that there is consideration in the international arena of cultural rights of Indigenous peoples, even if the motives for this protection, for example in ABS negotiations, are suspect.

Overall, international environmental instruments go part way to supporting the preservation of biological diversity by recognizing its reliance on the retention of Indigenous cultures. The regime for the protection of Indigenous cultural rights is still under development so it is impossible to say what its overall impact will be on the retention of Indigenous cultures in the long run. As noted in Chapter 1, recognition of a

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[160] *Ibid.*

[161] EC, Members of the Federal/Provincial/Territorial Working Group on Access and Benefit-Sharing, (Ottawa, EC, 2008), online: EC, http://www.ec.gc.ca/apa-abs/apropos-about/fpt.cfm?lang=eng. This list is valid to June 06, 2008.

[162] See for example, EC, *Northern Workshop on Access to Genetic Resources and Associated Traditional Knowledge and Benefit-Sharing* (Ottawa: EC, 2005); EC and Comisión Nacional para el Uso y Conocimiento de la Biodiversidad *International Expert Workshop on Access to Genetic Resources and Benefit Sharing Record of Discussion,* (Ottawa: EC and Comisión Nacional para el Uso y Conocimiento de la Biodiversidad, 2004). There are a plethora of academic articles on this topic as well.

connection between Indigenous peoples and the land, while well-meaning, is ultimately insufficient to halt the decline in Indigenous cultures and the concomitant decline in biological diversity. States must at the same time recognize the human rights of Indigenous peoples.

Human Rights Instruments

Of course the recognition of human rights is a primary objective in its own right. The analysis below points to the value of human rights instruments in setting standards that aid the retention of cultural diversity. Respect for human rights is essential in any effort to protect the earth. Environmental efforts that fail to accord respect for human rights are doomed to failure. By recognizing human rights and respecting them in the application of domestic law along with environmental protection, States can enhance their capacity to sustain biological diversity.

This paper reviews a number of international human rights instruments, including: the *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*[163] (ILO 169); the *International Covenant on Civil and Political Rights*[164]; and UNDRIP[165]. These will be examined in brief below to highlight elements that support the retention of Indigenous cultures.

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[163] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 1650 U.N.T.S. (entry into force 5 September 1991).
[164] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entry into force 23 March 1976, accession by Canada 19 May 1976). (Covenant on Civil and Political Rights).
[165] *Supra* note 1.

Convention ILO 169

In 1989, The International Labour Organization adopted ILO 169 as replacement for ILO 107 of 1957. Among other things, this agreement requires parties to protect the rights of Indigenous peoples, including, "[p]romoting the full realisation of the social, economic and cultural rights of these [Indigenous] peoples with respect for their social and cultural identity, their customs and traditions and their institutions."[166] This includes adopting special measures to safeguard Indigenous cultures and the environment.[167] "The social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals" and "the integrity of the values, practices and institutions of these peoples shall be respected."[168]

The Convention stipulates that Indigenous peoples have the right to self-determination, including determining priorities for use of their lands, and self-government on economic, social and cultural matters.[169] This instrument also accords Indigenous Peoples the right to participate in "the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[170] "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit"[171] and in "applying national

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[166] *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,* 27 June 1989, 1650 U.N.T.S. (entry into force 5 September 1991), article 2(2)(b).
[167] *Ibid,* article 4(1).
[168] *Ibid,* article 5(a) & (b).
[169] *Ibid,* article 7(1).
[170] *Ibid,* article 7(1).
[171] *Ibid,* article 7(4).

laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws"[172]. The connection between traditional lands and Indigenous cultures is noted.[173] Land rights are identified in this convention,[174] as are the rights of Indigenous peoples to "participate in the use, management and conservation of" natural resources of their traditional lands[175].

As enlightened as this Convention is, it does not apply to First Nation peoples in Canada. Canada is not a party to this agreement. ILO 169 is worth noting, however, because it demonstrates international standards to be expected since at least 1989 regarding the rights and interests of First Nation peoples.

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (Covenant on Civil and Political Rights) recognizes the inherent rights of all peoples to self-determination and self-government.[176] Canada is a party to the Covenant and both optional protocols.[177] Canada's interpretation of this agreement, to date, does not recognize First Nation peoples as a group to whom self-determination applies.

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[172] *Ibid,* article 8(1)
[173] *Ibid,* article 13.
[174] *Ibid,* article 14.
[175] *Ibid.,* article 15.
[176] Covenant on Civil and Political Rights, *supra* note 164, at Article 1
[177] Canada acceded to the Covenant in May 1976.

The World Conference on Human Rights in 1993 provides assistance in interpreting the Covenant:

> The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.[178]

The Covenant on Civil and Political Rights stipulates, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[179] The *Vienna Declaration and Programme of Action*[180] (Vienna Declaration) adopted at the World Conference on

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[178] UNGA, World Conference on Human Rights, 1993, *Vienna Declaration And Programme Of Action*, UN Doc. A/CONF.157/23 (1993), at para 20. (Vienna Declaration)
[179] Covenant on Civil and Political Rights, *supra* note 164 at Article 1(1).
[180] Vienna Declaration, *supra* note 178 at Article 20.

Human Rights makes clear that self-determination refers to the authority and capacity of Indigenous peoples to decide their own fates.

> Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.[181]

It also states:

> this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[182]

Surely this clarification cannot be interpreted to dispose Indigenous peoples of their rights of self-determination and self-government to the point that it threatens their connection with the land, as this would undermine the well-being of the nation as a whole. As the retention of cultural diversity enhances the retention of biological diversity, the inclusion of Indigenous governments in environmental governance adds to

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[181] *Ibid.* at para. 2.
[182] *Ibid.*

and enhances, rather than dismembers or impairs, the well-being of a State. This is a fact acknowledged by the Vienna Declaration when it states that:

> States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.[183]

The Covenant also recognizes the rights of peoples to "freely dispose of their natural wealth and resources" and that "[i]n no case may a people be deprived of its own means of subsistence."[184] These provisions facilitate respect for human rights by respecting the linkage between the people and the land. With the right to choose when and how to dispose of products of the land, peoples have greater capacity to manage their relations with the land in a fashion which is self-sustaining. This provision also frees people from the threat of deprivation of the elements necessary to sustain their cultures, i.e., lack of access to biological diversity.

Article 27 of the Covenant on Civil and Political Rights stipulates that, where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall be

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[183] *Ibid,* at para. 20.
[184] Covenant on Civil and Political Rights, *supra* note 164 at Article 1(2).

granted the right, "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." Culture includes the relationship peoples have with the land and the ways this is manifest. This includes the diversity of customs for managing human impacts on the environment. The reference in this agreement to community based rights implies political rights of 'peoples', not just individuals. Acknowledging community based political rights and linking this to rights to pursue cultures that rely on a close link with the land strengthens the right of Indigenous peoples to practice environmental self-determination and self-government.

Interestingly, Canada was present at the meeting to adopt the Vienna Declaration and in fact served as a regional Vice President on the Bureau[185], however, Canada abstained when the vote was called to adopt it.[186]

United Nations Declaration on the Rights of Indigenous Peoples

The Vienna Declaration called on states to conclude the draft agreement on the rights of Indigenous peoples, then still under development.[187] Since then, the negotiation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) has been completed and the instrument adopted by the United Nations General Assembly in 2007. A review of the provisions of this instrument is particularly *apropos* to the purposes of

[185] UNGA, *Report of the World Conference on Human Rights*, UN Doc. A/CONF.157/24 (Part I) at para. 23.
[186] *Ibid,* at para. 51.
[187] *Ibid.* at para 28.

defining standards of respect for the rights of Indigenous peoples, as Article 43 specifically states, "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[188]

This instrument recognizes many key human rights of Indigenous peoples. The preamble notes "the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources."[189] The Declaration also recognizes "that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment" [190]. In particular this instrument confirms that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[191] "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[192] There are also many provisions confirming the rights of Indigenous peoples to retain their cultural and spiritual practices including protection for their languages and education systems.[193] Indigenous peoples have rights to participate in decision making on matters which affect their interests and to participate in

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[188] UNDRIP, *supra* note 1 at article 43.
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.* at Article 3.
[192] *Ibid.*, at Article 4.
[193] *Ibid.*, at Articles, 11 , 12, 13, 14, 25, 31, 34, and 36.

consultation processes requiring their free prior and informed consent to law and policy which impacts their interests.[194]

This instrument will become a key in the further development and recognition of the human rights of Indigenous peoples. As minimum standards, this instrument sets the bar to be achieved by all states who participate in the United Nations. The acknowledgement and observation of these rights of Indigenous peoples aid not only the Indigenous peoples themselves directly, but also support the health and well being of all humanity, by helping to support the retention of traditional cultures. But, as will be seen later, Canada voted against the adoption of UNDRIP by the United Nations and the Conservative Party has ignored the political will of Parliament to implement the instrument domestically. This chapter has reviewed international agreements recognizing the link between Indigenous peoples and the environment as well as those defining the human rights of Indigenous peoples. Canada, it was noted, participates in some of these instruments, but not all, specifically those that Canada interprets as recognizing First Nation peoples' rights to self-determination. As noted in Chapter one, if the international community and Canada fail to acknowledge the linkages between human rights and environmental protection, neither system of law will secure the necessary respect for First Nation peoples and their traditional world view.

This paper now turns to a closer scrutiny of the degree to which Canada respects the inherent rights of First Nation peoples to environmental self-determination and self-government. This begins with a review in Chapter four of Canadian judicial decisions

[194] *Ibid.*, at Articles 18 & 19.

addressing the domestic adoption of international law as well as the development of environmental law and standards for the protection of the rights of Indigenous peoples independent of international law.

Chapter Four

The Courts on environment and self-government[195]

The review of international law in the previous Chapter outlined international norms for the protection of the environment, respect for Indigenous peoples' human rights, and respect for cultural diversity. Many of these are laws to which Canada has agreed to be bound. In this chapter, court decisions will be examined to consider the judiciary's application domestically of standards derived from international law. This chapter will also examine court decisions to determine if the courts recognize the connection between First Nation peoples and their lands, independent of international law. In addition, this chapter will look for evidence of recognition by the courts of an inherent right of First Nation peoples to self-determination and self-government. This chapter concludes that serious questions remain about how the Courts might find when confronted with Indigenous rights to environmental self-government.

Treatment of International Law

The application of international environmental law by the Canadian courts was the subject of analysis by Natasha Affolder.[196] Affolder compares the use of international biodiversity law in legal arguments before the courts in Canada. She found the courts

[195] This chapter builds on an analysis of case law by Peigi Wilson, *First Nations' Right to Environmental Self-Government: Views from the Court, Federal Government, and First Nations*, April 2008, unpublished.
[196] Natasha Affolder, "Domesticating the Exotic Species: International Biodiversity Law in Canada" (2006) 5 McGill L.J. 217.

have ignored international law;[197] not invoked international law because they could find no evidence of the incorporation of that law into Canadian law;[198] or treated it with uncertainty.[199] Affolder notes the courts have been reluctant to adopt emerging international environmental law norms without clear direction from the legislature.[200] On rare occasions, however, the courts have accepted international biodiversity law as a tool for statutory interpretation.[201]

In these few cases, the courts have demonstrated a willingness to consider international law in interpreting preambular paragraphs of legislation to determine the ambit of ministerial discretion.[202] As there are several pieces of environmental law in Canada that reference respect for Indigenous governments and traditional knowledge,[203] depending on the facts of the case, future First Nation litigants could argue the application of these environmental cases as precedent for the recognition of international norms for the protection of their traditional cultures and respect for their governments.

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[197] *Ibid.* at pp. 225-227.
[198] *Ibid.* at pp. 227-229.
[199] *Ibid.* at pp. 229-230.
[200] Ibid., at pp. 229-230. See for example: *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District*(2002), 50 C.E.L.R. (N.S.) 56.
[201] *Ibid.* at pp. 231-232. See for example: *Animal Alliance of Canada v. Canada* (A.G) [1999] 4 F.C. 72, 168 F.T.R. 114 (T.D.); *R.* v. *Blackbird*(2005), 74 O.R. (3d) 241,248 D.L.R. (4th) 201 (C.A.). *Alberta Wilderness Association* v. *Cardinal River Coals Ltd., Alberta Wilderness Association v. Cardinal River Coals Ltd,* [1999] 3 F.C. 425, 165 F.T.R. I (T.D.).
[202] *Ibid.*, at pp. 231-232.
[203] See for example, the *Species at Risk Act, supra* note 2, the *Canadian Environmental Protection Act, (1999), supra* note 28, *Canadian Environmental Assessment Act, supra* note 29, and the *Canada National Marine Conservation Areas Protection Act*, *supra* note 30.

The adoption of international human rights laws in Canada has been steady since the amendment to the Canadian Constitution in 1982.[204] The courts have examined international law to aid in the interpretation of the *Canadian Charter of Rights and Freedoms*[205] (Charter) in over 50 cases.[206] There is an expanding body of analysis of the application of international law in Canada, not to discourage its use, but to better understand its form and content.[207] It is easy to predict that the courts will be asked to consider the application of UNDRIP in considering the further development of section 35 of the Constitution.

But consideration of the application of international law is only part of the issue. The development of domestic law independent of international influence must also be considered to determine the degree to which the courts are supporting First Nation peoples' rights.

Respect for the link between First Nation peoples and the land

There is a myopia of the courts to the impact of their rulings on First Nation peoples. Generally speaking, the courts are usually not reflecting on the consequences of their decisions on the environment or First Nation peoples' rights when reviewing a disputed

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[204] Anne Warner La Forest, Domestic Application of International Law in Charter Cases: Are We There Yet? 2004, 37 U.B.C. L. Rev. 157 – 218.
[205] *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[206] Warner La Forest, *supra* at note 204, at p. 157.
[207] *Ibid.*

corporate takeover or a contract for the sale of land. It is neither Canada's majority social culture nor its legal precedent to reflect on these kinds of interconnections. It is simply just not an issue for them.[208]

Even in Indigenous cases, in *Taku*, for example, the courts adopt a very narrow perspective of inherent human rights of self-determination and self-government. The protest of the Taku River Tlingit First Nation revolved around the construction of a road through their traditional territory to an existing mine site. The ore had previously been shipped down river by boat. The road would allow land transportation into the area and would be the first road ever north of the Taku River. The Taku disagreed with the results of the environmental assessment process imposed by the Crown. The Crown found limited environmental impact and approved the road construction. The complaint was dismissed by the Supreme Court of Canada (S.C.C.), even though the Court was aware of the potential for environmental damage.[209] The S.C.C. focused on whether there had been adequate consultation, not whether the activities impeded rights to environmental self-determination or self-government. The Court dealt with the adequacy of the process – the consultation, not the adequacy of the outcome – the accommodation. The courts have authorized many activities by the Crown or by private concerns which undermine the ecological integrity of First Nation territories and which impose sometimes catastrophic impacts on First Nation cultures.

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[208] This can be easily corroborated upon a cursory review of S.C.C. decisions. The vast majority address neither First Nation cultures nor protection of biological diversity.

[209] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550 (Taku).

This is not to say the courts do not respect the environment. For example, courts have acknowledged the importance of the environment to the well being of the human population in Canada.[210] The S.C.C. has embraced environmental protection as "a fundamental value of Canadian society".[211] The Court has identified a common law right to a clean environment on a number of occasions and suggested that there are corresponding duties on government to protect environmental rights.[212] New environmental principles are being considered by the courts, including the: 1) polluter pays principle; 2) the precautionary principle; 3) intergenerational equity; 4) sustainability; and 5) public trust. The S.C.C. has been willing to use these principles to address environmental harm.[213]

In the context of Indigenous cases the S.C.C. has acknowledged the close connection between First Nations peoples and the land; and is in fact quite sympathetic to this connection. In *Delgamuukw* Chief Justice Lamer held that the link between First Nation peoples and the land is an element of their *sui generis* interest in land.[214] The S.C.C. has agreed that a relationship with the land is integral to First Nation peoples' distinctive culture.[215] "[R]ecognition of the importance of the continuity of the relationship of an aboriginal community to its land over time is implicit in the pre-existing nature of Aboriginal tenure."[216] There exists "a special bond between the group and the land in

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[210] Jerry V. DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" 2007, 17 J.E.L.P.159.
[211] *Ibid.*, at p. 163; see also, *114957 Canada Ltée (Spray-Tech, Société d'arrosage)* v. *Hudson (Ville)*, [2001] 2 S.C.R. 241 at para. 1.
[212] DeMarco *supra* note 210 at pp. 165-175.
[213] *Ibid.*
[214] *Delgamuukw, supra* note 5, at paras 112-115.
[215] *Ibid,* at para. 117.
[216] *Ibid,* at paras. 126 and 128.

question such that the land will be part of the definition of the group's distinctive culture".[217]

Furthermore, the S.C.C. has acknowledged the need for conservation in order to sustain First Nation cultures. In *R v. Sparrow*[218], *R. v. Gladstone*[219], *R. v. Nikal*[220], and *Kruger and al. v. The Queen*,[221] the S.C.C. has confirmed that protection of the land is essential to support First Nation cultures. In *Nikal,* the S.C.C. said, "The aboriginal right to fish must be balanced against the need to conserve the fishery stock."[222] The exercise of the right "depends on the continued existence of the resource".[223]

Yet, in an ironic twist, the courts have demanded First Nation peoples' interests yield to a conservation ethic defined by the Crown, thus holding First Nation peoples to account for conservation while denying First Nation peoples the opportunity to hold others to similar account.[224] This double standard frustrates First Nation governments in their efforts to protect their lands and cultures.

A number of commentators have expressed concern that the ethic of conservation is being used by the courts and Parliament to assert control over First Nation peoples and

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[217] *Ibid,* at paras. 126, 128.
[218] *Sparrow, supra* note 5.
[219] *R. v. Gladstone* [1996] 2. S.C.R. 723 (Gladstone). The Court notes at para. 74 "[g]iven the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures.
[220] *R.v. Nikal* [1996] 1 S.C.R. 1013 at para XCIV.
[221] *Kruger and al. v. The Queen*, [1978] 1 S.C.R. 104. at p. 112.
[222] *Nikal, supra* at note 220 at para XCIV.
[223] *Ibid.*
[224] *Ibid.*

restrict their access to resources.[225] Andrew Chapeskie, writing on the production of *manomin* under traditional Ojibway management schemes, notes:

> Conservation; is it to become the next frontier of conflict over natural resources between Aboriginal communities and state governments worldwide? The trend seems to be as evident in Canada as it is for any other country. One group of Aboriginals risk penalties in order to protect resources in their ancestral territories. The courts in turn say that the priority of conservation is the responsibility of the State for its exercise on behalf of all Canadians including Aboriginal peoples. The dissonance between divergent State and Aboriginal paradigms employed in grappling with these issues is pervasive. The situation is especially frustrating to Aboriginal communities where their members continue to rely on customary resource stewardship practices. It is also frustrating given that the efficacy of this resource stewardship is now achieving wider recognition.[226]

This is not to suggest that Indigenous communities are precluded from exercising protective measures that are stronger than a legislative regime. Rather, of concern is the lack of engagement between the Crown and First Nation peoples to determine collectively how to best protect the land. Little respect is given by the Crown to traditional First Nation environmental governance of any fashion. This interferes with the capacity of First Nation peoples to exercise their cultures and hence undermines the retention of biological diversity.

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[225] Chapeskie, *supra* note 10 at p. 77.
[226] *Ibid.* at p. 94.

André Goldenburg takes issue with the courts' support for conservation where it authorizes infringement of an Indigenous right. [227] Goldenburg considers two explanations: the weakening of the *Sparrow*[228] test and the "expression of conservation as a hegemonic cultural discourse"[229]. In the first case, Goldenburg believes the courts are responding to a fear that Indigenous peoples are likely to over-harvest a resource. [230] In its expressed concern about conservation, the Courts have found a mechanism to limit Indigenous rights.[231]

In the second case, Goldenburg believes the courts have applied a cultural bias to defeat Indigenous interests. The author identifies four ways in which conservation has been used by the courts in this fashion. First, the courts have provided little guidance on the point at which conservation concerns override Indigenous rights. Without such clarification, the value of 'conservation' as a yardstick for determining infringement is called into question.[232] Is it enough for the government to suggest there might be a conservation problem to justify infringement, or must there be actual proof of a causal connection between conservation objectives and the exercise of an Aboriginal right? Second, where the courts have invoked concerns about conservation, they have facilitated economic gain at the expense of First Nation interests, enhanced the rights of settlers, and restricted Indigenous access to a resource.[233] Third, arguments about environmental

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[227] André Goldenburg, 'Surely Uncontroversial' – The Problems and Politics of Environmental Conservation as a Justification for the Infringement of Aboriginal Rights in Canada (2002) 1 J.L.& Equality 278.
[228] *supra* note 5.
[229] Goldenburg, *supra* note 227, at p. 288.
[230] *Ibid.*, at p. 283.
[231] *Ibid.*
[232] *Ibid.*, at pp. 290-293.
[233] *Ibid.*, at pp.284-286.

conservation are being used to justify racism and paternalism.[234] Fourth, Indigenous peoples are incapable of environmental management.[235]

There is concern that conservation is being used as a justification for continued paternalism by the courts towards Indigenous peoples and to deny their rights to self-determination. Chapeskie cites *R.* v. *Agawa*[236] as a case where it was presumed that Indigenous peoples had not managed wildlife resources for abundance in the past or if they had they would not be able to do it now.[237] In *Gladstone*, the S.C.C. acknowledged that the Heiltsuk exercised prudence in their harvest of herring roe on kelp, but conveniently ignored this demonstration of environmental self-governance when this would have implied a potential limitation on non-Indigenous peoples' interest in the commercial catch.[238]

This is of particular concern because it raises the possibility that the rights of First Nation peoples could be cast as property interests rather than social or cultural rights. The Courts have tended to support greater intrusion on First Nation peoples' rights where the issue is access to property.

> It is important when considering the infringement of section 35(1) rights to distinguish between Aboriginal title and Aboriginal rights. Aboriginal title, though an exclusive interest is always subject to the sovereignty of the Crown, who holds all lands and natural resources. Aboriginal rights...are distinguishable

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[234] *Ibid.* at pp. 286-287.
[235] *Ibid.* at pp. 287-291.
[236] [1988] 3 C.N.L.R. 73 (O.C.A.). Leave to appeal to S.C.C. denied.
[237] Chapeskie, *supra,* note 10 at p. 135.
[238] Gladstone, *supra* note 219 at paras 53 and 57. See Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39:1 U.B.C. Law Review 139.

> from Aboriginal title, because the Crown does not have a vested interest in these types of social or cultural rights. The Crown does not claim as sovereign the right to dictate, for example, religion, or mobility, or speech, or place of residence. In fact, the contrary is true. The sovereign has deliberately relinquished any issues of sovereignty vis-à-vis these rights, except to ensure their enjoyment is respected by the Crown and by others. Aboriginal rights, therefore, are more secure from infringement than Aboriginal title. That is provided the Aboriginal rights are not property rights that have an economic component [footnotes deleted].[239]

The courts are more likely to impose greater restrictions on the legislature if laws and policies infringe First Nation peoples' social and cultural rights.

> The Courts are comfortable with exclusive rights, such as rights to fish, provided these rights do not pertain to issues of property or commercial interests. As the Crown holds ultimate title to all lands and natural resources as a result of its claim of sovereignty, the Crown holds the sovereign right to distribute lands and resources as it sees fit. This includes all Aboriginal title lands and commercial interests in natural resources. Exclusive Aboriginal title or other commercial interests can be infringed by the Crown as sovereign... Therefore, despite the fact that Aboriginal title is exclusive to Aboriginal peoples vis-à-vis third parties, it is not an exclusive right vis-à-vis the Crown's rights. Social or cultural rights, such as the right to culture or to self-government, trump interests of [non-Indigenous

[239] See Wilson, *supra* note 71, at p. 31.

peoples]. The Crown has no vested interest in social or cultural rights, other than to protect them at law. [240]

The challenge lies in how environmental interests will be defined. Are environmental concerns related to the use of land and natural resources, and therefore proprietary interests? Or are they to be defined as social or cultural rights associated with the retention of First Nation cultures? Do environmental issues relate to the land or to the people?

From the general traditional perspective of First Nation peoples the answer is both. It is not possible to sever the people from the land and discuss matters of purely economic interests in the land when considering environmental impacts. Nor is it possible to divorce the people from the land when discussing social or cultural impacts. As we have seen, it requires joint consideration of the land and the people to sustain biological diversity and the cultures of First Nation peoples. Whether this view will be supported by the courts, or the Crown in consultations, remains to be seen. Numerous commentators have expressed concern about the willingness of the Crown to focus on the economic element.[241]

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[240] *Ibid.*, p. 35.

[241] See for example, Ardoch Algonquin and Shabot Obaadjiwan First Nations, *Toward Developing an Aboriginal Consultation Approach for Mineral Sector Activities: A response from the Ardoch Algonquin and Shabot Obaadjiwan First Nations*, 2007, unpublished; also see Environmental Commissioner of Ontario, Reconciling our Priorities : Annual Report , 2006-2007 (Toronto: Province of Ontario, 2007), online: Environmental Commissioner of Ontario, http://www.eco.on.ca/english/newsrel/2007/Annual_report-0607-FINAL-EN.pdf at p. 65.

While the S.C.C. is convinced of a connection between the First Nation peoples and the land, it has also unjustifiably limited Indigenous rights, found equivalent common law privileges of non-Indigenous peoples to Indigenous peoples' constitutional rights, and allowed provincial legislation to infringe Indigenous rights associated with land. But the S.C.C. has not yet considered whether First Nation peoples hold rights under section 35 of the Constitution to self-determination or self-government, nor whether these rights extend to environmental governance.[242]

Rights to Self-Determination and Self-Government

In determining what constitutes an Indigenous right, Chief Justice Lamer developed a "distinctive practices test".[243] The Court recommends a "purposive approach" to define an Indigenous right.[244] This is to allow the Constitutional interpretation to be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers"[245] and "in the light of the interests it was meant to protect"[246]. First, section 35 of the Constitution must be given "a generous and liberal

[242] Note that a lower court in British Colombia has confirmed rights to self-government. Justice Williamson in *Campbell v. British Colombia (A.G.)*, noted, "...[A]fter the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of [A]boriginal people to govern themselves was diminished, it was not extinguished. Any [A]boriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty... Aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. *Campbell v. B.C. (Attorney General of)*, [2000] 4 C.N.L.R. 1, paras. 79 and 81.
[243] This is discussed in Doug Moodie, "Thinking Outside the 20th Century Box: Revisiting 'Mitchell' - Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government, (2003-2004) 35 Ottawa L. Rev. 1 – 41.
[244] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 21 (Van der Peet).
[245] *Ibid.*, Lamer cites, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 155.
[246] *Ibid.*, Lamer cites *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344.

interpretation" and "doubt or ambiguity must be resolved in favour of aboriginal peoples"[247] as the honour of the Crown is at stake. Second, the Court must explain the purpose of the Constitutional protection; "the interests the provision is intended to protect".[248] As Lamer notes, Indigenous rights exist because Indigenous peoples were living in North America in distinct societies prior to the arrival of Europeans. The purpose of protecting Indigenous rights under section 35 of the Constitution is to give effect to this fact.

These rights, Lamer continues, "must be temporally rooted in the historical presence -- the ancestry -- of aboriginal peoples in North America."[249] The courts must identify the "crucial elements"; those "practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans."[250] "In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right [emphasis added]."[251] In *Van der Peet*, Lamer sets out a test to aid in making this determination. The courts must, among other things:

- consider the perspective of Aboriginal peoples themselves;
- identify the precise nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right;
- find evidence that a practice, custom or tradition is of central significance to the Aboriginal society in question;

[247] *Ibid.*, at paras. 24 and 25 respectively.
[248] *Ibid.*, at para. 27.
[249] *Ibid.*, at para. 32.
[250] *Ibid.*, at para. 44.
[251] *Ibid.*, at para. 46.

- consider whether the practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact;
- consider the influence of European culture only if it is demonstrated that the practice, custom or tradition is only integral because of that influence; and
- take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples. [252]

The application of the test is a matter of examining the factual record – both oral and written evidence – to determine the existence or not of a particular practice, custom or tradition. Commentators have challenged this test as it contemplates freezing rights in time.[253] The fear is that First Nation peoples will be held to a few antiquated notions of their cultures and their rights deprived of much modern day substance. But legal commentators have also considered the application of the test to self-government.[254] A brief review of case law demonstrates the likelihood of the courts eventually recognizing a right to self-government.

First, the courts themselves have acknowledged First Nation peoples had communities and were considered nations at the time of contact. Justice Marshall in *Worcester* could

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[252] *Ibid.*, at paras. 48-75.
[253] See for example, Borrows, *supra* note 72; and Patrick Macklem, *Indigenous Difference and the Constitution of Canada,* (Toronto: University of Toronto Press, 2001).
[254] See for example John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right", 2005 38 U.B.C. L. Rev. 285.

have been copying a definition of nations[255] when he wrote, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial [emphasis deleted]."[256] This is admitted by the S.C.C. in *R. v. Sioui,* [257] when Chief Justice Lamer cites *Worcester v. State of Georgia* noting that Britain "considered [First Nations] as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged [emphasis deleted]."[258] There is ample evidence that in the early history of First Nation – European relations, First Nation peoples exercised self-determination and self-government.[259]

There is considerable evidence too that the exercise of sovereign authority by First Nation peoples traditionally included regulation of human interaction with the environment.[260] Many traditional First Nation laws relate to humanity's interrelationships with the land.[261] We know this in part from decisions of the courts themselves. In *Delgamuukw* for instance, the S.C.C. noted that the relationship with the land is a fundamental element of distinct First Nation cultures.[262] Other cases have found

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[255] Avis, *supra* note 11, at p. 759. A nation is defined as: "a community of people occupying and possessing a defined territory and united under one government: especially a community that is politically independent."
[256] *Worcester v. State of Georgia* 31 U.S. (6 Pet.) 515 (1832), at pp. 548-49.
[257] *R. v. Sioui*, [1990] 1 S.C.R. 1025.
[258] *Ibid.*
[259] See Borrows, *supra* note 254, for a more full exploration of the rights to self-government.
[260] See Borrows, *supra* notes 10 and 38, and Henderson, *supra* note 10, at pp. 406-419.
[261] *Ibid.*
[262] *Delgamuukw, supra* note 5, at para 115.

similarly.[263] There is also the evidence of Indigenous scholars and leaders that a strong connection to the land is a part of the distinct culture of First Nation peoples, and it was an element of their traditional governance.[264] On the weight of the evidence, the courts must find that First Nation peoples were exercising environmental governance prior to contact with Europeans. Environmental governance has not been extinguished, continues from pre-contact[265] and has been enshrined in treaties[266].

Consultation, Accommodation and Reconciliation

Yet, self-determination and self-government described by the courts could amount to less than full recognition of First Nation peoples' inherent rights to self-determination and self-government.[267] Indigenous rights also must be reconciled with the sovereignty of the Crown.[268] The purpose of recognizing section 35 rights is to acknowledge that First Nation peoples were here first and to reconcile this fact with the sovereignty of the Crown.[269] The S.C.C. has consistently encouraged the Crown and First Nations to pursue consultation and negotiation as the best means to reconcile their interests.[270]

In *Delgamuukw*, Justice Lamer states:

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[263] See for example, *Haida*, *supra* note 5 and *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (Mikisew).
[264] See Borrows, *supra* note 10 and Henderson, *supra* note 10 for example.
[265] McClenaghan, Theresa, *Molested and Disturbed: Environmental Protection by Aboriginal Peoples through Section 35 of the Constitution Act, 1982*, (1999) [unpublished] at pp. 19-22.
[266] *Ibid.*, at pp. 25-30.
[267] Moodie, *supra* note 243 at para 44.
[268] Van der Peet, *supra* note 244, at paras. 30 and 31.
[269] *Ibid.*
[270] See for example, Delgamuukw, *supra* note 5, at para 186; Haida, *supra* note 5, at para. 14.

> ...consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands [or rights] 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.[271]

The duty may range from a requirement to "...give notice, disclose information, and discuss any issues raised in response to the notice..."[272] up to an "...opportunity to make submissions for consideration, formal participation in the decision-making process and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision".[273]

The number of consultation cases that continue to come forward is indicative of the lack of clarity about the Crown's duty to consult. How is consultation to be conducted, what are the obligations of various parties, how do the parties know the requirements to consult have been fulfilled, and what types of results are to be achieved by consultation? The courts have begun to address these issues in a series of cases, but great uncertainty remains.[274]

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[271] Delgamuukw, *Ibid.* at para 168.
[272] *Ibid.*,at para. 43.
[273] *Ibid.*, at para. 44.
[274] See for example, *Haida, supra* note 5; Taku, *supra* note 2o9; Mikisew, *supra* note 263; as well as *The Ahousaht Indian Band, et al* v. *The Minister Of Fisheries And Oceans* 2007 FC 567 (May 29, 2007); *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 F.C., 763 (July 20, 2007); *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 (November 10, 2006); *Treaty Seven Grand Chief Chris Shade and Treaty Six Grand Chief Danny Bradshaw* v. *The Attorney General Of Canada And The Minister Of Indian Affairs And Northern Development*, 2003 FCT 327 (March 20, 2003); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2007] O.J. No. 1842, [2007] C.C.S. No. 17305, among others.

The duty to consult has been criticized as being purely procedural in nature.[275] Consultation can amount to little more than a hoop through which First Nation peoples must jump.[276] Gordon Christie, an Inuk legal scholar, criticizes consultation as it tends to "push and pull" Indigenous peoples into assimilation.[277] At question is the degree to which the Crown must accommodate the rights and interests of First Nation peoples.

According to Justice Lamer, section 1 of the Charter must be applied in considering section 35 Indigenous rights. His interpretation legitimizes a high degree of government interference with Indigenous rights.[278] This down grades the priority interest assigned First Nation peoples rights by Chief Justice Dickson. In the *Sparrow* decision, Chief Justice Dickson held that the rights of First Nation peoples took priority over the interests of others, except where limitations were required for conservation purposes.[279] Chief Justice Lamer, who succeeded Dickson as Chief Justice, held instead that Indigenous rights are subject to limitation because of the economic, legal and political rights and interests of settler society.

> Because...distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those

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[275] Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?", (2006) 17 J.E.L.P. 27; see also Wilson, *supra* note 71.
[276] *Ibid.*
[277] Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39:1 U.B.C. Law Review 139 at p, 154.
[278] Goldenburg, *supra* note 227, p. 279-284.
[279] Sparrow, *supra* note 5.

> rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[280]

This may be a reasonable statement in light of the fact that different cultures must co-exist in Canada. For example, it might be reasonable to forego rights to hunt in some territory in order to protect public safety. A prohibition on hunting deer with high powered rifles at night in a suburban neighbourhood would likely not be seen by most First Nation peoples as an unreasonable restriction of their rights. Lamer himself offers the example of restrictions for conservation purposes.[281]

The issue is not whether First Nation peoples' rights might have to be curtailed from time to time, but who defines when that is necessary and the limits of the imposition. If First Nation peoples see themselves as equal participants in the process, as a right of self-determination they can choose to impose restrictions on themselves. In the course of so doing, they have the opportunity to develop adaptations that are in keeping with their traditional cultures. This allows the continuation of First Nation peoples' cultures which facilitate the retention of biological diversity. Of course, as noted earlier, there is no guarantee that First Nation governments will necessarily opt for traditional laws. This does not change the fact that rights to self-determination and self-government must be

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[280] Gladstone, *supra* note 227 at para 73.
[281] *Ibid.* at para. 41.

observed in Canada. Instead the manner in which First Nation peoples are encouraged to accord respect for environmental protection must change. The Crown is not at liberty to impose a particular set of values on First Nation peoples, but must instead negotiate environmental protection with First Nation governments.

But, Justice Lamer suggests that the interests of First Nation peoples must make way for the interests of the majority. For example, "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard" of justified legislative infringement of Indigenous rights.[282] In *Delgamuukw*, Lamer states that "the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad."[283] He gives the following examples.

> In my opinion, 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, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.[284]

The impact of these activities on the jurisdiction and capacity of First Nation peoples to maintain their traditional relationship with the land has been substantial and are in large part

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[282] *Ibid.*, at para 75.
[283] Delgamuukw, *supra* note 5 at para. 165.
[284] *Ibid.*

responsible for the current impoverished state of First Nation cultures and the biological diversity on which they depend. Lamer's proposal has the effect of trumping Constitutional rights of First Nation peoples for the benefit of the majority who hold no similarly positioned rights. This denies First Nation peoples the opportunity to continue their traditional relationship with the land. It guarantees the "frozen rights" interpretation of Indigenous rights,[285] and in so doing frustrates the operation of First Nation peoples' environmental laws and governance as a mechanism for the protection of biological diversity.

Justice Beverly McLachlin, as she then was, wrote a dissenting opinion in *Van der Peet.* She found several faults with Lamer's approach.

> Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required.[286]

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[285] Borrows, *supra* note 71.
[286] Van der Peet, *supra* note 227, at para 302.

Justice McLachlin was concerned that the Chief Justice was allowing majority rule to trump minority rights. It is somewhat disappointing that she has not chosen to distinguish the "*Van der Peet* Trilogy" and restore First Nation rights to priority status since she replaced Justice Lamer as Chief Justice of the S.C.C.

Others have taken up this challenge, for example in a recent Supreme Court of British Colombia (B.C.S.C.) decision, *Tsilhqot'in Nation v. British Columbia.*[287] In this case Lamer's reasoning in *Van der Peet* and *Gladstone* was rejected.

> The majority's link between it's [sic] theory of reconciliation and the justification of infringements test described in *Van der Peet* and *Gladstone* would appear to effectively place Aboriginal rights under a *Charter* s. 1 analysis. As McLachlin J. points out, this is contrary to the constitutional document, and arguably contrary to the objectives behind s. 35(1). The result is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. *It is reconciliation on terms imposed by the needs of the colonizer* [emphasis in the original].[288]

The B.C.S.C. in this case cites legal scholar Lisa Dufraimont on the purpose of reconciliation,

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[287] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.
[288] *Ibid,* at para 1350.

> Like the broadening test for justification of infringement it informs, the discussion of reconciliation in *Gladstone* and *Delgamuukw* suggests that Aboriginal rights must give way when they conflict with public goals and interests. This idea of reconciliation is simply not a plausible articulation of the purpose of s. 35(1). Governments do not recognize and affirm minority rights for the benefit of the majority. Rather, the purpose of s. 35(1), as suggested in *Sparrow*, is remedial. Aboriginal rights have been constitutionalized *precisely in order to promote a just settlement for Aboriginal peoples* by strengthening and legitimizing their claims against the Crown [emphasis in the original].[289]

If broad justification of infringement of First Nation peoples' rights is to be rejected, how then are First Nation rights and the sovereignty of the Crown to be reconciled? Justice McLachlin in *Van der Peet* examines how reconciliation between distinct legal cultures might be achieved.[290] " . . . '[A] morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives' of the 'two vastly dissimilar legal cultures' of European and aboriginal cultures. [emphasis added]"[291] McLachlin goes on to note that the goal of reconciliation does not "...require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation...".[292]

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[289] *Ibid.* See also Lisa Dufraimont, in "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Fac. L. Rev. (QL) at para. 24.
[290] Van der Peet, *supra* note 227 at para. 310.
[291] *Ibid*, citing Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 Queen's L.J. 350.
[292] *Ibid.*

It is worth quoting at length McLachlin's vision of how to achieve reconciliation.

> In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process -- the stage of defining aboriginal rights -- the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective -- how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process -- definition of the rights guaranteed by s. 35(1) followed by negotiated settlements -- is the means envisioned in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives.[293]

According to Justice McLachlin, the courts can assist in defining the inherent and treaty rights of First Nation peoples but it is up to the Crown and First Nation governments to then negotiate how these rights will be accommodated within the Canadian legal framework.

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[293] Van der Peet, *supra* note 244 at para 313.

The courts have acknowledged the strong connections to the land evident in First Nation cultures. They have also acknowledged that protection of the land is essential to protect First Nation cultures. The Courts have confirmed that First Nation peoples were nations with independent governments. There is ample evidence that environmental self-determination and self-government were 'practices, customs, or traditions' 'integral' to First Nation peoples' distinct cultures. It is predicted that the courts will be presented with mounting evidence of the interconnections between conservation and First Nation peoples' environmental self-determination and self-government. It remains to be seen how these rights are to be reconciled with the sovereignty of the Crown.

As will become evident in the next chapter, there is, unfortunately, ample evidence that Cabinet and Parliament do not respect First Nation peoples' traditional laws, nor, in some cases, even its own. The paper now turns to a review of federal Indigenous and environmental law and policy to examine Parliament's treatment of First Nation peoples' rights to environmental self-determination and self-government.

Chapter Five
Federal Indigenous and Environmental Law and Policy

This chapter examines major federal environmental and Indigenous laws and policies to uncover the degree to which the Crown supports or impedes First Nation peoples' environmental self-determination and self-government. As with the chapter above on the courts, this chapter will commence with a review of Canada's adoption of international environmental and human rights laws. Following this, four pieces of environmental legislation will be considered in depth: SARA; CEAA; CEPA'99; and the MCAA. Also to be reviewed are the FNLMA (*First Nations Land Management Act*),[294] the *Indian Act*,[295] and the Inherent Rights Policy[296]. This review will consider the degree to which these laws and policies:

- conform to international human rights standards;
- embrace traditional First Nation perspectives on the relationship between the land and people; and
- encourage First Nation peoples' self-determination and self-government.

As will become evident, First Nation peoples are frustrated at every turn in their efforts to manage human relations with the land in keeping with their traditional laws. The Crown rejects international standards, gives token regard to First Nation cultures, and excludes First Nation governments from environmental decision making. These impediments to the retention and practice of First Nation peoples' traditional environmental governance

[294] *Supra* at note 25.
[295] *Supra* at note 24.
[296] *Supra* at note 26.

undermines the retention of First Nation cultures and hence the retention of biological diversity. Without a role to play in national environmental governance, First Nation peoples are prevented from exercising their traditional cultures that support the retention of biological diversity. While this constitutes a serious attack on the rights and interests of First Nation peoples it also continues to undermine the retention of biological diversity upon which all Canadians rely. The continued suppression of First Nation peoples' inherent rights to environmental self-determination and self-government ultimately defeats Canada's overall objective of securing the public well being.

Canada's Respect for International Law

Canada considers itself a leader in the international community in respect of human rights:

> Since the foundation of the United Nations (UN), Canada has been firmly committed to the promotion of human rights within Canada and in the world. It has been said that UN conventions do not legislate rights, but recognize them and build upon them, principally by using moral suasion, education and public opinion. In this light, countries with good human rights records, like Canada, have a special responsibility: to contribute to this worldwide effort, not only by

constantly affirming and protecting the rights of their own people, but by being seen to do so.[297]

Canada's is a dubious claim when it comes to the recognition of the rights of First Nation peoples, however. In fact, Canada has become an international pariah in this respect. Canada, for example, voted against the adoption of UNDRIP by the United Nations General Assembly. It was one of only four states to do so. The Canadian Government has suggested that Canada is not bound by UNDRIP as Canada has not signed it. Indian Affairs Minister Chuck Strahl stated, "By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution."[298]

Neither legal analysis nor political opinion supports this view. An open letter from legal practitioners and academics to Prime Minister Harper, dated 1 May 2008 states, "We are concerned that the misleading claims made by the Canadian government continue to be used to justify opposition, as well as impede international cooperation and implementation of this human rights instrument."[299] Moreover, the majority of Members of Parliament reject the views of Cabinet or the Conservative Party on UNDRIP. On 8

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[297] Canadian Heritage, Human Rights Program, "How Canada works with the United Nations", (Ottawa: Canadian Heritage, 2007), online: Heritage Canada, <http://www.pch.gc.ca/progs/pdp-hrp/inter/un_e.cfm >.

[298] Amnesty International Canada, *UN Declaration on the Rights of Indigenous Peoples: Canada must set positive example*, (Ottawa: Amnesty International, 2008), online: Amnesty International, <http://www.amnesty.ca/take_action/actions/ip_un_declaration.php. >.

[299] Letter from over 100 Canadian lawyers, 1 May 2008, online: Amnesty International Canada, http://www.amnesty.ca/index_resources/open_letters/un_ip_declaration_experts_letter.pdf

April 2008, the opposition parties in the House of Commons passed a motion in the House to recognize UNDRIP.[300] It states,

> That the government endorse the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the United Nations General Assembly on 13 September 2007 and that Parliament and Government of Canada fully implement the standards contained therein.[301]

The motion passed in the House by 148 votes to 113.[302] Thus far, however, the federal government has refused to embrace this instrument in law or policy.

Canada has also been criticized by the United Nations Human Rights Committee for its failures to implement the Covenant on Civil and Political Rights. In its report of 20 April 2006, the most recent, the Committee was concerned that Canada may be extinguishing First Nation peoples' rights and failing to protect First Nation languages, among other things.[303] The Committee recommended Canada re-examine its policies respecting inherent Indigenous rights in the negotiation of land claims. The Committee also expressed concern about the continuing decline of Indigenous languages and recommended,

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[300] Hansard, House of Commons, 8 April 2008, at 1755, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3400639#T1755.>.

[301] House of Commons, Committee on the Status of Women, Third Report, Motion to adopt Report, passed House of Commons <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3247352&Language=E&Mode=1&Parl=39&Ses=2 >.

[302] Hansard, *supra* note 300.

[303] United Nations Human Rights Committee, 85th Sess., UN Doc. CCPR/C/CAN/CO/5 2 November 2005, at paras. 8-10, online: UN Human Rights Committee, http://huachen.org/english/bodies/hrc/hrcs85.htm.

> The State party [Canada] should increase its efforts for the protection and promotion of Aboriginal languages and cultures. It should provide the Committee with statistical data or an assessment of the current situation, as well with information on action taken in the future to implement the recommendations of the Task Force on Aboriginal Languages and on concrete results achieved.[304]

Instead, in 2007, the government cut funding to support Indigenous languages.[305] Recall that the state of First Nation peoples' languages is the leading indicator of the health of their cultures. A lack of government support for the retention of these languages undermines the retention of First Nation peoples' cultures and hastens a decline in biological diversity.

Further evidence of Canada's failure to embrace international standards is found in federal environmental and Indigenous law and policy. Proof of the failure of the Legislature to respect the domestic courts can also be found. Not only does this undermine the rule of law in Canada and sustain the siege of First Nation peoples' cultures, but also threatens our collective environmental well being.

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[304] *Ibid.*

[305] Muriel Draaisma, CBC News, "Aboriginal Canadians: Endangered languages", Feb. 22, 2008, online: CBC News <http://www.cbc.ca/news/background/aboriginals/endangered-languages.html>

Environmental legislation

Species at Risk Act

The obvious place to begin a review of federal legislation dedicated to the protection of biological diversity is with SARA. The purposes of SARA are to "prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened."[306] SARA was adopted, in part, to fulfill Canada's obligations under the CBD.[307] This legislation is intended to provide "legal protection for species at risk".[308] The process set out in the legislation involves identifying species at risk, implementing plans to slow the decline of biological diversity, and restoring endangered species to their previous vigour. The legislation also establishes offences for endangering the lives or habitat of endangered species.

SARA, while addressing an environmental issue of concern to First Nation peoples, does so with little regard for the cultural perspectives of First Nation peoples and without provision for the inclusion of First Nation peoples in the SARA governance regime. In his remarks to the Parliamentary Standing Committee on Environment and Sustainable Development, then AFN National Chief Mathew Coon Come stated,

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[306] SARA, *supra* note 2, at s. 6.
[307] *Ibid.*, at Preamble.
[308] *Ibid.*

> I'd like to say that the creation of the bill is generally applauded. First nations have since time immemorial understood and taken steps to protect our animal and plant life from extirpation or extinction...However, it is the position of the AFN that amendments to the bill are necessary to better reflect a commitment to a holistic ecosystem approach that embraces the concept of sustainable development.[309]

This legislation does not embrace a cultural perspective of interconnectedness common to most First Nation peoples. Instead, this legislation places an emphasis on the economic value of endangered species. It does not appear to consider biological diversity to be part of the communal wealth and an essential element of the collective well being. For example, the fifth paragraph of the Preamble to the Act makes reference to the use of "cost-effective measures to prevent the reduction or loss" of species.[310] The Minister is authorized to determine that recovery of a species is not "feasible".[311] In light of the statement in the preamble, there is concern that 'feasible' really means 'economically feasible'. Each SARA action plan must identify "the socio-economic costs of the action plan and the benefits to be derived from its implementation".[312] Here again is an opportunity for economic considerations to take precedence over other concerns. The fear is that the legislature may weigh the financial cost of protecting various species against things prized more highly, like oil, or timber, or uranium.

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[309] House of Commons, Parliamentary Standing Committee on Environment and Sustainable Development, (2 May 2001), at 1545, (National Chief Mathew Coon Come) online: Parliament of Canada, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040739&Language=E&Mode=1&
[310] SARA, *supra* note 2, at Preamble.
[311] *Ibid.*, s. 41(2).
[312] *Ibid.*, s. 49(1)(e).

This legislation presumes that humanity may pick and choose which elements of biological diversity shall be saved. It further presumes that humanity has the wisdom to choose wisely. First Nation peoples expressed fundamental disagreement with this approach.[313] First Nation traditional philosophies do not consider humanity to have the capacity, nor should it seek the capacity, to make choices of survival or extinction of a species. All things are connected and as a result, all things have intrinsic value, both to humanity and to other parts of the ecosystem. All elements of the biodiversity are to be respected and thus all must be protected.

Under SARA the Governor in Council has sole responsibility for adding a species to the list of those that are endangered.[314] There are no provisions in the Act compelling it to do so. Indigenous representatives argued strenuously that the decision to list a species as endangered or not should not be a political decision but a matter purely of fact. Concerns that Cabinet could choose political expediency over environmental protection are heightened by the provisions to allow economic interests to determine the viability of a species. Indigenous representatives found this provision particularly problematic.[315]

National Chief Mathew Coon Come addressed this priority issue in presenting to the Parliamentary Standing Committee on Environment and Sustainable Development.

> First is the listing of the wildlife species at risk. The requirement that the list be established and approved by the Governor in Council has the effect of making the listing of species a political decision. In our opinion, the endangerment or not of a

[313] Coon Come, *supra* note 309, at 1530.
[314] SARA, *supra* note 2 at s. 27.
[315] Coon Come, *supra* note 309.

> species is a question of fact, not politics. As the Governor General [sic] will decide which species shall be listed, there is a real likelihood that economic expediency will be placed before the objective of sustainable biological diversity. Biological diversity has enormous significance for first nations. Every species plays a role in making the environment what it is. The loss of one species affects everything that is left. Many aspects of first nations [sic] lives are so connected with the environment that the loss of a species can disrupt subsistence, culture, spiritual practices, and communal life. These essential elements of first nations [sic] life cannot be left to the vagaries of Canadian politics. It is recommended that the bill be amended to remove the Governor in Council's discretion to list species, as in clause 27, and instead provide that all species assessed by COSEWIC will be listed.[316]

There is no reference in the preamble or elsewhere in the legislation to concepts of obligation or duty of care owed by the people to the land. This is a central tenet of most First Nation peoples' cultures, yet it is absent from Canada's biological diversity protection act. There is a reference to the "responsibility for the conservation of wildlife in Canada",[317] but one wonders if this is conservation for the "rational, prudent exploitation of natural resources to obtain from them the maximum sustained yield".[318]

In addition there is a presumption of superiority of the Crown over biological diversity. The preamble states, "Canada's natural heritage is an integral part of our national identity

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[316] *Ibid.*
[317] SARA, *supra* note, at Preamble.
[318] Tsosie, *supra* note 10.

and history."[319] The use of the possessive noun 'Canada's' presumes ownership of biological diversity. This interpretation is confirmed at common law, where the sovereign is presumed to hold ultimate title to the land and all things of the land.[320] If the sovereign can own the land, the sovereign is neither equal to nor a part of the thing owned. This is a relationship of superior to inferior. Even if the use of the possessive in this case could be more benignly interpreted to mean "found in, or located in", the fact remains that in law, all things 'found in' Canada, are owned by the sovereign. The presumption of ultimate ownership by the Crown is of course subject to dispositions made to individuals. But these dispositions do not challenge the notion of 'ownership' or proprietary interests in land. They merely transfer the proprietary interest from the sovereign to the individual. Thus it is not only the sovereign that 'owns' the land, but the individual as well. Notions of ownership that imply rights to use the land without corresponding notions of obligation to the land are a fundamental conflict between the Canadian common law and traditional laws of most First Nation peoples.[321]

There are references to Indigenous peoples throughout the legislation as evidence of respect accorded in the legislation for First Nation peoples. The preamble acknowledges that "the roles of the aboriginal peoples of Canada and of wildlife management boards established under land claims agreements in the conservation of wildlife in this country are essential" and that "the traditional knowledge of the aboriginal peoples of Canada

[319] SARA, *supra* note 2 at Preamble.
[320] Henderson, *supra* note 10 at pp. 67-70.
[321] This is not to suggest that land owners do not have any obligations. For example, owners of waterfront property may be required to build a prescribed distance from the shore line in order to protect the shore from erosion. By and large, however, the presumption holds that land is a commodity to be used for the sole benefit of the land owner and as he or she sees fit.

should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures".[322] The body of the legislation also refers to Aboriginal organizations,[323] *Indian Act* Bands, and Wildlife Management Boards (WMBs), and establishes a National Aboriginal Council and a subcommittee of COSEWIC on Aboriginal Traditional Knowledge.

Despite all this, SARA denies Indigenous peoples the practical expression of their inherent right to self-government. This legislation is ultimately self-defeating. The provisions of the Act which involve Indigenous peoples are dissected below to confirm the truth of this.

Some would point to the National Aboriginal Council on Species at Risk (NACOSAR) as evidence of Aboriginal involvement. The mandate of NACOSAR is to "advise the Minister on the administration of the Act" and "provide advice and recommendations to the Canadian Endangered Species Conservation Council [CESCC]".[324] Aboriginal peoples had to push very hard to gain even this much recognition. This provision was only added when the bill was in its final days of review by the Parliamentary Standing Committee on Environment and Sustainable Development before it was passed by the House of Commons.[325] NACOSAR is a purely advisory body. It has no decision making

[322] *Ibid.*
[323] Aboriginal organizations would include, for example, the Assembly of First Nations, the Métis National Council and Inuit Tapirisat Kanatami.
[324] SARA, *supra* note 2 at s. 8.1.
[325] The efforts of Métis Member of Parliament, Rick Laliberte were instrumental in this.

authority. Furthermore, participation in NACOSAR is only by Aboriginal organizations and only those approved by the Minister of the Environment.[326]

The CESCC is composed of the federal, provincial, and territorial ministers responsible for species at risk in their territory. If Canada was prepared to engage First Nation governments as equals, the Crown would invite First Nation governments to participate in this Council. Thus far, Canada has invited Indigenous organizations to make presentations from time to time, but this in no way compensates for the lack of a seat at the table for Indigenous governments. If Canada wants to ensure it hears, understands and takes advantage of the knowledge about this land and the peoples of this land, First Nation governments need permanent equivalent seats on the CESCC.[327]

The Act mandates that COSEWIC must consider the best available Indigenous traditional knowledge[328] and establish an Aboriginal Traditional Knowledge Subcommittee (ATK Subcommittee) to assist them in this regard[329]. This too is a purely advisory body. The ATK Subcommittee only provides information to the Minister on the health of a species and may make recommendations for listing the species as endangered or not. Like COSEWIC itself, there is no authority resting in the ATK Subcommittee to insist that any particular species be protected. The Governor in Council is free to take this advice or not as it deems politically expedient.

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[326] The author served as the AFN representative to the Legal and Technical Subcommittee of this Council from 2004-2006.
[327] For example, at the 1999 meeting of the Council in Iqaluit and the meeting in 2006 in Yellowknife.
[328] SARA, *supra* note 2 at s. 15(2).
[329] *Ibid,* s. 18(1).

WMBs may be a possible exception[330]. Some Indigenous governments are represented on these boards and the number of Indigenous participants are often equal to or even greater than those of the Crown. For example, the Nunavut Wildlife Management Board is composed of nine members. It is,

> a co-management board, jointly governed by four representatives of Inuit organizations and four representatives of the governments of Nunavut and Canada (who may also be Inuit) along with an independent chairperson. Members are nominated by Inuit organizations or government departments and appointed by the [M]inister of Indian and Northern Affairs Canada.[331]

While these WMBs are an improvement, they do not constitute self-government. In every case,[332] the Indigenous representatives must be appointed to a WMB by a Minister of the Crown. Only governments recognized by their inherent right to govern may freely choose their own representatives in discussions between partners. This respect is denied First Nation peoples by the Crown. This observation is not intended as a criticism of these Boards. The Indigenous peoples in these cases are to be applauded as they have succeeded in re-establishing elements of their traditional forms of government in the face of on-going colonialism. They have merely folded the Crown into the mix. The WMBs are an example of the consensus based decision making process that is advocated in this paper. But this does not change the fact that any ongoing success for these Boards is

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[330] Nunavut Wildlife Management Board, "Responsibilities and Mandate of the NWMB", (Iqaluit: NWMB, undated), online: NWMB, http://www.nwmb.com/english/about_nwmb/responsibilities.php#manage. Other Wildlife Boards include the Yukon Fish and Wildlife Management Board and the Beverly and Qamanirjuaq Caribou Management Boards.

[331] *Ibid.*

[332] See for example the Yukon Fish and Wildlife Management Board and the Beverly and Qamanirjuaq Caribou Management Boards.

ultimately dependent on the good will of the Crown to accept the nominee of the Indigenous peoples.

Where SARA contemplates the inclusion of Indigenous organizations, it too allows the Minister of the Environment to decide which Indigenous organizations will be invited to participate. While strategies and plans are to be prepared in cooperation with WMBs and Indigenous organizations, such cooperation is only "to the extent possible".[333] The interpretation of the degree of cooperation necessary is open to definition by bureaucratic efficiency and the political whim of Cabinet. The references to *Indian Act* Bands must also be discounted as references to First Nation governments recognized by their inherent right to self-government, as *Indian Act* Bands hold only delegated authority from the Minister of Indian and Northern Affairs.

Rick Laliberte, a Métis and Member of the House of Commons and the Parliamentary Standing Committee on Environment and Sustainable Development (Committee on Environment) when SARA was being debated put it this way:

> The way I look at it and the best way I can explain this is how the chairman referred to it at the outset, as a canoe trip. That's the way I view this legislation. We're building a canoe, but right at the outset, in subclause 7(1), we define who has the paddles. It's the Canadian Endangered Species Conservation Council. We also know who has the anchor—the Governor in Council—because before this canoe can go, the Governor in Council will decide if it moves or not. The people

[333] SARA, *supra* note 2 at s. 39(1) and 48(1).

who are going to be consulted are the ones inside the canoe who don't have the paddle. But they can say, "Oh, it's a nice day; we can go today. It's not windy. It's safe to go across."

What I understand about the Canadian Endangered Species Conservation Council...is that, because the ministers from the provinces and the territories are going to be having paddles, and also the three ministers of environment, heritage, and fisheries.... Maybe the section 35 representation of the peoples of this country should have a paddle as well, because for centuries you have protected these species and have nurtured these species. Why should the paddle be taken away from your hands now when the species are most vulnerable and when our country has expanded to a point that has threatened the critical habitat of this country?[334]

The AFN made several presentations to the Committee on Environment on SARA when it was under development. Among other things, the AFN raised the failure of the legislation to embrace First Nations in a government to government relationship to improve efforts to address species at risk. National Chief Coon Come urged the federal and provincial governments to engage First Nation governments.

As to the involvement of first nations [sic] governments, first nations hold aboriginal title to large portions of this land, particularly in British Columbia, the Atlantic provinces, and Quebec. We have treaty rights to pursue traditional activities, the exercise of such rights being dependent on a healthy environment.

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[334] Rick Laliberte, May 2, 2001, at 1705, online: House of Commons, Canada, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1040739&Language=E&Mode=1&Parl=39&Ses=2

> Furthermore, we have responsibilities under legislation, such as section 81 of the Indian Act, and modern treaties regarding the protection, conservation, and management of the environment. Finally and most importantly, we have a sacred duty to the Creator as caretakers of the earth. First nations have a strong vested interest in addressing environmental issues in this country. Furthermore, we argue that the federal government, in addition to meeting its legal and policy obligations, has much to gain by including first nations in the decision-making process...
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> At a minimum, the bill must contain express commitments for consultation with first nations peoples, organizations, and governments and the involvement of first nations governments in the development and implementation of the legislation. Unfortunately, upon review of the draft legislation, we are disappointed in this. Furthermore, the wording has the effect of failing to recognize or acknowledge the self-governing powers of first nations with self-government agreements and/or land claims agreements.[335]

These comments were echoed by other First Nation representatives at the Committee stage of the Bill.[336] They fell on deaf ears, however, as the requested amendments were

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[335] Coon Come, *supra* note 309.

[336] See for example, House of Commons, Parliamentary Standing Committee on Environment and Sustainable Development , (7 June 2001) at 1230 (Ovide Mercredi) online: Parliament of Canada, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=55186&Lang=1&PARLSES=371&JNT=0&COM=213; *Ibid,* (2 May 2001) at 1810 (Chief Patrick Francis), online: Parliament of Canada http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=54813&Lang=1&PARLSES=371&JNT=0&COM=213; *Ibid*, (8 May 2001) at 0915 (Daryn R., Leas) online: Parliament of Canada, http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=54904&Lang=1&PARLSES=371&JNT=0&COM=213.

not made and the Act was passed without consideration of the need to reconcile the sovereignty of the Crown with the inherent rights or even the treaty rights of First Nations to self-government. The lack of acknowledgement of First Nation governments in this legislation suggests that Parliament believes these entities are either non existent or have no role to play in the protection of biological diversity. This is illogical given the proven connection between the retention of cultural and biological diversity. It is also short sighted. Denying First Nation peoples the right to inherent environmental self-government limits the spin off effect of greater biological diversity retained for the benefit of all Canadians. Environmental self-governance is a mechanism for sustaining biological diversity. The decline of biological diversity is a serious environmental problem and the decline is being aggravated by climate change. Canada must enlist every possible means to reverse the decline for our collective well-being. Canada cannot afford to turn its back on environmental self-governance by First Nation peoples when it has been demonstrated and is widely agreed to be such a valuable aid.

Implementation of SARA has proved challenging for First Nation peoples.[337] Funding to First Nation governments and organizations to build capacity to aid in protection of species at risk and for species and habitat protection has been criticized in an audit prepared on behalf of Environment Canada. The NACOSAR Secretariat for example was found to be underfunded by "half the levels requested by, and allocated to Environment Canada for this purpose. Presently, the Department provides the Secretariat

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[337] Environment Canada, *Formative Evaluation of Federal Species at Risk Programs*, (Ottawa, Environment Canada, 2006), at pp. 21-23 online: <http://www.ec.gc.ca/ae-ve/default.asp?lang=En&n=53869FF3-1.>.

with 1 full-time employee and a $500,000 operating budget, whereas the corresponding Treasury Board envelope allocated 2 full-time employees and $1 million per annum for this purpose."[338]

The same audit noted:

> While an Aboriginal Capacity Building Program has been created, the program has not yet been established on a sound footing. The program lacks a strategic and comprehensive (national) approach to delivery, and overarching governance and accountability structures are either lacking or considered inadequate. The program has been provided minimal funding and has carried out limited activity to date, with allocations at levels far below those provided for by Treasury Board. Aboriginal peoples' organizations, including NACOSAR, as well as Fisheries and Oceans Canada and Parks Canada, have indicated that Environment Canada has not engaged them sufficiently in the design and implementation of the Program. A Critical Habitat Fund was developed to accompany this capacity-building initiative. Although no critical habitat has been identified, funds have been allocated to projects that may lead to the future identification of critical habitat. Many of the resources intended for the Critical Habitat Fund, however, were re-profiled to other non-Aboriginal program areas.[339]

This summary review of SARA highlights a lack of respect for First Nation peoples' cultural perspectives and denies First Nation peoples 'a paddle' to help move implementation of the legislation in a positive fashion. Canada takes full advantage of

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[338] *Ibid.* at p. 21.
[339] *Ibid* .

the deliberate loophole in Article 8(j) of the CBD, which allows national legislation to supersede protection of traditional Indigenous cultures. SARA is a clear rejection by Canada of the provisions of Article 8(j) of the CBD, which is the protection of *in situ* biological diversity through the retention of traditional Indigenous cultures. Arguments that Canada is nevertheless in full legal accord with the CBD are morally diminished. This exclusion of First Nation peoples from national efforts to reverse the decline of biological diversity is also environmentally damaging over the long term. Canada has rejected an important mechanism for protecting biological diversity to its own detriment. As will be seen, these same problems are evident in CEPA'99, considered next.

Canadian Environmental Protection Act, 1999

CEPA'99 is dedicated to pollution prevention and protection of the environment and human health. This is a lengthy and detailed Act. It addresses a wide variety of issues including regulation of biotechnology, ocean dumping, and toxic substances. Although not specifically directed at the protection of biological diversity, many environmental and human health issues addressed in this legislation can have a deleterious impact on the retention of biological diversity.

CEPA'99 generally acknowledges the links between environmental degradation and human health, which is in keeping with First Nation peoples' traditional perspective of interconnectedness. The preamble comes closest to First Nation peoples' perspectives

when it acknowledges that the protection of the environment is essential to the well being of Canadians and thus there is a need to "integrate environmental, economic, and social factors in decision making".[340] As will become evident in the review below, the mechanisms to do so are lacking in the legislation.

The reference in the Preamble to the value of traditional Indigenous knowledge in protecting the environment and human health is practically the sole reference to traditional knowledge in the entire Act. There are a total of two other references. Section 247 provides,

> A person is not eligible to be appointed as a review officer unless the person is knowledgeable about the Canadian environment, environmental and human health, administrative law or traditional aboriginal ecological knowledge [emphasis added].

Section 334(2) states,

> A person is not eligible to be appointed as a member of a board of review unless the person is knowledgeable about the Canadian environment, environmental and human health or traditional aboriginal ecological knowledge [emphasis added].

Even these opportunities to provide for the inclusion of traditional knowledge can be easily limited. In most instances, First Nation cultures are not a consideration at all. Yet the language of the Preamble to the Act suggests that First Nation cultures will be embraced in this legislation and First Nation governments accorded a respectful place in its implementation. The Preamble to CEPA'99 provides,

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[340] CEPA'99, *supra* note 28, at Preamble.

> the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution; [and]...
>
> the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development.[341]

Again, however, the Act fails to live up to its Preamble billing. First, 'Aboriginal governments' are narrowly defined in the legislation as "a governing body that is established by or under or operating under an agreement between Her Majesty in right of Canada and aboriginal people and that is empowered to enact laws respecting (*a*) the protection of the environment; or (*b*) for the purposes of controlling engine emissions, the registration of vehicles or engines."[342] In other words, 'Aboriginal governments' are only those recognized by the Crown to hold authority and only to the degree approved by the Crown. This definition does not include *Indian Act* Bands. Thus far, only the Inuit, those First Nations with self-government agreements meet this definition.[343] Those governments operating under the provisions of the FNLMA would also conceivably fall under this provision, but the necessary agreements to bring the environmental provisions of the FNLMA into effect have not yet been finalized. This definition of Aboriginal

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[341] *Ibid.*
[342] *Ibid. at* s. 2.
[343] This includes the Nisga'a, James Bay Cree, and Yukon First Nations as well as the Tlicho, Tswassen and Westbank First Nations.

government clearly does not recognize the inherent right of all First Nation peoples to be self-governing.

Second, the Act contains very few instances where the involvement of Indigenous governments in the implementation of the Act is specifically identified. The Minister is obliged to offer to consult with Indigenous government representatives and Indigenous peoples in various instances.[344] An offer to consult is a far cry from recognition of the inherent right of First Nation governments to manage the environment, however.

The only other reference to Indigenous governments is with respect to representation on the National Advisory Committee (NAC). The purpose of NAC is to supply the Minister with advice on regulations for the management of toxic substances and other environmental matters of interest to the Crown.[345] A limited number of Indigenous governments may participate on NAC. The Act invites one representative of either First Nation or Métis governments, as defined under the Act, from each of the five Environment Canada regions to sit on NAC.[346] Currently three of the five regions are unrepresented under this scheme,[347] in which case a representative of Indigenous peoples in the region may participate as provided in regulations established by the Minister for

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[344] For examples see, *Ibid.* at ss. 47(2), 54, 62, 69, 76, 121, 140, 208, 209, and 323.

[345] *Ibid.* at s. 6(1). The full text reads,

> For the purpose of enabling national action to be carried out and taking cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments, the Minister shall establish a National Advisory Committee
> (*a*) to advise the Ministers on regulations proposed to be made under subsection 93(1);
> (*b*) to advise the Minister on a cooperative, coordinated intergovernmental approach for the management of toxic substances; and
> (*c*) to advise the Minister on other environmental matters that are of mutual interest to the Government of Canada and other governments and to which this Act relates.

[346] The regions are: the Atlantic Provinces; Quebec; Ontario; the Prairie Provinces and the North; and British Colombia and the Yukon.

[347] The Atlantic Provinces, Ontario, and the Prairie Provinces and the North.

selecting a representative. However, no such regulations have yet been established. In other words, though acknowledging the importance of cooperation with Indigenous governments this legislation fails to make provisions for recognizing the inherent rights of First Nation governments, for the involvement of First Nation governments in implementing the legislation, or even in determining who will represent First Nation peoples in a region where there is no First Nation government recognized by the Act. The fact too that the legislation provides for a limited number of Indigenous governments to participate fails to respect First Nation decision making processes or the diversity amongst First Nation peoples. One First Nation government representative cannot speak on behalf of the diversity of First Nation governments within the Environment Canada regions and likely has no authority to speak on behalf of another First Nation government in any case. Indigenous peoples have expressed concern about the way NAC functions and its adequacy as a mechanism to address their concerns about environmental protection.[348] Clearly the federal Crown does not include First Nation governments with inherent rights to self-government in the area of the environment in the phrase 'all governments' used in the preamble. This frustrates efforts to share traditional knowledge and aid in making decisions that will sustain both First Nation cultures and the land on which these cultures depend.

The Act allows the Minister of the Environment to enter into equivalency agreements with Indigenous governments to implement elements of CEPA'99. This is another

[348] Environment Canada, *supra* note 337 at p. 22.

possible nod to the participation of First Nation governments in environmental protection, however no such agreements have been concluded.[349]

One of the most obvious places to include First Nation governments in the implementation of the Act is with respect to Part 9. This section is intended to address the lacunae in legislation to protect the environment of *Indian Act* reserve lands. Section 207 stipulates that Part 9 of the Act, which addresses government operations and federal and Indigenous land, applies to "[A]boriginal land, ... persons on that land and other persons in so far as their activities involve that land." The Minister of Environment has the authority to develop guidelines and codes of practice for managing Indigenous lands.[350] The Minister may offer to consult with Indigenous governments who are members of NAC if the guidelines or codes of practice to be adopted would apply to their Indigenous lands. The legislation does not require that anyother Indigenous governments be consulted or otherwise invited to participate in developing these guidelines or codes.[351] Regulations may be passed dealing with, among other things, the establishment of environmental management systems, pollution prevention and pollution prevention plans, and environmental emergency response.[352] Substances may also be controlled under these regulations, including quantities that can be used or sold, how substances might be released, how they are to be stored, handled, transported, and displayed, and so on.[353] The Minister, in the process of developing regulations, is entitled to demand from any person carrying on activities or proposing to carry on activities on Indigenous lands:

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[349] *Ibid.* at p. 21.
[350] CEPA'99, *supra* note 27 at s. 208.
[351] A common law duty to consult would presumably be available, however.
[352] *Ibid.*at s. 209.
[353] *Ibid.* at s. 209(2).

plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work, undertaking or activity; and analyses, samples, evaluations, studies or other information relating to the environment that is or is likely to be affected by the work, undertaking or activity.[354]

The federal government extended offers to consult with First Nation peoples on *Federal Halocarbon Regulations, 2003* and fuel storage on reserves.[355] Other than issues related to safe drinking water on reserve addressed below, little has happened under this Part of the Act. The 2006 Review of CEPA'99 notes,

> While progress is being made on a small number of individual issues (e.g., fuel storage tanks, halocarbons, First Nations municipal water), given the current processes and progress, it is highly unlikely that ...holding operations on Aboriginal lands to the same environmental protection and prevention standards as comparable operations on adjacent non-Aboriginal lands – will be met.
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> Considerably more work needs to be done to create a strategic risk-based, focused and cooperative approach to the establishment of environmental protection standards for the federal house.[356]

Drinking water on reserve has been the subject of intense scrutiny. The Auditor General in 2005 issued a report condemning the federal government's lack of coordinated action

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[354] *Ibid.* at s. 211.
[355] Environment Canada, *supra* note 337 at p. 65.
[356] *Ibid.* at p. 67.

to address drinking water problems on reserve lands.[357] In 2006 the federal government announced the establishment of an Expert Panel on Safe Drinking Water for First Nations.[358] The report of this panel was reviewed by the AFN.[359] This review considered the various options presented by the Expert Panel for addressing the lacunae in regulation of drinking water on reserve. It concluded that all the options presented by the Panel infringed First Nation peoples' rights.[360] An alternative option was recommended, a "collaborative approach" "based upon a self-government foundation, that is, a foundation that recognizes that all parties have a role to play in water management, and their respective roles are based upon their jurisdictions over lands and waters."[361] This approach has not been adopted by the Federal government.

As with SARA, CEPA'99 also fails to respect the inherent right of First Nation peoples to exercise environmental self-governance. Without capacity and recognized jurisdiction to address environmental problems, First Nation peoples are relegated to the sidelines while the federal Government continues to ignore one of Canada's most prized assets in the struggle to protect diversity; the diversity of the peoples of this land.

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[357] Commissioner of the Environment and Sustainable Development, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons, September 2005,* (Ottawa: CESD, 2005), Chapter 5, online: Auditor General, http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200509_05_e_14952.html#ch5hd3c.
[358] Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations* (Ottawa: Canada, 2006), online: Canada, http://www.eps-sdw.gc.ca/rprt/vlm1/intr_e.asp.
[359] AFN, *Review of the Final Report of Expert Panel on First Nations' Drinking Water*, (Ottawa: AFN, 2006) online: AFN, http://www.afn.ca/misc/FREP.pdf.
[360] *Ibid.* at p. 1.
[361] *Ibid.*

Canadian Environmental Assessment Act

The primary purpose of CEAA is to provide a process for considering the environmental consequences of projects requiring federal approval. The language of this legislation respects elements of First Nation peoples' philosophies. It also provides some respect for First Nation governments. Overall, however, like other federal environmental legislation, CEAA is disrespectful of First Nation philosophies and governments and stymies their capacity and opportunity to govern themselves or their lands.

The AFN gathered the views of First Nation peoples on the operation of CEAA during the course of the first five year review of the legislation. The AFN reported that,

> First Nations across Canada have expressed the strong view that the CEAAct, in its implementation, fails to:
>
> - protect Treaty and Aboriginal rights;
> - ensure meaningful consultation with First Nations where Treaty and Aboriginal rights may be impacted by the project/activity under federal environmental assessment review;
> - ensure meaningful and on-going First Nation participation in environmental assessment;
> - ensure that First Nations have adequate resources (financial, human, technical and time) to fulfill their responsibilities both under the Act and as governing bodies;
> - ensure that First Nations have meaningful and continuous involvement in the administration of the Act and in the review of the performance of the Act; and

- allow for alternate First Nation environmental assessment regimes.[362]

The opening paragraphs of CEAA speak to the need to balance economic development and environmental quality. However, the degree to which the Act actually achieves this balance has been questioned many times by First Nation peoples. National Chief Coon Come spoke to this when he addressed the Committee on Environment in April 2002, when it reviewed CEAA.

> Our approach is aimed at developing a new relationship between Canada and aboriginal peoples by incorporating our values within the Canadian Environmental Assessment Act. Part of this work means reorienting the act. Right now the key underlying value seems to be the predominance of development. We believe the focus of the act should be environmental stewardship and protection.[363]

The Act defines "environment" to mean,

> the components of the Earth, and includes
>
> (*a*) land, water and air, including all layers of the atmosphere,
>
> (*b*) all organic and inorganic matter and living organisms, and
>
> (*c*) the interacting natural systems that include components referred to in paragraphs (*a*) and (*b*);[364]

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[362] AFN, *Assembly of First Nations Position and Recommendations for Amendments To the Canadian Environmental Assessment Act* (Ottawa: AFN, 2000), online: AFN, < http://www.ceaa.gc.ca/013/001/0002/0004/0004/afn_e.htm>.

[363] House of Commons, Parliamentary Standing Committee on Environment and Sustainable Development (25 April 2002) at 0910, (National Chief Mathew Coon Come) online: Parliament of Canada, http://cmte.parl.gc.ca/Content/HOC/committee/371/envi/evidence/ev521305/enviev68-e.htm#Int-212078

[364] CEAA, *supra* note 29 at s. 2(1).

Whether this definition fits with First Nation peoples' perspectives was discussed in Committee. Several representatives of Indigenous organizations spoke to this matter. They consistently stressed that the land and the people are one, they are connected. All people are impacted by the land and have an impact on it.[365] Therefore, they argued, it was essential to include cultural and social elements of the environment in the definition.[366] Chief David Walkem, representing the Nicola Tribal Association, told a simple story to explain the connection between people and the land.

> One of the strangest things that happened, which my father explained to me, was that in about 1970 or 1971 some people came into an area near where we live and they put on a map "environmental protected area" to protect some plants that were unique to the area, and then they went away. A few years later they came back and said "What's going on here? You guys are still raising your cattle here and you're using the land. This is a protected area." They never once considered the fact that we're part of it.[367]

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[365] Coon Come, *supra* note 363.Coon Come states,

> "For us, who identify ourselves in relation to the land, that's why we are stressing that you expand the definition to include the social and the cultural and be mindful of the special component of it, because that's more a people relationship. If we succeed in doing that... I certainly would support going beyond the definition of just a physical component, when actually we are part of it--the land and I are one. And certainly our relationship with the animals—we depend on them—makes us one."

Aboriginal representatives were clearly not convinced that consideration of "environmental effects", the definition of which in the Act includes cultural heritage and current traditional uses of land by Aboriginal peoples, adequately captured their concerns.

[366] There was at least one convert in the room. Vice Chair Karen Kraft-Sloan, MP stated, "I believe one of the great failings of western science has been reductionism and the separation of human and non-human nature." House of Commons, Parliamentary Standing Committee on Environment and Sustainable Development (25 April 2002) at 1050 (Karen Kraft-Sloan, M.P.) online: Parliament of Canada, http://cmte.parl.gc.ca/Content/HOC/committee/371/envi/evidence/ev521305/enviev68-e.htm#Int-212078

[367] House of Commons, Parliamentary Standing Committee on Environment and Sustainable Development (April 25 2002) at 1040, (Chief David Walkem) online: Parliament of Canada, http://cmte.parl.gc.ca/Content/HOC/committee/371/envi/evidence/ev521305/enviev68-e.htm#Int-212078

National Chief Coon Come makes reference in his remarks to a decision taken in The Hague at the CBD COP that had taken place only three weeks earlier.[368] The Parties, including Canada as an active participant, agreed to adopt recommendations for social, cultural and environmental assessment on a voluntary basis.[369] These recommendations were further developed and adopted in 2004 as the Akwé: Kon Guidelines.[370] Since their adoption by the CBD First Nation governments and organizations have pushed for the application of these Guidelines domestically to little avail.[371]

Section 16.1 of CEAA was added to the Act in 2003 following the first five year review of the Act. This section states, "Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment".[372] This is an improvement over the previous version of the Act, which did not consider the inclusion of traditional knowledge at all in conducting an assessment. This paragraph was perceived as a positive step by Indigenous representatives and they recommended leaving this provision in its permissive state.[373] They expressed concern that the inclusion of traditional knowledge not be made mandatory in order to respect the right of First Nation

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[368] This was the sixth meeting of the Conference of the Parties.

[369] *Recommendations For The Conduct Of Cultural, Environmental And Social Impact Assessments Regarding Developments Proposed To Take Place On, Or Which Are Likely To Impact On, Sacred Sites And On Lands And Waters Traditionally Occupied Or Used By Indigenous And Local Communities,* UNEP, CBD Dec. VI/10, UNEP CBD COP, 6th Session, UN Doc. UNEP/CBD/COPVI/10, (2002). online: CBD <http://www.cbd.int/decisions/?m=COP-06&id=7184&lg=0>.

[370] *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities,* UNEP, CBD Dec. VII/16, UNEP CBD COP, 7th Session, UN Doc. UNEP/CBD/COPVII/16, (2004). online: CBD <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf. >.

[371] The Yukon is the sole jurisdiction in Canada to adopt legislation that addresses social and economic issues in the environmental assessment process. See the *Yukon Environmental and Socio-economic Assessment Act supra* note 136.

[372] CEAA, *supra* note 29 at s. 16.1

[373] Coon Come, *supra* note 363; Walkem, *supra* note 367; Kusagak, *supra* note 103.

people to refuse to divulge traditional knowledge for sacred or other reasons.[374] They did want amendments however to the language proposed to ensure that First Nation peoples' "intellectual traditions" were not marginalized or trivialized. National Chief Coon Come spoke about the need to make traditional Indigenous knowledge more than "simply a consideration in the environmental assessment. There must be a clear commitment to incorporate first nations [sic] values into the substance of the law itself."[375] Section 16.1 was eventually adopted as first presented in the House and there was no further clarification of the role of traditional knowledge in environmental assessment elsewhere in the legislation.

The Canadian Environmental Assessment Agency (Agency) has done some work since to expand on this provision in its application of the legislation. In 2000, the Agency funded research on issues to consider from an Indigenous perspective in conducting environmental assessment.[376] Recommendations included involving Indigenous peoples in the earliest stages of project development so they can identify potential environmental impacts and help develop alternative approaches to lessen them.[377] In 2003, a group of professionals working in the field of environmental assessment representing government, non-government organizations and Indigenous organizations lamented the lack of consistency in the inclusion of traditional knowledge in environmental assessment and

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[374] Coon Come, *Ibid.*
[375] *Ibid.*
[376] Winds and Voices Environmental Services Inc., *Determining Significance of Environmental Effects: An Aboriginal Perspective* (Winnipeg: Winds and Voices Environmental Services, 2000) online: Canadian Environmental Assessment Agency, <http://www.ceaa.gc.ca/015/001/003/index_e.htm >.
[377] *Ibid.* at Schedule 1.

the lack of guidance from the Agency on how this should be done.[378] Interim Principles[379] on implementing section 16.1 were adopted in 2004 and simple steps for proponents to take in determining whether to include traditional knowledge in an environmental assessment were identified in the Public Participation Guide to conducting environmental assessment most recently updated in 2008.[380] Bear in mind, however, that the incorporation or not of First Nation peoples' traditional knowledge remains largely discretionary.

One of the express purposes of CEAA is "to promote communication and cooperation between responsible authorities and Indigenous peoples with respect to environmental assessment";[381] note the reference to Indigenous peoples, not governments. There is no reference to Indigenous governments in this legislation, narrowly defined or otherwise.

That said, section 10 of the Act allows *Indian Act* Bands to conduct environmental assessments of projects that will be carried out on reserve lands. These Bands operate under the supervision of the Minister of Indian Affairs and Northern Development, so this provision is not recognition of their inherent right to self-government. One might think that First Nation governments would be eager to take up this authority, but to date not a single First Nation has done so. First Nation governments have not rushed to

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[378] Alan Emery, et al., *Aboriginal Peoples and Traditional Knowledge in Environmental Assessments*(Ottawa: Canadian Environmental Assessment Agency, undated), online: Canadian Environmental Assessment Agency, <http://www.ceaa.gc.ca/013/001/0002/0004/0001/opp1_e.htm >.
[379] Canadian Environmental Assessment Agency, *Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act -- Interim Principles*, (Ottawa, Canadian Environmental Assessment Agency, 2004), online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/012/atk_e.htm.>.
[380] Canadian Environmental Assessment Agency, *How to do Environmental Assessments,* (Ottawa: Canadian Environmental Assessment Agency, 2008) online: Canadian Environmental Assessment Agency <http://www.ceaa.gc.ca/012/019/2-2-1_e.htm >.
[381] CEAA, *supra* note 29 at s. 4(1)(b.3).

assume this formal process because they cannot afford to take on the responsibility without adequate resources to do the job well. First Nation governments do not have independent resources to fund this activity and to date no federal department has stepped forward with resources to support this endeavour. Responsibility to fund environmental assessment on reserve is bounced back and forth between federal departments and between the Crown and First Nations. The federal Crown has been eager to off load responsibility but slow on coming up with resources to support these activities. First Nation governments have been rightly loath to enter into these agreements with foreknowledge of their certain failure without adequate resources.[382]

Cooperation on environmental assessment among jurisdictions is addressed in Section 12 of CEAA. This section rightly acknowledges that some Indigenous governments have authority to conduct environmental assessment under land claim or self-government agreements.[383] Where other First Nation governments need cooperation from the federal or provincial governments to address their environmental concerns they must rely on the good offices of the federal Minister of the Environment to intercede on their behalf. If a First Nation government is concerned about proposed activities of a federal department,

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[382] For comments on how environmental assessment on reserve was, and in its fundamentals, still is being, funded see House of Commons, Parliamentary Standing Committee on the Environment and Sustainable Development (25 April 2002) at 0905 (Michael Cox, Director of Environmental Services, Confederacy of Mainland Mi'kmaq) online: Parliament of Canada, <http://cmte.parl.gc.ca/Content/HOC/committee/371/envi/evidence/ev521305/enviev68-e.htm#Int-212078>.

[383] While these governments have authority under their self-government agreements to address environmental assessment, the Inherent Rights Policy lists environmental assessment, along with environmental protection, conservation and management as a head of power over which the Crown retains dominion. This will be discussed at greater length below. See, Indian and Northern Affairs Canada, *supra* note 26.

they must rely on the Minister to refer the matter to a mediator or review panel.[384] If a First Nation wishes to have their concerns addressed about provincial activities which threaten their local environment, then the federal Minister of the Environment must be convinced of the need to intercede on their behalf.[385]

In *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans)*[386] the Federal Court, Trial Division considered the issue of a fiduciary duty owed to the Mi'kmaq in the course of an environmental assessment. Although the Court dismissed this legal argument on a technicality regarding the amendment of the statement of claim, the Court held in obiter,

> Failure to consider that [fiduciary] duty and the responsibility it raises, where an aboriginal interest has been earlier recognized and may be adversely affected by the project, in my view, constitutes a failure by those acting on behalf of the respondent Ministers to act with fairness towards the applicants in the environmental assessment process. Indeed, it is an error in law, in my view, to fail to address the aboriginal interest, and if it be affected, to assess whether that effect is warranted, in accord with the approach set out by the Supreme Court of Canada in *R.* v. *Sparrow*.[387]

In *Taku,* the Court examined an environmental assessment process to determine its adequacy as a consultation process. The Court was not concerned with the outcome of

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[384] Note CEAA, *supra* note 29 at ss. 48(2) allows the Minister to refer a matter to a mediator or review panel if the Minister believes that an activity proposed by a First Nation government will impact lands outside reserves or land claim territories.
[385] *Ibid.* at *s.* 48.
[386] *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans),* [1996] F.C.J. No. 1373.
[387] *Ibid.* at para 53.

the process, instead concentrating on proof that such a process had indeed taken place, the level of First Nation people's involvement and whether First Nation peoples' views were taken into account. In any case, if the Taku remained concerned, the Court was satisfied that additional activities were contemplated that allowed further reflection on the impact of the project on their rights and interests.[388] The Court did not discuss the fiduciary duty directly, but by extension as an element of the honour of the Crown.

A fiduciary holds the power to positively or negatively influence the interests of the beneficiary. The Courts require the fiduciary to uphold the highest standards of honesty, steadfastness, and good faith. The fiduciary duty is "rigorous in its demands of the Crown, protecting the interests of the aboriginal peoples, and as a part of the common law, binding on the Crown and enforceable in the Courts."[389] The Courts have found that the Crown owes First Nation peoples a fiduciary duty as a result of their *sui generis* relationship.[390] While the Crown has a legal fiduciary duty that is constitutionally entrenched, there is great uncertainty about its application.[391]

The Crown can owe both a general fiduciary duty arising from the initial nation to nation relationship of First Nation peoples and the Crown, as well as specific fiduciary duties arising from a treaty or other specific event between the Crown and a specific First

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[388] Taku, *supra* at note 209 at para. 46.
[389] John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials and Commentary, 2nd Edition,* (Toronto: Butterworths, 2003) at p. 247.
[390] *Guerin* v. *R*,. [1984] 2. S.C.R. 335
[391] See Borrows and Rotman, *supra* note 389 at p. 245.

Nation.[392] Understanding the duty requires consideration of the multilayered context of the relationship between the Crown and the First Nation.

To answer the question of whether a fiduciary duty lies with the Crown to protect the environment on which First Nation peoples depend requires consideration of the general and specific nature of the claim. Whether a fiduciary duty exists or not rests on the specifics of any given case. Without a specific case to consider it is impossible to say with certainty whether a general or specific fiduciary duty might exist to protect the environment in order to support cultural diversity. That said, it is possible to identify some elements to consider and speculate on possible interpretations by the Court.

The content of the fiduciary obligation on the Crown to protect the environment for First Nation peoples will likely come down to a matter of balancing the interests of the general public with those of First Nation peoples. As a fiduciary, the Crown cannot allow self-interest or the interests of third parties to dictate its actions vis-à-vis the First Nation.[393] The Crown may balance competing interests,[394] though it may not "shirk its fiduciary duty" [395] "merely by invoking competing interests" .[396] The Crown must ensure, in fulfilling a public interest, that its actions minimally impair First Nation peoples' interests.[397] In *Taku*, the Court held that "accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on

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[392] *Ibid.* at p. 248.
[393] *Ibid.* at p. 275.
[394] "The Crown was in the position that it was obliged to ensure that the interests of all for whom its officials had responsibility were protected." *Kruger* v. *R*,. [1985] F.C.J. No. 167, as reported in Borrows and Rotman, *ibid.* at p. 280.
[395] *Wewaykum Indian Band* v. *Canada*, [2002] S.C.R. 79 at para. 104.
[396] *Ibid.*
[397] *Ibid.* See also, *Osoyoos Indian Band* v. *Oliver (Town)*, [2001] 3 S.C.R. 746.

those concerns and with competing societal concerns."[398] In light of this, the Courts may be prepared to entertain an obligation on the Crown to ensure activities it approves do not have an inordinate environmental impact on First Nation peoples. Whether this is a fiduciary duty or some other duty such as the honour of the Crown arising from section 35 of the Constitution would remain to be seen.

This issue of 'competing interests' was raised earlier in the context of the application of section 35 of the Constitution. While *Sparrow,* referenced in the *Union of Nova Scotia Indians* case, grants a priority interest to First Nation peoples, in *Van der Peet*, the Court held that First Nation peoples' rights had to be reconciled with and could be found to be subservient to the interests of the majority of Canadians. If the Courts take a similar approach as *Van der Peet* to the interpretation of a general fiduciary duty to protect the environment, First Nation peoples' interests in a healthy environment may be trumped by the interests of the Crown or third parties, for example in the pursuit of business, or agriculture or energy production.[399]

In any case, the courts will likely want to see evidence that the Crown has indeed reflected on both the public and First Nation peoples' interests in determining whether a potential fiduciary duty has been breached. The courts have recommended consultation and accommodation to allow the examination and balancing of competing interests. In

[398] Taku, *supra* note 209 at para. 2.
[399] See the broad list of activities contemplated that could be deemed to supersede the interests of First Nation peoples by the Court in *Delgamuukw*, *supra* note 5 at para 168.

the case of *Taku*, the S.C.C. approved the environmental impact assessment process as adequate consultation.[400]

Thus, whether a fiduciary duty exists to protect the environment for the benefit of First Nation peoples depends on many factors. First, what is the nature of the relationship between the First Nation and the Crown? Reference must be had to the specifics of the First Nation – Crown relationship. Whether the Crown has fulfilled a potential fiduciary duty will likely depend on the process used to examine and balance interests. We have yet to see if the Courts will follow the rule established in *Sparrow* or the rule established in *Van der Peet* with respect to balancing interests of the Crown and First Nation peoples. This will depend in part on whether the courts interpret the specific environmental interest to be an economic interest or an interest in the cultural and social well being of the First Nation.

The degree to which the Crown is prepared to dictate terms of environmental assessment to First Nation governments is evident in the *First Nations Oil and Gas and Moneys Management Act*.[401] Section 37 of that Act allows First Nation parties to establish environmental assessment laws regarding oil and gas projects on reserve. Subsection 37(2) makes it abundantly clear that the Federal Crown will establish the necessary standards to be met. It states, "the content of laws respecting environmental assessments of projects must conform with regulations" established by the Crown under the *First Nations Oil and Gas and Moneys Management Act*.[402] While the First Nation

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[400] Taku, *supra* note 209.
[401] *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c. 48.
[402] *Ibid.*.
See in particular section 37(1) which states,

governments that operate under this legislation have been actively involved in developing the legislation, at the end of the day there is no doubt that the Federal Crown calls the final shot.

What the future holds for environmental assessment in Canada is currently up for question. The federal government has established a Major Project Management Office (MPMO) with a mandate "to provide overarching project management and accountability for major resource projects in the federal regulatory review process, and to facilitate improvements to the regulatory system for major resource projects." [403] This includes Indigenous consultation. This is intended to "protect the environment and improve the competitiveness of Canada's resource industries."[404] One wonders which issue will take priority, as Canada has not yet demonstrated a capacity to marry these two concerns.

Yet again with environmental assessment we see how Canadian federal environmental legislation restricts First Nation peoples' inherent right to self government. First Nation traditional laws are ignored. There is not even agreement on what is to be protected. There certainly is no agreement on how well the legislation is working.

First Nation peoples have pressed for years for greater respect for the land. Many First Nation traditional laws place a premium on protecting the land for future generations. But the issue is not whether one system of environmental assessment might be superior.

A first nation's oil and gas laws must provide that no project, unless exempted by regulations made under subsection 63(2), may be undertaken until an environmental assessment of it has been conducted under those laws and every decision-making authority for the project has taken the results of the assessment into account in making any decision that would enable the project to be undertaken. (2) made under subsection 63(1). First Nation Oil and Gas Act.

[403] Canada, "Major Projects Management Office", (Ottawa: Canada, 2008), online: Canada, http://www.mpmo-bggp.gc.ca/index-eng.php.

[404] *Ibid.*

Diversity is the objective. Respect for cultural diversity is essential to the retention of biological diversity.

Canada National Marine Conservation Areas Act

The MCAA establishes a system to protect areas of the marine and coastal environments. The purpose of this legislation, as stipulated in the Preamble, is to establish marine protected areas to aid in the maintenance of biological diversity.[405]

This Act is somewhat respectful of First Nation peoples' rights and interests, but in the end sustains the status quo in Crown – First Nation relations. Outlined below are the positive elements of this legislation, for example, recognizing traditional knowledge and Indigenous governments. The following review also lays bare the presumed superiority of the Crown over First Nation peoples and the failure to respect First Nation philosophies.

The Preamble to the Act acknowledges the need to consider traditional knowledge, and involve Indigenous organizations, Indigenous governments, and bodies established under land claims agreements in planning and managing marine conservation areas.[406] But this

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[405] MCAA, *supra* note 30.

[406] *Ibid.* at Preamble.

> And whereas Parliament wishes to affirm the need to...
> consider traditional ecological knowledge in the planning and management of marine conservation areas, and
> involve federal and provincial ministers and agencies, affected coastal communities, aboriginal organizations, aboriginal governments, bodies established under land claims agreements and other

is only in the Preamble, and intended solely for purposes of interpretation. Consideration of traditional knowledge is provided for in section 8 of the Act, which permits the Minister to conduct scientific studies, which include traditional Indigenous ecological knowledge.[407] The Act adopts a relatively complete definition of ecosystem, but this is not deemed to include humanity as part of the ecosystem.[408]

A non-derogation clause is included in this Act, implying respect for First Nation peoples' rights, but without due consideration for the implications of other provisions of the Act on these rights.[409] The other environmental Acts discussed herein also contain a version of the non-derogation clause. The Senate has conducted a study of these clauses and has recommended that a standard clause be adopted. They have the agreement of many Indigenous organizations that this clause should make clear that the legislation must be implemented in a fashion respectful of the rights of Indigenous peoples.[410] Yet we have seen above the many instances where the legislation itself frustrates these rights.

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appropriate persons and bodies in the effort to establish and maintain the representative system of marine conservation areas...

[407] *Ibid.* at s. 8(3).

The Minister may maintain and operate facilities and carry out operations and activities to achieve the purposes of this Act, and may conduct scientific research and monitoring and carry out studies based on traditional ecological knowledge, including traditional aboriginal ecological knowledge, in relation to marine conservation areas.

[408] *Ibid.* at s. 2(1).

"ecosystem" means a dynamic complex of animal, plant and microorganism communities and their non-living environment interacting as a functional unit."

Aboriginal representatives argued in the working group this definition should include humanity as part of the ecosystem, but this perspective was rejected by the Crown. As the Senior Policy Analyst on the Environment for the AFN at the time, the author was present at the meetings of the working group and heard these comments first hand.

[409] *Ibid.* at ss. 2(2).

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982.*

[410] Standing Senate Committee on Legal and Constitutional Affairs, *Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and Treaty Rights,* (Ottawa: Parliament of Canada, 2007).

First Nation governments are recognized in the MCAA. The Minister may enter into agreements with First Nation governments to establish and maintain marine conservation areas.[411] In addition, there are obligations on the Minister to consult with First Nation organizations, governments and bodies established under land claim agreements:

- when preparing management plans,[412]
- in the development of marine conservation area policy and regulations, the establishment of any proposed marine conservation area and the modification of any marine conservation area, and any other matters that the Minister considers appropriate,[413] and
- with respect to composition of advisory bodies established for the management of marine areas or other purposes.[414]

The AFN was active in lobbying the federal government for improvements to the draft legislation, and participated in a working group established by Parks Canada to hear views of Indigenous peoples on the legislation. Presentations to the Parliamentary Standing Committee on Environment and Sustainable Development were made by the AFN on behalf of First Nation peoples. Again, many of the recommendations made by the AFN to be more respectful of the environment and First Nation peoples' rights and interests fell on deaf ears.

Elder Simon Lucas, who participated in the small working group established in 2001 by Parks Canada to review the draft legislation, consistently stressed that the legislation

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[411] MCAA, *supra* note 30 at s. 8(4).
[412] *Ibid.* at s. 9.
[413] *Ibid.* at s. 10(1).
[414] *Ibid.* at s. 11(3).

must recognize the integral connection between humanity and the environment; that humanity is in fact part of the environment.[415] This legislation gives some recognition to the linkages between the environment and social, cultural and economic well being,[416] but it suggests that this is only for those living in coastal communities. There is no recognition that those living inland also benefit from a healthy marine environment. From the perspective of First Nation traditional philosophies this ignores the interconnections of all things. As with SARA, the perspective of the interconnections is limited and flawed. Also, this legislation prefers to present the environment as something we might 'appreciate' and 'enjoy', but not something essential to our collective survival.[417] To the degree that the legislation does acknowledge humanity's reliance on the environment, this connection again is presumed to be limited by a geographical connection to the ocean.[418] The federal government was not swayed by the arguments put forward by the Indigenous representatives. As a result, the abiding perspective of the legislation is that humanity is not part of the environment but stands apart from and superior to it, and that the environment merely serves humanity.

Also evident in the legislation is a presumption that human contact with the land is *a priori* harmful. It does not contemplate a positive symbiotic relationship between humanity and the environment. For example, section 12 of the Act provides that, "[e]xcept as permitted by this Act or the regulations...no person shall use or occupy

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[415] Personal knowledge.
[416] MCAA, *supra* note 30 at Preamble. "Parliament wishes to affirm the need to...recognize that the marine environment is fundamental to the social, cultural and economic well-being of people living in coastal communities".
[417] *Ibid.* "Parliament wishes to affirm the need to...provide opportunities for the people of Canada and of the world to appreciate and enjoy Canada's natural and cultural marine heritage".
[418] *Ibid.* "Parliament wishes to affirm the need to...provide opportunities, through the zoning of marine conservation areas, for the ecologically sustainable use of marine resources for the lasting benefit of coastal communities".

public lands in a marine conservation area." This legislation contemplates the complete isolation of some lands from human contact. It operates from an assumption that human contact with the land is detrimental. Nowhere does the Act acknowledge that some kinds of human engagement with the landscape are beneficial to the environment, for example, in the retention of biological diversity. Indigenous representatives in the working group reviewing the legislation, consistently urged the federal government to acknowledge that the reason 'pristine' environments existed was not because there had been no human interaction, but because prior interaction with these environments by humans, specifically Indigenous peoples, was respectful of the land.[419] They had nurtured the land, not destroyed it and thus it was available to current generations to enjoy. But again this perspective was ignored. This Act allows the Crown to deny Indigenous peoples access to their traditional territories. This undermines the capacity of Indigenous peoples to pursue traditional practices in these areas, which restricts their capacity to facilitate the retention of biological diversity in these areas.

This is not to say that traditional activities have not been allowed in Canada's marine or other parks. In fact, there is considerable interaction between the Crown and First Nation peoples on the administration of a number of parks.[420] The concern alluded to here is that this cooperation is not enshrined in the legislation. It remains optional or subject to locally negotiated agreements with First Nation governments. As such, most First Nation

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[419] Personal recollections by the author of comments made by Aboriginal representatives on the MCAA working group.

[420] See for example, Parks Canada, Saguenay-St. Lawrence Marine Park: Saguenay St. Lawrence Marine Park Management Framework (Ottawa, Parks Canada, 2008), online: Parks Canada http://www.pc.gc.ca/amnc-nmca/qc/saguenay/plan/index_e.asp; Parks Canada Gwaii Haanas National Park Reserve and Haida Heritage Site (Ottawa, Parks Canada, 2007), online: Parks Canada, http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/index_e.asp .

peoples' rights remain subject to political whim. Their capacity to positively influence the retention of biological diversity through the exercise of traditional environmental governance is curtailed.

Indigenous representatives on the MCAA working group urged the federal government to acknowledge that all lands deserved the same respect being accorded to protected areas. The federal government was urged to regard the land and marine environments as an interconnected whole. Indigenous representatives struggled with the notion that a piece of land or the marine environment could be arbitrarily cordoned off for protection on the presumption that this would somehow protect it from environmental degradation arising from outside this protected area. They argued that drawing a line on the map around an area would not prevent it from being damaged by oil spills from tankers passing by, or from the effects of over fishing in waters immediately adjacent, or from airborne persistent organic pollutants landing on the water and ingested by the marine flora and fauna. The Indigenous representatives argued that all lands and waters should be cherished, rather than creating isolated pockets of protected areas and tolerating egregious environmental damage elsewhere.

The MCAA also ignores First Nation governments' rights and interests. The AFN raised questions about this element of the Act before the Parliamentary Standing Committee on Canadian Heritage.[421] Under the legislation, the marine protected areas may constitute

[421] House of Commons, Parliamentary Standing Committee on Canadian Heritage, regarding Bill C-10 on May 21, 2001, at 1225 (Ovide Mercredi) online: Parliament of Canada <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=55205&Lang=1&PARLSES=371&JNT=0&COM=219. >.

marine conservation areas or marine reserve areas.[422] The latter are established where there remain issues of Indigenous title. The Act permits the designation of an area as a Marine Conservation Area reserve prior to conclusion of issues of Indigenous title. Sections 5 and 6 of the Act allow amendments to marine conservation areas and marine reserves, including their boundaries. The Act provides that a marine conservation or reserve area may be changed or extinguished by the Courts if they find that "Her Majesty in Right of Canada does not have clear title to or an unencumbered right of ownership in lands within a marine conservation or reserve area."[423] However, before such amendments are made, section 7 requires the House of Commons to consider the proposed amendment in committee and to adopt the conclusion of the committee to recommend or reject the proposed amendment.[424] If the committee chooses to ignore First Nation peoples' legal or political interests the committee is under no legal obligation to approve an amendment that would recognize those interests. Therefore, First Nation lands and the rights of First Nation peoples remain subjugated to the whim of the federal Crown, and may be forced to take an action to the Courts for recognition of a section 35 right. This in turn limits the capacity and opportunity of First Nation peoples to sustain their traditional knowledge and practice.

This is the reason the AFN raised concerns about whether the designation would remain upon conclusion of issues of title. First Nation peoples wanted assurances that if Indigenous title was found, First Nation governments would have the opportunity to have

[422] MCAA, *supra* note 30 at s.4(1) and (2).
[423] *Ibid.* at s.5(3) and 6(3).
[424] *Ibid,* s.7.

the decision to create a marine conservation area amended or reversed.[425] They sought recognition of their right to self-determination. No such assurances were forthcoming in the Act as finally passed.

The AFN expressed concern too about the impact of section 12. This section subjects First Nation peoples' use of marine conservation or reserve areas to the will of the Governor in Council. Section 12 stipulates,

> Except as permitted by this Act or the regulations,
>
> (a) no interest in public lands in a marine conservation area may be disposed of; and
>
> (b) no person shall use or occupy public lands in a marine conservation area.[426]

The Act allows the Governor in Council to pass regulations for the protection of the ecosystem, cultural and archeological resources, management and control of renewable resource harvesting activities, or collect fees, rents and other charges for use of the area or resources in the area, and licenses, leases or easements.[427] This includes,

> the issuance, amendment, suspension and revocation of permits and other authorizing instruments [to engage in activities, including fishing in the marine conservation area or reserve] ..., including the number of persons who may hold any class of permits or other instruments and the authority of superintendents to impose conditions on holders of permits or other instruments.[428]

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[425] Mercredi, *supra* note 421 at 12:30 pm.
[426] MCAA, *supra* note 29 s. 12.
[427] *Ibid.* at s. 16.
[428] *Ibid.* at s. 16(f).

It should be noted that the Act makes many references to the need to respect Indigenous rights and interests and imposes duties to consult where Indigenous rights and interests are affected by the operation of the Act.[429] But this is not the same as recognizing the inherent rights of First Nation governments to determine the use of their traditional territories. There is no legal obligation on the Crown to engage First Nation governments as equals. Ovide Mercredi, past National Chief of the AFN, reflected on this in his presentation to the Parliamentary Standing Committee on Canadian Heritage:

> [T]here is a provision there that says that provinces, where their property's [sic] affected...will have a say in the management of that area by negotiated agreements with the federal government. But there's no such protection for us [First Nation peoples]. There's no requirement on the part of the federal government to have agreements with us. All it says is that you have a duty to come and talk to us, but there's no equivalent requirement that you need agreements with us for the management of the reserved conservation area...[430]

Earlier Mercredi had remarked that,

> Canada is not that progressive yet [in providing First Nation governments the same respect as provided to Provinces]. The parliamentarians do not see our people in the same light as they see the provinces. They see us as inferior governments. In fact, they see us as evolving governments. Some see us only as

[429] See for example, *Ibid.* at s.2, s. 9.
[430] House of Commons *supra* note 421, at 1245 (Ovide Mercredi).

> municipal forms of government. And some would prefer we were not governments at all.[431]

He concluded by noting,

> We're not opposed to all those high-sounding principles of the conservation of species, the preservation of the ecology, and the proper management of the resources. We're not opposed to that—absolutely not. We have to find another way of doing work on this idea of how we protect marine resources. This bill is too much of the old style, where you make a law, you make a prohibition, you impose fines, and you enforce it.[432]

Mercredi is correct in his assessment of this Act as sustaining the status quo of Crown - First Nation relations. This legislation places no legal obligation on the Crown to include First Nation governments as an equal partner in the identification, development or management of marine conservation areas. It does not respect First Nation peoples' philosophies with respect to the earth and humanity's relationship with the earth. Nor does it explicitly recognize and facilitate the exercise of the inherent rights of First Nation peoples and their governments to exercise their traditional cultures. It impedes First Nation peoples' rights to self-determination and self-government and thereby their capacity and opportunity to exercise and sustain their cultures. This jeopardizes cultural diversity, the loss of which undermines an objective of the legislation – the retention of biological diversity.

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[431] *Ibid.* at 1235.
[432] *Ibid.* at 1245.

This review of federal environmental legislation has demonstrated the ways in which the Crown frustrates the exercise of First Nation peoples' human rights and thereby ultimately undermines the very objective of the legislation, the protection of the environment and the retention of biological diversity.

Self-Government

It is not enough to look at environmental legislation, however, to determine the impact of federal statutes on First Nation peoples' capacity to sustain their cultures and the environment on which they rely. There are many other examples of federal law that impose restrictions either directly or indirectly.[433] The environment is affected by all we do and thus in some way or another, every piece of federal legislation has some kind of impact on the environment and steps on the inherent right of First Nation peoples to govern their land and themselves. The full study of all the federal impediments is beyond the scope of this paper, as it would require specialized knowledge in everything from child care to the *Income Tax Act*. A recent paper commissioned by the AFN notes,

> Treaties, land claims, the justice system, natural resource regulations, health and education laws, among many others, would have to be reviewed in detail to trace their impact on First Nations. In addition to legal constraints, there are also political, social, economic, and cultural impediments which would also have to be

[433] For a survey of impacts see, CBD, *supra* note 13.

examined, as they too combine to frustrate First Nations' self-determination and self-government.[434]

It is possible and worthwhile however to undertake a review of federal law and policy that deals specifically with First Nation peoples' rights to self-government with respect to environmental protection. This next section will consider the *Indian Act*, *First Nations Land Management Act* (FNLMA), and the Inherent Rights Policy and examine them for impediments to First Nation rights to environmental self-government.[435]

Indian Act

The *Indian Act* does not recognize the inherent right of First Nations to self-government with respect to the environment, or anything else for that matter. It imposes constraints on First Nation governance of "land; monies; personal matters; and collective political issues".[436] Most authority assigned to *Indian Act* Bands under this legislation is delegated from Cabinet or the Minister of Indian and Northern Affairs.[437] As such, the exercise of authority over First Nation peoples is fundamentally political in nature, albeit constrained, at least in theory if not always in practice, by law. While there is a federal bureaucracy for managing First Nation affairs, ultimate authority over the lives of First Nation peoples lies in the hands of whichever political party is in power at the time. This

[434] AFN, *Federal Legislative and Regulatory Constraints on First Nations' Self-government*, March 2008, unpublished.
[435] These were the subject of a brief review in the author's directed research paper. See Wilson, *supra* note 195.
[436] AFN, *supra* note 434.
[437] Some authority is directly delegated by the Act.

places the fate of First Nation peoples full square on the whims of the majority population. It is important to acknowledge this fact and keep it in mind for the discussion on reconciliation which follows, because while laws must be changed to respect First Nation peoples and governments, a change of political heart on the part of the majority non-Indigenous population is the first step in achieving true reconciliation.

All *Indian Act* Bands have some limited capacity to manage environmental issues on reserve under section 81 of the *Indian Act.*[438] Only subsection 81(o) deals directly with an

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[438] *Indian Act*, *supra* note 24 at s. 81.

1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(*a*) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
(*b*) the regulation of traffic;
(*c*) the observance of law and order;
(*d*) the prevention of disorderly conduct and nuisances;
(*e*) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;
(*f*) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
(*g*) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;
(*h*) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;
(*i*) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;
(*j*) the destruction and control of noxious weeds;
(*k*) the regulation of bee-keeping and poultry raising;
(*l*) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;
(*m*) the control or prohibition of public games, sports, races, athletic contests and other amusements;
(*n*) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;
(*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
(*p*) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
(*p*.1) the residence of band members and other persons on the reserve;
(*p*.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

environmental issue: "the preservation, protection and management of fur-bearing animals, fish and other game on the reserve". Other provisions could allow for action on the environment. For example, the control of invasive plant species could be read into subsection 81(j), "the destruction and control of noxious weeds". Subsection (g) dealing with zoning could allow Band Councils to keep potentially polluting businesses away from water sources. All by-laws are subject to veto by the Minister of Indian and Northern Affairs, however, and may not conflict with existing federal or provincial regulation. Novel applications of section 81 by-law making powers may require negotiation with the Minister to avoid being vetoed.

There are a number of cases that address the application of section 81, particularly subsection (o), which deals with the preservation, protection and management of fur-bearing animals on reserve.[439] These cases examined the application of fishing by-laws, upholding these laws where they applied strictly on reserve. The courts have respected this by-law making authority held by Band Councils, which gives First Nation peoples some control over environmental issues on reserve. Even while the courts are prepared to

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(*p*.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;
(*p*.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;
(*q*) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and
(*r*) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

[439] See for example, *R.* v. *Lewis,* [1996] 1 S.C.R. 921; *R.* v. *Jimmy*, [1987] 5 W.W.R. 755 (B.C.C.A.); *R.* v. *Blackbird*, [2005] 2 C.N.L.R. 309 (Ont. C.A.); *R.* v. *Ward* [1989] 2 C.N.L.R. 142. See also, Shin Imai, *The 2008 Annotated Indian Act and Aboriginal Constitutional Provisions*, (Toronto: Carswell, 2008) at pages 170 – 174. See also, Kent McNeil, *Aboriginal Rights: Challenging Legislative Infringements Of The Inherent Aboriginal Right Of Self-Government* (2003) 22 Windsor Y.B. Access Just. 329.

uphold the enforcement of these by-laws, a by-law vetoed by the Minister of Indian and Northern Affairs, to whom *Indian Act* bands remain subservient, cannot be enforced.

There are many environmental issues faced currently by First Nation peoples on reserve that are simply not addressed under the *Indian Act*. This is one of the main reasons for the so-called "regulatory gap" discussed above in the review of CEPA'99. There are no provisions to deal with hazardous wastes, ozone depletion, persistent organic pollutants, or source water protection, to name but a few. During the discussions on the review of CEPA'99, federal authorities advanced the idea of incorporating by reference provincial environmental laws to apply to reserves. This was considered a convenient short cut to defining environmental standards to apply to reserves. It would save the federal government developing duplicate standards specifically for First Nation peoples. The AFN argued against this proposal at the time. It was seen as yet another attack on rights to self-government. Such an approach allows the federal Crown to sidestep the intent of the Constitution which places responsibility for relations with First Nation peoples and governments with the federal Crown under section 91(24). By incorporating provincial laws, the federal government would place First Nation peoples at the environmental mercy of whichever province they happened to be located. While it is essential the First Nation governments be involved with the provinces in defining environmental standards and processes, this must be from a position of equality. At present this does not exist. First Nation governments are not involved, for the most part, in developing provincial environmental standards.

Many First Nation Bands have taken the limited authority under the *Indian Act* and developed impressive local environmental programs. This includes the likes of Bkejwanong (Walpole Island First Nation), Akwesasne, Eskasoni, and Secwepemc (Kamloops Indian Band). Many First Nation governments have also come together in tribal councils or provincial or territorial organizations to organize dedicated environmental capacity to serve the collective. This includes, for example, the Assembly of Manitoba Chiefs,[440] the Confederacy of Mainland Mi'kmaq,[441] and the Mushkegowuk Tribal Council.[442] Many of these programs are managed on a shoe string budget with insufficient personnel or financial support to fulfill the needs of the communities. Many First Nation governments have made requests for additional resources to fund adequate environmental programs.

Any authority delegated to First Nation governments under the *Indian Act* is strictly confined to the borders of the reserve. There is no question of their authority extending to land or waters beyond the reserve, despite the fact that nature does not acknowledge these man-made boundaries.[443] Therefore, a reserve may be faced with terrible pollution of their primary drinking water source caused by an upstream source, such as the mercury released from pulp and paper mills upstream of Asabiinyashkosiwagong Nitam-Anishinaabeg (Grassy Narrows First Nation), but have no capacity to address the cause of the pollution. John Borrows notes,

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[440] Assembly of Manitoba Chiefs, Policy Areas, Environment, online: Assembly of Manitoba Chiefs, http://www.manitobachiefs.com/issue/environment.html

[441] The Confederacy of Mainland Mi'kmaq, Lands Environment and Natural Resources Department, online The Confederacy of Mainland Mi'kmaq http://www.cmmns.com/Lands.php

[442] Mushkegowuk, Environmental Research Centre, online: Mushkegowuk Environmental Research Centre http://www.merc.ontera.net/

[443] See for example, *R.* v. *Lewis, supra* note 439.

> Indians cannot directly raise environmental issues off reserves even where they have a strong legal interest... This prohibits Indians from formally questioning most activities affecting their extended environments, such as hunting and fishing off reserve, and the performance of heritage and cultural rights off reserve.[444]

First Nation peoples are highly dependent on the good will of the Crown to respond on their behalf to environmental issues,[445] yet too often the Crown has been careless in its concern for the health and well being of First Nation peoples. The *Indian Act* shackles the capacity of First Nation governments to respond to environmental abuses. Fines under section 81 are minuscule and are sometimes considered simply the cost of doing business.[446]

Some *Indian Act* Bands have extended authority to address issues of land management under sections 53 and 60 of the *Indian Act*, the Regional Lands Administration Program, and Delegated Lands Management Program respectively, also called the 53/60 – Delegated Authority. Section 53 allows the Minister to delegate authority to First Nations to approve land transactions on designated lands, not necessarily strictly reserve

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[444] Borrows, *supra* note 38.

[445] Although First Nation peoples might be able to pursue court actions, for example a toxic tort case, breach of treaty or breach of an Environmental Bill of Rights, these are costly ventures with uncertain potential for success.

[446] *Ibid.*

> The Indian Act is completely inadequate in addressing environmental planning issues. For example, the Act's permit and licensing scheme relative to waste disposal and timber removal seem to encourage utilization rather than prevention. For example, the maximum fine for violation of these environmental standards is a mere 100 dollars. It is foreseeable that people would treat these penalties as extremely inexpensive licences that would enable them to exploit the reserve's environment without great cost. See *Indian Reserve Waste Disposal Regulation*, C.R.C. 1978, c. 960 and *Indian Timber Regulations*, C.R.C. c. 961, amended SOR /93-244 in S. Imai, *The 1997 Annotated Indian Act* (Toronto: Carswell, 1996) at 208-17.

lands. Section 60 allows the Governor in Council to authorize bands to conduct management activities on reserve lands. The degree of control authorized is wholly at the discretion of the Minister or Governor in Council and may be revoked at any time.[447]

First Nations Lands Management Act

The 53/60 Delegated Authority program has been largely overtaken by the FNLMA. The FNLMA allows Band Councils greater control over lands and monies than does the *Indian Act*. *Indian Act* Bands party to the FNLMA have expanded authority on reserve to protect the environment and conduct environmental assessment. Only 22 First Nations are currently operating under the FNLMA, although the federal government has indicated it is prepared to include additional communities.

Section 6 of the FNLMA requires First Nation governments to develop land codes. These codes are expected to address a wide variety of issues, including the division of property upon marital breakdown and the resolution of disputes regarding interests in reserve lands.[448] Environmental issues are addressed elsewhere in the Act. These codes

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[447] *Indian Act., supra* note 24 at s. 60:

> 1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
>
> 2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

[448] FNLMA, *supra* note 25 at s.6(1).

> A first nation that wishes to establish a land management regime in accordance with the Framework Agreement and this Act shall adopt a land code applicable to all land in a reserve of the first nation, which land code must include the following matters:
>
> (*a*) a legal description of the land that will be subject to the land code;
>
> (*b*) the general rules and procedures applicable to the use and occupancy of first nation land, including use and occupancy under
>
> (i) licences and leases, and

are subject to a process of verification. Section 8(1) of the FNLMA provides that a 'verifier', jointly appointed by the Minister and the Band shall determine whether a land code and the process for its approval are properly constituted. This is an improvement over the absolute discretion granted the Minister under the *Indian Act*, but still a far cry from recognizing the inherent right to self-government.

Once a land code has been verified, the First Nation parties may make laws respecting environmental protection and assessment. Yet again, however, there are a number of restrictions on this authority as outlined in section 21 of the FNLMA.

> (1) Before enacting any first nation law respecting environmental protection, a first nation shall enter into an agreement with the Minister and the Minister of the Environment in relation to environmental protection in accordance with the Framework Agreement.

(ii) interests or rights in first nation land held pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the first nation;

(*c*) the procedures that apply to the transfer, by testamentary disposition or succession, of any interest or right in first nation land;

(*d*) the general rules and procedures respecting revenues from natural resources obtained from first nation land;

(*e*) the requirements for accountability to first nation members for the management of first nation land and moneys derived from first nation land;

(*f*) a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests or rights in first nation land;

(*g*) the rules that apply to the enactment and publication of first nation laws;

(*h*) the rules that apply to conflicts of interest in the management of first nation land;

(*i*) the establishment or identification of a forum for the resolution of disputes in relation to interests or rights in first nation land;

(*j*) the general rules and procedures that apply in respect of the granting or expropriation by the first nation of interests or rights in first nation land;

(*k*) the general rules and procedures for the delegation, by the council of the first nation, of its authority to manage first nation land;

(*l*) the procedures that apply to an approval of an exchange of first nation land; and

(*m*) the procedures for amending the land code.

(2) For the purposes of an agreement entered into under subsection (1), the standards of environmental protection established by first nation laws and the punishments imposed for failure to meet those standards must be at least equivalent in their effect to any standards established and punishments imposed by the laws of the province in which the first nation land is situated.

(3) First nation laws respecting environmental assessment must provide for the establishment, in accordance with the Framework Agreement, of an environmental assessment process applicable to all projects carried out on first nation land that are approved, regulated, funded or undertaken by the first nation.

As is clear, First Nation governments must conform to the standards established by the Crown, thereby denying inherent rights to self-government. However, the greatest impediment to First Nation peoples exercising environmental governance under these provisions of the FNLMA thus far, is that the requisite environmental management agreements between the First Nation parties to the FNLMA and the Ministers of the Environment and Indian and Northern Affairs have not yet been concluded. None of the First Nation governments are exercising authority under these provisions of the Act even after almost 10 years of the legislation being in force, owing to federal foot dragging.[449] It was originally presumed that the environmental agreements would have been completed within the first year of the Act coming into force. At present First Nations are operating under individual agreements,[450] most of which contain provisions dealing with environmental protection and assessment. They are anxious to conclude the

[449] Personal communication, Chris Angeconeb, Director of Services for Eastern Communities, First Nations Lands Advisory Board, 11 July 2008.
[450] FNLMA *supra* note 25 at s. 6(3).

environmental management agreements, but funding has been insufficient to even complete the first step in this process for all First Nation parties.[451] Discussions on environmental assessment agreements have not even begun.[452] As with CEAA and the *Indian Act*, the FNLMA suffers from a lack of resources and political commitment to move forward.

Inherent Rights Policy

A very few First Nation peoples have negotiated self-government agreements with Canada that contain provisions respecting environmental issues. These treaties are negotiated nation to nation and represent the most progressive efforts at reconciliation between the Crown and First Nation peoples to date. Most of these 'modern day' treaties have been negotiated under the provisions of the Inherent Right Policy.[453] An examination of the environmental stipulations of each of these treaties and a review of their implementation would be a very interesting study but cannot be undertaken here.[454] Instead this paper will focus on the Inherent Right Policy.

In a review of the recommendations of the Royal Commission on Aboriginal Peoples about modern treaty making and renewal, John Borrows notes that,

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[451] Personal communication, Chris Angeconeb, Director of Services for Eastern Communities, First Nations Lands Advisory Board, 11 July 2008.
[452] *Ibid.*
[453] Inherent Rights Policy, *supra* note 26.
[454] Self-government agreements that contain environment related provisions include *James Bay and Northern Quebec Native Claims Settlement Act*, 1976-77, S.C. c. 32; *Nisga'a Final Agreement Act*, 2000, S.C. c. 7; Yukon First Nations Self-Government Act, 1994, S.C c. 35. For a discussion of these provisions see, Jennifer E. Dalton *Aboriginal Title And Self-Government In Canada: What Is The True Scope Of Comprehensive Land Claims Agreements?*, (2006) 22 W.R.L.S.I. 29; John Borrows, *Domesticating Doctrines: Aboriginal Peoples after the Royal Commission* (2001) 46 McGill L.J. 615 – 661. See also the discussion of the Nisga'a Lisims Final Agreement which follows.

> in many instances the contemporary treaty process reduces, rather than enhances, Aboriginal control and choice... in many cases it seems as if the contemporary treaty relationship requires Aboriginal conformity with Canadian practices, customs, traditions, and laws...Even though these [self-government and land claim] agreements certainly increase the options available to Aboriginal peoples, they simultaneously limit opportunities to pursue objectives that may differ in significant ways from those of Canada. [...] On balance... Aboriginal peoples are giving up much more in this process than they are gaining. At the same time, Canada seems to be giving up much less with respect to its governmental structure and system of landholding. The notion of reconciliation that underlies and justifies treaties, according to the [Royal] Commission, is more concerned with reconciling Aboriginal peoples to Canada than it is with reconciling Canada to the existence of different social, cultural, and political indigenous entities within the state. For the most part, therefore, modern treaties require that Aboriginal peoples conform to Canadian values and law, yet they do not demand that Canada simultaneously conform to Aboriginal ideologies and law. The imbalance that is being replicated in contemporary treaty relationships does not bode well for the survival of Aboriginal social and political regimes that differ from those found in the rest of Canada.[455]

Evidence of this imbalance can be found in the Inherent Rights Policy which outlines the matters on and the degree to which the Crown is prepared to negotiate self-government for First Nation peoples. The following review outlines federal policy on First Nation

[455] Borrows, *Ibid.*

peoples' inherent right to self-government. As will be seen, the Inherent Rights Policy is restrictive, compromising First Nation peoples' capacity to sustain their traditional governments and the founding principles on which they have traditionally governed themselves.

The areas of self-governing authority the Crown will recognize are in relation to "matters that are internal to their [First Nation] communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources"[456] or matters "essential to their operation as a government or institution."[457] This includes the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes;
- membership;
- marriage;
- adoption and child welfare;
- Aboriginal language, culture and religion;
- Education;
- Health;
- social services;
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws;

[456] Inherent Rights Policy, *supra* note 26, Introduction.
[457] *Ibid.*

- policing;
- property rights, including succession and estates;
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes;
- natural resources management;
- agriculture;
- hunting, fishing and trapping on Aboriginal lands;
- taxation in respect of direct taxes and property taxes of members;
- transfer and management of monies and group assets;
- management of public works and infrastructure;
- housing;
- local transportation; and
- licensing, regulation and operation of businesses located on Aboriginal lands.[458]

Virtually every one of these provisions has some sort of environmental component to them. There are obvious ones, such as natural resources management. Self-government in this area allows First Nation governments to determine where, when, how, and what kinds of natural resource development will occur on their lands.[459] This is a major victory for First Nation peoples who have struggled for years against the removal of natural resources from their territory without compensation and without respect for the land. Other areas of jurisdiction can also be used to help self-governing First Nation

[458] *Ibid.*
[459] Note that 'their lands' is a matter that must be negotiated in a land claim agreement; generally a fraction of the First Nation's traditional territories.

peoples address environmental problems on their lands. For example, licensing, regulation and the operation of businesses located on First Nation lands allows a First Nation government to choose what kinds of businesses it will encourage, and how those businesses are to operate. For example, it could encourage renewable energy production, simply by supporting renewable energy production as a public work, such as a public utility. In managing agriculture First Nation governments could pass laws which restrict mono cropping or the use of genetically modified seed in their territory. By controlling hunting, fishing and trapping on their lands, First Nation peoples can once again assume control over the harvest, passing laws on everything from aquaculture to the management of trap lines. Education provisions will allow First Nation peoples to share their traditional knowledge with their children so they retain that vital connection to the land. This would also be true of provisions related to adoption and child welfare, Indigenous language, culture and religion. Policing and the creation of a justice system also have an impact on the environment, as this is how environmental laws will be enforced. This allows First Nation peoples to define penalties and processes for enforcing First Nation laws. Protecting the health of First Nation peoples is definitely environment related.[460] Laws respecting housing allow First Nation governments to address overcrowding which encourages the growth of indoor mould, which is a leading cause of illness in the First Nation population.[461] Local transportation laws could deal with noise reduction or banning the use of two stroke engines for snowmobiles or water craft. There is

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[460] For example, Canada itself has CEPA '99, *supra* note 27, an Act dedicated to pollution prevention and the protection of human health.

[461] National Aboriginal Health Organization, First Nations Centre on behalf of the First Nations Information Governance Committee, *Preliminary Findings of the First Nations Regional Longitudinal Health Survey (RHS) 2002-03Adult Survey*, (Ottawa, NAHO, 2004) at p. 3, online: University of British Colombia <http://www.health-disciplines.ubc.ca/iah/acadre/site_files/resources/RHS_preliminary_adult_sept_9_04.pdf>.

tremendous room for creativity in using the provisions associated with local works to address many local environmental concerns. First Nation governments will no doubt find many ways to adapt traditional laws to address current environmental and social conditions to aid in re-establishing indigenous biological diversity.

However, there are other provisions of the Inherent Rights Policy which act to restrict the capacity and opportunity for First Nation governments to address environmental concerns. Two other categories of authority are delineated in the Inherent Rights Policy. The first are issues that the federal Crown considers "go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group."[462] The Crown is prepared to consider some measure of First Nation jurisdiction in these areas. But, as the Crown believes these issues have impacts of a regional or national nature, "primary law-making authority would remain with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws."[463] This includes, among other things:

- divorce;
- labour and training;
- administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws;
- penitentiaries and parole;
- environmental protection, assessment and pollution prevention;

[462] Inherent Rights Policy, *supra* note 26.
[463] *Ibid.*

- fisheries co-management;
- migratory birds co-management;
- gaming; and
- emergency preparedness.

Note that environmental protection, environmental assessment and pollution prevention, as well as fisheries co-management and the co-management of migratory birds all fall within this category. As with all the other environmental legislation and the environmental provisions of federal Aboriginal law, environmental issues remain firmly under the control of the Crown.

By way of example, Chapter 10, paragraph 3 of the Nisga'a Lisims Final Agreement states,

> Nisga'a Lisims Government may make laws in respect of the environmental assessment of projects on Nisga'a Lands. In the event of a conflict between a Nisga'a law under this paragraph and a federal or provincial law of general application, the federal or provincial law will prevail to the extent of the conflict.[464]

The agreement further notes that where projects on Nisga'a lands are expected to have an environmental impact, the Nisga'a Lisims Government will:

- provide Canada and/or the Province of British Colombia with notice of the project and potential environmental impacts;
- consult with the Crown about the project; and

[464] Canada, British Colombia, Nisga'a Nation, *Nisga'a Final Agreement*, *supra* note 454 at Chapter 10, s. 3.

- allow the Crown to participate in the environmental assessment process. [465]

The rights do not flow just one way in this case. The Nisga'a Lisims Government is accorded certain benefits if the federal or provincial Crown contemplates a project off Nisga'a lands that might impact Nisga'a territory or people.[466] The Nisga'a are entitled to have standing before any board, panel or tribunal dealing with environmental impacts on Nisga'a lands or people and is entitled to nominate a member.[467] That is "unless it is a decision making body, such as the National Energy Board."[468] Furthermore, environmental assessment processes of the federal, provincial and Nisga'a Lisims governments must include analysis of the existing and future social and cultural well being of the Nisga'a.[469]

These provisions, though more generous to the Nisga'a than under CEAA, are nevertheless a serious restriction on the capacity and opportunity of the Nisga'a Lisims Government to protect their lands and their people from negative environmental impacts. In all cases, the Crown retains final decision making authority with respect to environmental assessment. To the degree that these provisions impinge the capacity of the Nisga'a to sustain their traditional culture, these provisions are contrary to the rights recognized in UNDRIP.

With respect to environmental protection, the Nisga'a Final Agreement states,

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[465] *Ibid.* at s. 5.
[466] *Ibid.* at s. 6.
[467] *Ibid.* at s. 7.
[468] *Ibid.* at s. 7(b).
[469] *Ibid.* at s. 8(f).

> Except as otherwise set out in this Agreement, Nisga'a Lisims Government may make laws in respect of environmental protection on Nisga'a Lands, including discharges into streams within Nisga'a Lands. In the event of a conflict between a Nisga'a law under this paragraph and a federal or provincial law, the federal or provincial law will prevail to the extent of the conflict.[470]

The Nisga'a may seek agreements with either the federal or provincial governments to take on specific environmental protection functions.[471] The Agreement confirms that, "[n]o Party should relax its environmental standards in the Nass Area for the purpose of providing an encouragement to the establishment, acquisition, expansion, or retention of an investment."[472]

The Nisga'a have not yet established an administrative unit to specifically address environmental issues, but reported at its Special Assembly in 2008 that it was struggling to address waste management issues. Other environmental issues being addressed by the Nisga'a include reforestation, carbon emission off sets, and developing small run of river hydro projects.[473]

John Borrows, while lauding the efforts of the Nisga'a to achieve self-government and reconciliation with Canada, is concerned that they may lose land, elements of their traditional government, capacity to define their own rights, and the collection of direct

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[470] *Ibid.* at s. 11.
[471] *Ibid.* at s. 14 and 15.
[472] *Ibid.* at s. 18.
[473] Nisga'a Lisims Government, Lands and Resources Directorate, *Special Assembly 2008 Report, New Aiynash*, online: Nisga'a Lisims Government ,<http://assembly.nnkn.ca/node/339> .

taxes, among other things.[474] Many First Nation peoples have rejected the Inherent Rights Policy as the starting point for negotiations.[475]

As another example of self-government, the Grand Council of the Cree has a dedicated environmental office responsible for addressing environmental protection and assessment issues. They have expressed serious concerns with the manner in which Canada is implementing the environment related provisions of their self government treaty. For example, during the five year review of CEAA, the Grand Council complained that the CEAA regime "dilutes Cree rights and is inconsistent with the Treaty regime" in so much as it fails to recognize the environmental and social impact assessment and review procedure established by Section 22 of the *James Bay and Northern Quebec Agreement.*[476]

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[474] John Borrows notes,

> The Nisga'a may encounter the following potential losses as a result of the Final Agreement. Approximately 1,992 square kilometres of land that the Nisga'a will hold as a fee simple interest in the treaty can be alienated and thus conceivably be unavailable for Nisga'a use or possession at some time in the future. If any future Aboriginal rights are found by the courts to exist, they will be held by Canada and not the Nisga'a. The structure of Nisga'a governance significantly departs from, and in most respects replaces, the traditional House (wilps) system of government. Some important Nisga'a law-making authority will be subject to certain provincial and federal laws, either through equivalency or paramountcy provisions [for example environmental protection and assessment as noted above] Nisga'a institutions or court decisions will ultimately be subject to the discipline of the British Columbia Supreme Court. Individual Nisga'a taxation will be collected under general revenues. Finally, disagreements in respect of the Final Agreement are supervised by non-Nisga'a Canadian courts. Such provisions could represent a substantial challenge to Nisga'a attempts to fashion their lives in different economic, social, and political terms from those of the majority around them. Therefore, though the treaty represents some of the highest aspirations of Aboriginal peoples and Canadians in creating a relationship of mutuality and respect, it also contains a number of elements that potentially make Canadian visions of law, politics, and development the standard by which Nisga'a life may ultimately be judged [footnotes deleted]. Borrows, *supra* note 454 at p. 636.

[475] David C. Nahwegahbow, *Recognition Of Inherent Rights Through Legislative Initiatives* (North Bay, Nahwegahbow, 2002) at p. 9, online: Indigenous Bar Association, http://www.indigenousbar.ca/pdf/Recognition%20of%20Inherent%20Rights%20Through%20Legislative%20Initiatives.pdf

[476] Grand Council of the Crees (EEYOU ISTCHEE) Cree Regional Authority, *Environmental and Social Impact Assessment and Review under Section 22 of the James Bay and Northern Quebec Agreement and*

As to the other heads of authority itemized in this second category outlined in the Inherent Rights Policy, fishing and migratory birds are the two most closely connected to environmental concerns. The federal Crown is at least prepared to negotiate co-management of the fishery and migratory birds. However, the co-management regimes that have been created thus far are not based on the principle of the inherent right to self-government. The Crown, at the very least, has retained the right to appoint Indigenous representatives to the WMBs. There is no obligation on the Crown to accept a specific appointment from an Indigenous government. While there may be a practice of accepting an Indigenous government's nominee, a Cabinet that is disinclined to work cooperatively and out of respect for the inherent rights of an Indigenous government could chose to ignore such a practice and legally impede the opportunity of the Indigenous government to address their concerns about the care for the fishery or migratory birds.[477]

A third category of subject matters exists under the Inherent Rights Policy; issues the Crown believes there to be "no compelling reasons for Aboriginal governments or

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The Five-Year Review of the Canadian Environment Assessment Act, 31 March 2000 online: INAC <http://www.ceaa.gc.ca/013/001/0002/0004/0004/gcc_e.htm>.

[477] Examples of existing co-management boards include the Nunavut Wildlife Management Board, the Yukon Fish and Wildlife Management Board, *Porcupine Caribou Management Board,* and the Beverly and Qamanirjuaq Caribou Management Boards. While they have a great deal to commend them, they are not self-governing arrangements. Crown-First Nation co-management regimes have been the subject of study by, among others: Julian T. Inglis (ed.), *Traditional Ecological Knowledge: Concepts and Cases.* International Program on Traditional Ecological Knowledge. (Ottawa: International Development Research Centre, 1993); Alfonso Peter Castro and Erik Nielsen, *Indigenous People And Co-Management: Implications For Conflict Management* Environmental Science and Policy Volume 4, No. 4/5, August 2001, pp. 229-239; Julia Gardner, *First Nations Cooperative Management in Protected Areas in British Columbia: Tools and Foundation*, (Vancouver: Canadian Parks and Wilderness Society – BC Chapter and Ecotrust Canada, 2001); and Fikret Berkes, Johan Colding, and Carl, Folke, "Rediscovery of Traditional Ecological Knowledge as Adaptive Management" in *Ecological Applications*, Vol. 10(5), pp. 1251-1262. A useful bibliography current to 2005 is available at INAC, *Aboriginal Co-Management Bibliography Canada and the United States*, (Ottawa, INAC, 2005), online at: INAC, <http://www.ainc-inac.gc.ca/pr/ra/com/ap1a_e.html.>.

institutions to exercise law-making authority."[478] This category is subdivided into those powers which are related to "Canadian sovereignty, defense and external relations" and "other national interest powers".[479] In these matters the federal government retains full law making authority. The Crown will only consider administrative arrangements in some cases with First Nation governments respecting these issues. These subject matters include:

(i) Powers Related to Canadian Sovereignty, Defense and External Relations

- international/diplomatic relations and foreign policy;
- national defense and security;
- security of national borders;
- international treaty-making;
- immigration, naturalization and aliens; and
- international trade, including tariffs and import/export controls.

(ii) Other National Interest Powers

- management and regulation of the national economy, including:
- regulation of the national business framework, fiscal and monetary policy;
- a central bank and the banking system;
- bankruptcy and insolvency;
- trade and competition policy;
- intellectual property;
- incorporation of federal corporations;
- currency;

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[478] Inherent Rights Policy, *supra* note 26.
[479] *Ibid.*

- maintenance of national law and order and substantive criminal law, including:
- offences and penalties under the Criminal Code and other criminal laws;
- emergencies and the "peace, order and good government" power;
- protection of the health and safety of all Canadians;
- federal undertakings and other powers, including:
- broadcasting and telecommunications;
- aeronautics;
- navigation and shipping;
- maintenance of national transportation systems;
- postal service; and
- census and statistics.

As with the other categories, there are a number of issues here that have an environmental component to them. A few will be examined here by way of example.

For example, international trade, relations and treaty making have definite environmental ramifications. The import and export of goods is regulated for environmental reasons. Consider for example the purpose of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*[480] or the *Convention on the International Trade of Endangered Species.*[481] There are environmental provisions in major trade agreements, such as the side agreement on the environment to

[480] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, (22 March 1989) 1673 UNTS 57 (entry into force 5 May 1992,* Ratification 28 August 1992).
[481] *Convention on International Trade in Endangered Species of Wild Fauna and Flora,* 03 March 1973, C.T.S. 1975 No. 32, (entry into force, 1 July 1975, ratification by Canada 10 April 1975).

the *North American Free Trade Agreement.*[482] Consider too the international regime on intellectual property rights in traditional culture that is currently under development. Elements of national defence policy also have the potential to impact on First Nation peoples and their lands. The toxic waste and other environmental damage at military sites and the disposal of armaments including poisonous substances on the sea bed are examples of environmental concerns associated with defence policy.[483] Practicing low flying manoeuvres over calving caribou is another example.[484] The Crown may want to coordinate the armed forces, but the Crown must be respectful of the rights of First Nations to govern their lands and protect them from the environmental consequences of defence policy choices made by the Crown.

Transportation is another major source of environmental impact. This includes aeronautics, shipping, and national transportation systems such as railways and major highways. Road construction, the location of airports and shipping ports, and the railroads, all have taken a toll on First Nation peoples and their lands. Transportation is responsible for 27% of greenhouse gas emissions in Canada.[485] Final decision making in these matters at the sole discretion of the Crown gives the Crown power to cause serious and potentially catastrophic impacts on First Nation peoples and their lands. The failures of the current and past governments to address climate change in a responsible fashion

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[482] *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America,* 17 December 1992, C.T.S. 1994 No. 2, (entry into Force 1 January 1994).
[483] See for example, Department of National Defence, *The DEW Line Cleanup Project* (Ottawa: Department National Defence, 2008), online; DND, <http://www.rmc.ca/academic/gradrech/esg/dlcu_e.html>.
[484] See for example, Cultural Survival Inc, "When Outrage Is A Scarce Commodity: Low-flying Manoeuvres over Innu lands in Labrador" Cultural Survival Quarterly, Volume 24, no. 3.
[485] Suzuki Foundation, *Solving Global Warming, Solutions, Transportation*, (Vancouver, Suzuki Foundation, 2007), online: Suzuki Foundation, <http://www.davidsuzuki.org/Climate_Change/Solutions/Transportation.asp >.

are evidence of the consequences of leaving this authority solely in the hands of the Crown.

First Nation governments must have the right to participate, as equals, in decision making respecting this head of power to protect themselves and the environment of which they are part and on which they depend. The implications of federal regulation on the environment are evident in so many areas of federal management, from transportation to defence to international trade and intellectual property rights. While these areas of concern do not appear on the surface to have environmental implications, the brief review above highlights ways in which they have undermined the environmental well-being of First Nation peoples. Without the capacity and jurisdiction to engage the federal government as equals on the environmental implications of federal policy, First Nation peoples' concerns about protecting the lands on which they depend are being ignored. As environmental degradation worsens, the capacity of the land to sustain First Nation cultures is weakened. With the extinction of experience of the land, First Nation cultures further decline. This in turn leads to further loss of biological diversity.

The negotiation of self-government agreements abides by the instructions from the S.C.C. to reconcile the sovereignty of the Crown with the rights of First Nation peoples, but they do so in a fashion that accords greatest respect to the will of the majority non-Indigenous society. Chief Justice McLachlin's criticism in *Van der Peet* was directed at exactly this problem. She could not abide an interpretation of the Constitution that gave a superior interest to the majority population in the exercise of a section 35 right. As inherent governments, First Nation peoples are free to enter into negotiations with the Crown to

negotiate self-government and some have clearly felt confident to move ahead on the limited matters the Crown is prepared to relinquish. However, in light of the Cabinet's disregard for international law, the S.C.C.'s concerns about majority rule, and the political will of the House of Commons to implement UNDRIP, First Nation peoples have much to consider in deciding to accept the terms the federal Crown is currently prepared to offer.

Federal Funding

One other area of federal policy is worth considering when examining First Nation peoples' rights to environmental self-determination. Federal financial policy can have and has had an impact on the capacity of First Nation governments to address environmental issues. Generally speaking, resources available to First Nation peoples to participate in environmental governance or address environmental concerns are scarce or non-existent. The lack of funding constitutes a serious impediment to the exercise of First Nation peoples' inherent rights to self-government.

Federal financial policy hampers First Nation governments in three ways. First, First Nation peoples do not receive services from government comparable to those made available to non-Indigenous peoples; second, the Crown is not meeting its lawful

obligations to First Nations; and third, First Nation governments receive inadequate resources to support self-government.[486]

In fiscal year 2006-2007 INAC had funding authorities to the amount of $24.1 million to support First Nation governance over land, resources and the environment[487] out of a total budget of approximately $6.6 billion.[488] Of this it only spent $15.4 million. Significant portions of this was dedicated to implementation of the *First Nations Oil and Gas and Moneys Management Act*[489] and the addition of six new First Nation communities to the FNLMA, recalling that the environment related provisions of the FNLMA are not yet in force. For all environment matters INAC under spent its budget by almost half and at that, significant portions of the budget were not even directed to environmental concerns.[490] Federal financial liability for remediation of contaminated sites in the north alone rose by 20% to a total of $1.2 billion in the same year.[491] Across the entire INAC budget, only two percent supports self-government.[492]

INAC has identified serious environmental problems facing First Nation communities. As of 1 March 2006, there were 328 contaminated sites across the northern territories that

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[486] Assembly of First Nations, *Federal Government Funding to First Nations: The Facts, the Myths, and the Way Forward,* (Ottawa: Assembly of First Nations, 2004) pp.6-7, online: AFN, <http://www.afn.ca/cmslib/general/Federal-Government-Funding-to-First-Nations.pdf>.
[487] Treasury Board of Canada Secretariat, *2006-7 Departmental Performance Report, Indian and Northern Affairs Canada, Canadian Polar Commission and Indian Specific Claims Commission, Section II Analysis of Program Activity by Strategic Outcomes*, (Ottawa: Treasury Board of Canada Secretariat, 2007), online: Treasury Board of Canada, <http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/ian/ian02-eng.asp#tl>.
[488] *Ibid.*
[489] *First Nations Oil and Gas and Moneys Management Act*, *supra* note 401.
[490] Treasury Board of Canada Secretariat, *supra* note 487.
[491] *Ibid.*
[492] AFN *supra* note 486 at p. 5.

had been assessed or were suspected by INAC.[493] The problems with the supply of fresh drinking water to First Nation reserves are well documented.[494] In March 2008, the Commissioner for Sustainable Development and the Environment reported that action to address contamination from fuel storage tanks, which accounts for 66% of contamination on federal lands (which would include reserve lands), has been unsatisfactory.[495] First Nation peoples are being denied the capacity to address environmental problems, and the federal Crown is not doing a good job of addressing these problems on their behalf.

This concludes the review of federal Aboriginal and environmental law and policy. This review has considered the degree to which the Crown applies international legal norms, adopts First Nation traditional philosophies, or facilitates First Nation peoples' environmental self-determination and self-government. Overall, the evidence confirms a lack of respect for First Nation peoples by Parliament. Federal Indigenous law presumes Crown sovereignty over First Nation peoples. The overriding principle of the *Indian Act*, for example, is a presumption by the Crown that it has the right to dictate the lives of First Nation peoples. The FNLMA is a step in the right direction, giving greater recognition to the capacity of First Nation peoples to manage their own affairs, but it gives no greater recognition of their inherent rights. Besides, the environmental

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[493] INAC, *Contaminated Sites Program Performance Report 2006 – 2007* (Ottawa: INAC, 2007) at p. 6, online: INAC <http://www.ainc-inac.gc.ca/ps/nap/consit/csrep0607/csrep0607_e.pdf >.

[494] Canada, *Report of the Expert Panel on Safe Drinking Water for First Nations, Volume 1 & 2,* (Ottawa: Canada, 2006), online: Canada, <http://www.eps-sdw.gc.ca/rprt/index_e.asp>; Commissioner of the Environment and Sustainable Development, *2005 Status Report of the Commissioner of the Environment and Sustainable Development*, (Ottawa, Auditor General, 2005) Chapter 5, online: Auditor General, <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200509_05_e_14952.html>.

[495] Commissioner of the Environment and Sustainable Development, *2008 March Status Report of the Commissioner of the Environment and Sustainable Development* (Ottawa: Auditor General, 2008) at para. 3.44 – 3. 53, online: Auditor General, <http://www.oag-bvg.gc.ca/internet/English/aud_ch_cesd_200803_03_e_30129.html#ch3hd4c>.

provisions of this Act are not yet in force. The Inherent Rights Policy dictates in what areas of jurisdiction the Federal Government is prepared to acknowledge First Nation rights. Although the Crown is prepared to recognize First Nation governments' jurisdiction over local affairs, the Federal Government maintains sole jurisdiction over a vast array of other matters which have the potential to undermine the health and well-being of First Nation peoples and lands. Environmental conservation, protection and management and environmental assessment remain under the control of the federal government, as do other heads of power which have demonstrated environmental side effects. While the Inherent Rights Policy allows First Nation peoples to develop stronger standards to apply locally, it gives them no opportunity to influence the decision making of the federal government when it is the federal government's standards that need to be changed. Federal environmental legislation limits the participation of First Nation governments in environmental decision making, at most to an advisory role. Widely held First Nation perspectives, such as the links between humanity and the land, are not embraced in environmental legislation. The limited financial resources available to First Nation governments to address environmental concerns is further evidence of the systemic disregard for their interests. Indigenous law and policy denies First Nation peoples the right to self-determination and self-government contrary to international and domestic law.

The Canadian courts have begun to interpret section 35 of the Constitution, but many questions remain. How will the courts define the rights of self-determination and self-government? To what degree will the courts recognize First Nation peoples' traditional

connection to the land and respect First Nation peoples' traditional cultures about their connection to the land? Are the courts prepared to protect First Nation peoples' land in order to help sustain their traditional cultures? The courts have called for the reconciliation of the sovereignty of the Crown with First Nation peoples rights, and have instructed the Crown to pursue consultation, negotiation and accommodation as the means to reconcile. Yet while the courts have identified the procedural elements of consultation, they have offered little guidance on the expected accommodation, instead leaving it to the two vastly unequal parties to negotiate. The Crown has made some efforts to adopt instructions from the courts, for example by including provisions for consultation. However, this review of legislation has demonstrated how much more remains to be done to bring about the reconciliation recommended.

In the meantime, First Nation cultures continue to decline, as does biological diversity. This is a threat to all Canadians, not just First Nation peoples. This state of affairs cannot continue.

Chapter Six

Recommendations for the Future

As has become evident over the course of this paper, the Crown, particularly Parliament and Cabinet, interferes with the retention and practice of First Nation peoples' cultures. This is self-defeating as it only promotes a continued decline in both cultural and biological diversity to the detriment of all Canadians. How then can Canadians – First Nation peoples, Inuit and Métis peoples, and non-Indigenous peoples alike – reverse this course? How can Canada move forward to secure its future well-being?

First, as has been made evident in this paper, there must be greater respect for the rule of law. International instruments, adopted by the Canadian Parliament, outline the minimum standards to be achieved to protect the environment and respect human rights. The Canadian Constitution requires the recognition of First Nation peoples' human rights. The Courts have concluded the law compels the reconciliation of First Nation peoples' rights with the sovereignty of the Crown. The Crown is obliged to recognize and respect the rule of law, which includes fulfilling its obligations to First Nation peoples in an honourable fashion.

To fulfill a promise, such as the Constitution or the domestic application of international law, requires an act of will. It takes an act of political will to change government policy, such as the Inherent Rights Policy, and embrace self-determination and self-government. It takes an act of political will to adopt the decisions of the Courts and not pursue further

litigation. It takes an act of political will to choose to reconcile, to become friends again. Without this political will it is impossible to move forward in a honourable fashion. This unfortunately remains a major hurdle in Canada. The current regime is antipathetic to the aspirations of First Nation peoples. The Conservative Party of Canada, currently forming the minority government, holds little political will to respect the rights of First Nation peoples.[496] The Liberal Party, which has held power longer than any other political party in Canada, has not treated First Nation peoples much better during its tenure.[497]

Once the Canadian leadership musters the political will to respect the human rights of First Nation peoples, a gargantuan task lies ahead. What is being proposed here is a massive overhaul of Canadian law to recognize the twin imperatives of respect for human rights and environmental protection. The adoption of the concept of interconnectedness as a founding principle of legal theory and as a model for governing ourselves and our interactions with the environment will have profound impacts on existing laws and governing structures. To reconcile First Nation and non-Indigenous legal systems, as recommended by the Court, will require careful consideration of this principle of interconnectedness and its implications on a vast array of legal and political issues. Some have commenced this work.[498] It is not possible to canvas the implications of this concept on Canadian law and government in depth here. Provided below instead are a few examples to demonstrate the complexity of reconciliation.

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[496] This despite the official apology by Prime Minister Stephen Harper in June 2008 for the forced assimilation of Aboriginal peoples and particularly the residential school system.

[497] Although Paul Martin's administration signalled change.

[498] Borrows and Henderson, see also AFN, *Our Nations, Our Governments: Choosing Our Own Path,* Final Report of the Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, (Ottawa: AFN, 2005), online, AFN http://www.afn.ca/cmslib/general/FNG%20report_Eng%20final.pdf ; Borrows, *supra* note 14; and John Borrows, *Justice Within*: *Indigenous Legal Traditions,* (Ottawa: Law Commission of Canada, 2006).

For example, dozens of legal systems will have to be reconciled with the common and civil law traditions. In order to achieve this end, just as Borrows and Henderson have begun for the Ojibway and Mi'kmaq First Nations, other First Nation peoples will have to describe in detail their traditional laws. The Elders will likely take the lead role in this work, as they are the repositories of these laws. First Nation legal scholars and those versed in the civil and common law traditions can assist in translating legal traditions across cultural lines. But this is not an academic exercise. First Nation governments and the Crown must then, as equals, together determine whether to adopt any particular traditional law and if adopted how it might need to be amended to suit the circumstances of the 21st century.

For example, to incorporate the concept of interconnectedness in federal environmental law such as SARA, CEAA, CEPA'99, and the MCAA would require amendment of the legislation and a significant shift in federal perspective to embrace humanity as an element of the environment and to reject the notion that humanity has the wisdom, the right or even the capacity to bend the land to its will. For example, instead of setting aside protected areas, which cannot be isolated from environmental degradation in the first place, adopting a notion of interconnectedness requires recognition that all lands and waters are to be cherished and treated in such a fashion as to ensure the integrity of all ecosystems. To do so requires changes not only to MCAA and other legislation establishing protected areas, but also changes to many other laws at the national, provincial, territorial and municipal levels. To take but one example, shipping oil by sea

will have to be made much more secure to ensure the vessels are capable of withstanding accidents and weather conditions thereby preventing oil spills if the vessels go aground.

To respect rights of self-determination and self-government, the Inherent Rights Policy would have to be repealed and a new policy adopted that considers recognition of First Nation peoples' inherent rights to self-government across the breadth of issues contained in the current policy.[499] The Crown must consider ways and means to facilitate self-determination and self-government in everything from trade, to justice, to economic development, and of course the environment. There is precedent for this approach. The peoples of Greenland and Denmark have just recently agreed to adopt a proposal that would facilitate Greenland's independence on all matters except security and foreign relations.[500]

As an element of the reconciliation of legal systems, new approaches to decision making will have to be developed, implemented and evaluated. Both Canadian and First Nation traditional governance structures and decision making processes will have to be reconciled. It will be necessary to examine the efficacy of these systems in supporting, at least, respect for human rights and environmental protection. It will likely take a radical change in governing structures in Canada in order to facilitate the exercise by First Nation peoples of their rights of self-determination and self-government. It will also

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[499] See for example, AFN *supra* 486.

[500] Duncan Campbell, "Greenland to loosen ties with Denmark", *The Guardian*, 27 November 2008; online, The Guardian, <http://www.guardian.co.uk/world/2008/nov/27/denmark>. Examples from New Zealand and the United States are not appropriate in light of the fact that both states voted against the Declaration on the Rights of Indigenous peoples. Although Australia, under a new government, reversed its earlier vote against the declaration, relations with Indigenous peoples in that country are still too much based on the old colonial approach to provide progressive examples at this time.

require the reformation of First Nation governments, no longer constrained by the *Indian Act*.

The AFN has recommended a measured movement towards self-government for First Nation peoples based on the capacity of the community to take up greater responsibility.[501] Immediate goals include improving existing services and creating options for greater control by First Nation governments as well as regulatory change to remove barriers to self-government. Medium term plans include training to build capacity in First Nation communities and demonstration projects to build capacity and to identify alternative approaches. The long term goals include a nation to nation relationship, structural and institutional change to reflect the new relationship and the equitable sharing of lands and resources.[502] Some First Nation communities are close to assuming full self-government while others may be at the early or intermediate stages and would be prepared to work towards self-government over a number of years. This is really a matter for the First Nation communities to decide for themselves.

Eventually though, every federal and provincial body that has authority to make decisions which impact the environment or the survival of First Nation cultures will have to include representatives of First Nation governments. This would include:

- tribunals, such as the Ontario Environmental Tribunal;
- councils, such as the Canadian Council of Ministers of the Environment and its equivalent in natural resources, trade, and so on;

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[501] See for example, AFN, *The Voice of First Nations: Planning for Change*, (Ottawa: AFN, 2001).
[502] *Ibid.* at p.203.

- boards, such as the National Energy Board; and
- panels, such as environmental assessment panels.

As a simple example, the Canadian Council of Ministers for the Environment (CCME) must amend its mandate and structure to include First Nation governments as equals to the Ministers of the federal and provincials Crowns. This would do away with the need for NACOSAR in SARA and amend the current imbalance between NACOSAR and the CCME explicit in SARA. Likewise, the NAC in CEPA'99 will have to be amended to recognize and include all First Nation governments, not just a handful the Crown is prepared to acknowledge. The *Indian Act* will have to be replaced with treaties and self-government implementation legislation.[503]

New governing structures may also have to include new arrangements in Parliament and the Senate, as well as in municipal councils, regional councils, and provincial and territorial legislatures to accommodate self-governing First Nations. Co-management structures serve as an example of more inclusive governing apparatus. The Inuit influence on the Territorial Government of Nunavut provides yet other ideas and approaches. The concept of a federation is a traditional concept for some First Nation peoples, as demonstrated by the Iroquois Confederacy or the Blackfoot Confederacy, so perhaps First Nation governments are interested in extending the Canadian federation to include the First Nations. The United Nations and the European Union are other examples of decision making systems on which the new relations between the Crown and First Nation governments could be modeled. Once concluding the type of system, the

[503] See AFN *supra* note 486.

Crown and First Nation governments will have to agree on, among other things, the rules and procedures of these amended systems, and the allocation of resources to support their operation.

Whatever laws or governing structures are established, First Nation peoples must see themselves reflected in them. First Nation peoples must have a sense of cultural continuity between their traditional and contemporary societies.[504] Consensus based decision making, for example, honours equality and respect, and is a tradition in both First Nation and non-Indigenous societies. There is precedence for this approach in the *First Nations – Federal Crown Accord on the Recognition and Implementation of First Nation Governments.* [505] This Accord established a Joint Steering Committee to consider,

a) New policy approaches for the recognition and implementation of First Nation governments, including mechanisms for managing and coordinating renewed and ongoing intergovernmental relationships, and assessment of the potential for a 'First Nation Governments Recognition Act';
b) New policy approaches to the implementation of treaties;
c) New policy approaches for the negotiation of First Nation land rights and interests;

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[504] See Harvard Project on American Indian Economic Development, *Overview of the Harvard Project*, (Boston: The President and Fellows of Harvard College, 2004), online: Harvard University, <http://www.hks.harvard.edu/hpaied/overview.htm.>

[505] This Accord was adopted by consensus between the Crown and the Assembly of First Nations in 2005. AFN, *First Nations – Federal Crown Accord on the Recognition and Implementation of First Nation Governments* (Ottawa: AFN, 2005), online: AFN, <http://www.afn.ca/cmslib/general/PolAcc.pdf.>.

d) A statement of guiding principles for reconciling section 35 rights in the context of ongoing relationships with First Nation peoples, their governments, and Canada; and

e) New or existing opportunities to facilitate First Nations governance capacity-building, working with First Nations communities and organizations to jointly identify approaches that support the implementation of First Nations governments, including program, policy, institutional and legislative initiatives.[506]

This Accord was adopted by the House of Commons and the Senate,[507] but the current administration has chosen to ignore it, just like it is ignoring the vote in the House of Commons to approve the adoption of UNDRIP.

One final note on the way forward is warranted. To reconcile means to "make friends again; settle (a quarrel, disagreement, etc.); bring into harmony; make satisfied or content with".[508] To reconcile is a process. While reconciliation is the end sought, the process adopted must both support and reflect this objective. Achieving reconciliation depends on the adoption of a reconciliatory process. In this case, the process determines the end result. We cannot achieve reconciliation through litigation, intimidation, ignorance, unreasonableness, or disrespect. We can only achieve it through open, honest discussion and careful consideration of different perspectives and concerns. First Nation peoples

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[506] *Ibid.*
[507] See, *An Act to implement the Kelowna Accord*, S.C. 2008, c. 23. See also, Bill S-216, *An Act providing for the Crown's recognition of self-governing First Nations of Canada.*
[508] Avis, *supra* note 11 at p. 940.

and the Crown must be able trust each other, respect each other, be willing to listen to each other, and learn to understand the other.

Conclusion

This paper has argued that a positive symbiotic connection exists between humanity and the land. This connection has been acknowledged by scientists, philosophers, the Canadian courts, and the international community. It is a world view that permeates most First Nation cultures. Yet, Canada continues to experience a decline in both biological and cultural diversity. This paper has pointed to the myriad ways that federal statutes and policies have undermined the retention of First Nation cultures, which in turn undermines the integrity of indigenous biological diversity. First Nation peoples are rarely engaged or their participation supported by Canada on matters respecting land use, natural resource use and development, or the protection, conservation and management of the environment. Indigenous governing structures have been abolished, ignored, suppressed and under-funded. Without the opportunity or capacity to engage in environmental governance, First Nation peoples encounter an 'extinction of experience' which further undermines traditional laws about respecting the environment and fuelling greater environmental decline.

It is in Canada's collective best interest to recognize First Nation peoples' rights to self-determination and self-government as a means to facilitate the retention of biological diversity, while acknowledging that it is incumbent on all governments, First Nation or Canadian, to ensure environmental protection. While much of this paper has read like a treatise on First Nation peoples' political aspirations, the truth of the matter is that First Nation peoples' objectives coincide with the best interests of all Canadians – the

protection of the environment for our collective well-being. From the environmental perspective, protracted arguments about self-determination and self-government are frustrating. They are akin to arguing about who gets to hold the water hose when the house is burning around you. To address the grave environmental problems we collectively face today there is a great need to work together and summon all our resources. In light of the symbiotic relationship between respect for human rights and protection of the environment, this means including First Nation peoples in environmental decision making, and recognizing their moral and legal rights to sustain their traditional relationship with the land.

Canada is facing grave environmental problems; the decline of biological diversity is a problem in itself as well as a symptom of a much larger environmental disaster looming. Canada cannot afford to turn its back on First Nations and the international community by rejecting a key ingredient in the effort to retain biological diversity – the traditional cultures of First Nation peoples. The land and the people are one. Human rights and environmental protection must be allied. Respect for human rights and environmental protection must go hand in hand. The people and the land are connected; we forget this traditional law to our collective peril.

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