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Submission to the Royal Commission on Aboriginal Peoples

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INTRODUCTION

The Canadian Environmental Law Association (CELA) was founded in 1970 with a goal of advancing environmental protection through the use of law. We are now funded by the Ontario Legal Aid Plan as a specialty law clinic, and provide representation to environmental groups and low income individuals regarding environmental problems. Our mandate also includes lobbying and consulting with government and business to improve environmental law and policies.

Our clients have included Aboriginal groups, and we have had the opportunity to co-operate with Aboriginal organizations in various of our initiatives (ie. the four-year environmental assessment of forestry in Ontario).

I am pleased to have an opportunity to discuss with you some of what we have learned about issues of concern to Aboriginal peoples in Canada.

THE COMMISSION'S FOUR TOUCHSTONES FOR CHANGE

We have reviewed the four touchstones, as outlined in the Commission's Focusing the Dialogue, and believe that, from a non-aboriginal perspective, they are important bases for recommendations for a changed future for Aboriginal peoples. We hope that our information can be helpful in your consideration of a new relationship between Aboriginal and non-aboriginal peoples; Aboriginal self-determination; and Aboriginal self-sufficiency.

THE PROBLEM OF WASTE MANAGEMENT ON RESERVE LANDS

In Canada, environmental regulation is a shared jurisdiction between the federal and provincial

governments, and Ontario is a leader in environmental law in various respects, including with regard to waste management. Lands and communities regulated by the province are now subject to a complex and progressive regulatory regime regarding waste. Requirements include environmental assessments, with full public consultation, for proposed new dumps; certificates of approval from provincial regulators; compliance with various technical standards; and increasingly, application of the 3R's: reduction, re-use, and recycling.

In contrast, lands regulated by the federal government lack such a regime.

Our attention has been drawn to problems of waste disposal on reserve lands. In a 1983 study, Environment Canada found that off 111 abandoned waste disposal sites on federal lands of various agencies, 73 were on reserve lands.

Two sites were designated "Priority I" sites which could present a high risk potential to health and the environment. One site was on Akwesasne, and included dredge sediments from the St. Lawrence River with high mercury content. The other was on the Serpent River reserve, at the site of a plant that had made sulphuric acid and iron pellets from 1956 to 1963; abandoned piles of materials remained, and the land was considered contaminated. These sites were judged to require immediate assessment.

Seven of the 11 identified "Priority II" sites, judged to provide a "medium risk potential" were also on reserve lands. These included sites on Walpole Island, Kettle Point, Alderville, Garden River, Kashechewan, Pikangikum, and Sachigo Lake. Problems included leachate flowing into nearby water sources, and likely eventual pollution of water sources from pollutants including oil.

We are unaware to what extent these sites have been cleaned up since the study was done. However, more recently, there was a well-publicized plan by the Municipality of North York to dump its municipal wastes on the Six Nations lands near Brampton. Exposure in the press

and community pressure derailed this plan.

Under the Indian Act, the federal government has enacted Regulations respecting Waste Disposal in Indian Reserves (C.R.C., C. 960) which prevent operation of garbage dumps on reserves without permits. However, it appears that this regulation is not necessarily enforced, and further, it does not provide a detailed, sufficiently protective scheme, in line with current policies of waste management.

We are aware that within Southern Ontario, there are currently pressures to use aboriginal lands to dump industrial and other wastes, since these lands are exempt from the strict regulatory scheme that pertains to provincial lands. Entrepreneurs both on and off reserve obviously see these lands as potential bases for lucrative waste disposal businesses.

Given the potential for serious environmental harm and human health problems that can result from improper waste management, we consider that aboriginal governments, both current and future, will need to address this question. We are aware that various aboriginal communities are currently working on schemes for environmental protection on their lands, sometimes looking to US tribes for approaches to problems that include water and air pollution, damage to agricultural and forest lands, fisheries etc.

Given the history of improper dumping on reserve lands, and the attraction of these lands for current waste management businesses, we wish to bring to your attention that it will be necessary for First Nations governments of the future to address these issues as well, within a context of overall environmental protection programs.

ABORIGINAL SELF-GOVERNMENT AND RESOURCE SHARING

CELA endorses the inherent right of self-government of aboriginal peoples, and recognizes

that this implies a re-allocation of resources now controlled by non-aboriginal governments and individuals.

We also recognize that this re-allocation is currently accompanied by major and sometimes bitter controversies in various regions of Canada. Because we recognize the justice of aboriginal claims, and the need for changes in how we all manage our environment and resources, CELA sponsored a conference on these questions in January of 1992. We called it: Sharing the Land: Emerging Issues in Aboriginal Land Use, and brought together aboriginals, environmentalists, government leaders, and academics.

Its purpose was to provide information about aboriginal issues to environmentalists, but more important, to provide opportunities for dialogue amongst the various groups and interests involved in the controversies.

We believe the conference achieved these goals. In addition, the record of discussions provides, we believe, a range of examples of the approaches being taken, within Ontario, to three of the Commission's touchstones: redefining the relationship between Aboriginal and non-aboriginal peoples, Aboriginal self-determination and self-sufficiency.

Issues discussed at the conference included:

- In the light of the Sparrow decision, how will "conservation" be defined in the future, so as to justify measures enacted for resource conservation, by non-aboriginal governments, which have impacts on Aboriginal use as well. This is a major concern of the segment of the environmental community that is active in wildlife conservation, particularly through the creation of parks.

- A great variety of approaches to building self-government are being used by Aboriginal peoples in Ontario. Steps include land claims, assuming control of "sectoral programs" such

as health care, Memoranda of Understanding with the provincial government regarding resource management off-reserve; co-management agreements; and stewardship councils. The Nishnawbe-Aski Nation has used negotiated employment, land use and development agreements with the provincial government and businesses such as mining companies.

• The creation of park lands by provincial government with the support of conservationists, has in some cases been done with no consultation with First Nations, and has resulted in worsening their economic development options. Now that exploitation of resources has left little land available to complete a parks system of representative natural areas, conservationists are hostile to the assertion of Aboriginal land use on current park lands. Some of the most high-profile land use disputes in Ontario involve provincial parks subject to Aboriginal claims, notably Algonquin Park and Quetico Park.

Some segments of the environmental community consider that protective options other than parks may be developed, that can accommodate needed aboriginal uses of the lands.

• There is a continuing need for education and exchanges between Aboriginals and non-aboriginals in affected communities in order to diffuse the misinformation and levels of conflict now being experienced in some areas.

We are providing the Commission with the proceedings of the conference, including plenary sessions and workshop records, where specific disputes were discussed by representatives of all sides to the disputes. We hope the record will assist the Commission in understanding the controversies, and will provide examples of hopeful processes now underway.

FREE TRADE IMPACTS ON ABORIGINAL LANDS

CELA has been studying and monitoring the impacts of free trade on the environment of

Canada since 1988. We believe that one of the greatest environmental impacts of the Canada-US Free Trade Agreement and of the proposed NAFTA is its limitations on our rights to conserve natural resources.

Both agreements commit Canada to supplying the US market in perpetuity with all of our resources which we now export to the US, in the same proportion of our total overall production that they now receive. These provisions affect all resources including energy (oil, natural gas, electricity), water, fisheries, forest products, etc. In effect, once we turn on the tap for any resource, we cannot turn it off.

At the same time, the trade agreements severely limit our rights to pass laws requiring local processing of resources, government purchasing from local communities, or other local development programs.

If the Canadian federal or provincial governments pass laws to limit exports or promote local development, the laws may be challenged by US business through the dispute panel process established under the trade agreements. These processes are secret, and only federal governments can participate in them, although what is frequently on trial is the right of our governments to pass laws their citizens demand.

In our view, at least two issues of concern to aboriginal peoples arise under the agreements.

First, the combined effect of the terms of the agreements pertaining to resources is that conservation of resources and reserving them for residents of Canada is increasingly difficult. For example, the US, the world's largest consumer of energy, now has perpetual access to Canadian energy resources, many of which are found on lands subject to aboriginal claims. One need only think of James Bay, the Mackenzie Delta, and smaller energy developments throughout the country. Huge schemes for water export, such as the Grand Canal Scheme, and NAWAPA, the North American Water and Power Alliance, are again being discussed.

These mega-developments have immense potential negative impacts on the Canadian environment, often specifically on the lands of aboriginal communities. Canadian regulation of forests and fisheries has also been worsened by cases heard under the trade agreements.

As aboriginal peoples know, we cannot rely on our elected federal government to protect our environment or to protect aboriginal rights. This is even more true now, when the government has embraced the ethic of globalization and competitiveness to an extreme degree. The Canadian government stated in its 1991 Foreign Policy framework that we can only set environmental standards "in step with" our major trading partners. It is currently reviewing all regulations administered by Environment Canada to establish whether they contribute to competitiveness, including whether they comply with GATT, the Canada-US Free Trade Agreement, and NAFTA. As a staffer of the Inuit Tapirisat discussed with me, the Inuit consult with the federal government regarding the Migratory Birds Protection Act, and rightly did not accept that they should be obliged to show that migratory birds contribute to Canadian competitiveness.

In short, we believe that the free trade regime will continue to put barriers in the paths of environmentalists and aboriginal people who believe that the priority is to change from our historical patterns of uncontrolled resource use to use founded on conservation and long-term sustainability.

Secondly, the question arises: what rights will aboriginal governments have in the future to participate in trade negotiations and dispute processes which may have direct impacts on aboriginal communities? Certainly, the agreements have no provision for such participation: even provincial governments may not participate, although their policies may be under examination by these secret processes. Nor can citizens participate or even observe the hearings. Yet decisions may be made in these hearings, as in the negotiations, with immense implications for aboriginal communities.

Many indigenous Mexican peoples are already feeling the impacts of NAFTA, through the privatization of lands that were formerly communal agricultural lands. This policy, pursued by the Mexican government currently with promotion of NAFTA, is causing Mexican native peoples to lose lands they previously farmed, resulting in an influx of impoverished peoples to the cities.

We believe it would be helpful, in the struggle against expansion of free trade in Canada, to hear aboriginal voices raised against it. We do believe it poses additional profound problems for aboriginal self-government.

CONCLUSION

Again, we thank you for the opportunity to speak with you today, and wish you well in your important work. If we may assist you in any way, we would be pleased to do so.