Balancing Indigenous Rights and International Environmental Concerns in Polar Bear Management: New Developments in Canadian Modern Treaty Contexts

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I. Introduction

A September 2021 decision of Canada's Federal Court of Appeal in *Makivik Corporation v Canada (Attorney General)*[1] highlights broad, complex issues involving in balancing Indigenous rights and international environmental concerns in polar bear management. These issues are challenging, and the case signals both the ongoing challenges and the developing expectations of achieving a different balance than has been achieved in the past.

The issues of integrating different underlying interests, rights, and values in relation to polar bear management issues have been noted for some time by scholars like Kamrul Hossain as involving a manifestation of international law fragmentation, in which Indigenous rights dimensions of the issue might well be in tension with treaty commitments related to polar bears developed in the context of broader environmental concerns.[2] In respect of the latter, Nigel Bankes, a scholar normally highly attentive to Indigenous rights concerns, has written about the 1973 *Agreement on the Conservation of Polar Bears (ACPB)*[3] with scarcely a mention of Indigenous harvesting,[4] manifesting some of the disconnect of legal regimes on polar bear management oriented to other perspectives from the pertinent Indigenous perspectives bearing on this context.[5]

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[1] 2021 FCA 184.

[2] Kamrul Hossain, "Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Right Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?" (2008) 10 International Community Law Review 295

[3] *Agreement on the Conservation of Polar Bears*, UNTS 2898, I-50540, Oslo, 15 November 1973, entered into force 26 May 1976.

[4] Nigel Bankes, "Polar Bears and International Law", in Natalia Loukacheva (ed) *Polar Law Textbook II* (Copenhagen: Nordic Council of Ministers, 2013) 123.

[5] For other treatments of note on this and associated questions, see also Martha Dowsley & George Wenzel, "The Time of the Most Polar Bears': A Co-Management Conflict in Nunavut" (2008) 61:2 Arctic 177; Leena Heinamaki, "Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of

In light of these important Arctic issues—with the direct pertinence of polar bears but also with potentially broader-reaching implications implicit in any better-developed means of reconciling the interests and values at stake in this context—any case law development on the issue is of broader interest, and it is in this vein that we turn to the recent Canadian development in the *Makivik Corporation* case. This case sees the application of modern treaties negotiated between the Canadian government and Indigenous peoples in Canada's Arctic regions, along with associated duties of consultation with Indigenous peoples, in finding greater clarity than seems to be possible at this point in time based solely on more general considerations.[6]

II. The *Makivik Corporation* Case

Makivik Corporation v Canada (Attorney General)[7] is an appeal from a judicial review of an administrative decision made by the Minister of the Environment and Climate Change Canada. The Minister, in accordance with the system set out in the Nunavik Inuit Land Claims Agreement (NILCA), varied a decision made by the Nunavik Marine Region Wildlife Board (the "Board"). The case reflects upon a careful balance between Indigenous rights and international environmental concerns in polar bear management. We focus on those aspects of the decision, while noting the significance of the case for Canadian administrative law doctrine in ways examined by other authors.[8]

By way of background, the NILCA at issue within the case is a modern treaty negotiated between Canada and the Nunavik Inuit, represented in the case by the Makivik Corporation, pertaining to the northern and offshore regions of Quebec and Labrador. Article 5 of NILCA establishes a co-management regime for wildlife that designates decision-making authority for the

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the Global Environment" (2009) 11 International Community Law Review 3; Greta Swanson et al, "Traditional Ecological Knowledge in Environmental Decision-making" (2019) 49:4 Environmental Law Reporter News & Analysis 10309.

[6] For a complexity on how different modern treaties in different parts of Canada's Arctic interact, see also Daniel W. Dylan, "The Duty to Consult on Wildlife Matters in Overlapping Northern Land Claims Agreements" (2015-2016) 1 Lakehead Law Journal 45.

[7] *Makivik Corporation, supra* note 1.

[8] See especially Daniel W. Dylan, "Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimajatuqangit: the Dimensions of Judicial Review in Nunavut" (2021), 34 Can J. Admin L & Pract. 265.

NILCA-established Board and Federal and Nunavik Ministers. The Board is an institution of public government and has various powers including setting an annual total allowable take (TAT) and non-quota limitations (NQLs) on harvesting species subject to the regime. The Board is set out in NILCA as the primary regulator and main instrument for wildlife management in the region.

The decisions made by the Board that are related to matters within Federal jurisdiction are subject to a "two-way, conversation-like process" between the Board and the Federal Minister.[9] The Board firstly sends the Minister a private, initial decision, to which the Minister then responds with an acceptance or rejection. The Board is able to reconsider the decision in light of the Minister's reasons, and then create a final decision that may be made public. The Minister may then accept, reject, or vary this final decision with reasons.[10]

The Board establishes a TAT for various subpopulations of polar bears. Polar bear harvesting has cultural, economic, social, and nutritional significance to the Nunavik Inuit, and thus the decision-making process set out in NILCA requires this significance to be considered alongside the other central objective of conservation.[11] Harvesting is set out in NILCA as to only be restricted "to the extent necessary to effect a conservation purpose."[12]

The Board commissioned a study of Inuit traditional knowledge (ITK) that it referred to in its decision-making. The Board decided upon a TAT of 28 bears, and stated that they had concluded that this would be sustainable and consistent with the Inuit's traditional practices.

However, the results of the ITK study contradicted some available scientific data. Specifically, the ITK disagreed with the scientific data that the relevant subpopulation of polar bears had deteriorating body conditions.

The Minister initially rejected the TAT, stating that 28 bears was unsustainable, and suggested that the Board should include a sex-selective harvest NQL. The Minister's rejection did not contain any mention of issues with the ITK

[9] *Makivik Corporation, supra* note 1, para 27.
[10] See *ibid*, para 28
[11] See *ibid*, para 16-18.
[12] *Ibid*, para 23

study or the NQLs that the Board established. The Board's reconsideration affirmed their TAT of 28 bears and rejected the suggestion of an NQL of sex-selection, stating that it was against Inuit values and the natural balance of the wildlife populations.[13]

After the Board's final decision, concerns related to the ITK study were raised by Federal officials. The Board was not given notice of these concerns prior to its final decision. These issues mainly consisted of methodological issues with the ITK study, including gaps of information as to how many individuals were interviewed or the scale of observations made.[14]

The Minister then varied the final decision, which reduced the TAT to 23 bears, added the requirement of a sex-selective harvest, and rejected some of the Board's NQLs. This decision by the Minister is what was then subject to judicial review.

The application judge found that the Minister's conduct failed to uphold the honour of the Crown as it pertained to the NQLs, but declined granting relief. However, on appeal, the Court ultimately decided that the Minister's conduct in relation to the NQLs as well as to the ITK failed to uphold the honour of the Crown, and granted declaratory relief on that basis.

Though there were numerous issues between the parties, many of which pertained specifically to Canadian administrative law, some of the issues dealt with the balancing and integration of Indigenous traditional knowledge and practices alongside scientific and conservation principles. The case also considers the government's obligations to Indigenous peoples in relation to international conservation objectives.

The NILCA establishes the expectation that traditional Inuit knowledge of wildlife is to be integrated with scientific knowledge and research.[15] The Makivik Corporation raised numerous issues with the lack of adequate integration between the two in the Minister's decision, particularly suggesting that the Minister was under an obligation to "find a way to put the two systems together" regardless of their differing conclusions.[16]

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[13]See *ibid*, para 40.
[14]See *ibid*, para 49.
[15]*Ibid*, para 2.
[16]*Ibid*, para 90.

However, the fact that the two systems were in opposition posed a difficulty for how proper integration could take place. A cited article observes that "there is currently no formula or algorithm" determining how to properly integrate the two.[17] Further, counsel for the Makivik Corporation admitted that it is "difficult" to integrate the two when they are in direct disagreement and that it largely becomes circumstantial.[18] The inconsistencies present led to the Court's conclusion that the decision by the Minister and the degree of integration was reasonable.

The difficulties in such an exercise are clear in the Court's suggestion that the Board had engaged in a similar process as the Minister, despite arriving at different conclusions.[19] The question of what specifically qualifies as an adequate integration between the two source of knowledge is left unclear, considering that the Court simply concluded that the Minister's attempt was reasonable in light of those factual uncertainties.[20]

However, procedural flaws that pertained to the Canadian government's conduct in relation to Indigenous issues were ultimately determinative against the government's argument. The Minister's letter to the Board rejecting the initial decision did not disclose any of the reservations concerning the ITK study, despite the Minister having a memorandum that had set out those said methodological concerns. Although the Court stated NILCA does not establish an obligation for extensive dialogue, the requirement set out in NILCA for the Minister to provide reasons for her decisions is to be interpreted purposively within the

[17] *Ibid*, para 96.
[18] *Ibid*.
[19] See i*bid*, para 95.
[20] There was another issue that the judge declined to consider. The application judge had extensively considered the influence of international politics as well as CITES (the Convention on International Trade in Endangered Species of Wild Flora and Fauna) upon the Minister's decision. There had previously been a threat of a trade ban, through the up-listing of the polar bear to Appendix I of CITES, which would effectively halt international trade of the polar bear. The Minister is interpreted to have significantly considered this in her decision especially as it pertained to the economic implications of this for the Inuit: paras 119 and 122. The Makivik Corporation argued that it was unreasonable for the Minister to weigh the Inuit's economic concerns over their cultural concerns. This raises the tension that may often exist between a State's international obligations and their obligations to a rights-bearing community. The Court declined to deal with this portion of the argument related to international politics, instead determining that potential economic impacts are relevant under the scheme of NILCA: para 125.

context of NILCA and its objectives.[21] The purpose behind that requirement cannot be fulfilled "unless the minister's written reasons disclose the real reasons for the Minister's decision to reject."[22] This conclusion is aided by how providing sufficient reasons is significant in reconciliation within Canadian jurisprudence. The Court makes reference to the past Supreme Court of Canada decision in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*. in stating that not only do written reasons "foster reconciliation" but are a "sign of respect [which] displays the requisite comity and courtesy."[23]

Thus, even though the Minister was not required through the NILCA to be in constant dialogue, the Minister failed to adequately implement the NILCA's requirements and was determined to have breached the honour of the Crown. On a similar basis, the Court also determines that the Minister did not reasonably act in accordance with the honour of the Crown in relation to the NQLs. The Minister's failure to communicate denied the Board an opportunity to address the concerns with the NQLs, going against the intention of the NILCA decision-making process.

III. Broader Implications

The Court thus ultimately showed some deference to the Ministerial decision on how to integrate Indigenous knowledge and Western scientific knowledge in relation to the management of polar bears. There is little clear guidance to be discerned on this issue from this decision, and there are ongoing challenges in considering such decisions and the associated balancing of Indigenous rights and treaty commitments within international legal regimes that have been less attentive to Indigenous rights. At the same time, the Court was able to offer a measure of protection by drawing upon Canada's legal doctrines on consultation with Indigenous peoples as an aspect of governmental conduct associated with the honour of the Crown.[24] In doing so, the Court also drew upon specific modern treaty

[21]See *ibid*, para 109

[22]*Ibid*.

[23]*Ibid*, para 111. For the past decision, see *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*., 2017 SCC 40, [2017] 1 S.C.R. 1069. For a past discussion of it in this journal, see Dwight Newman, "Litigation Concerning Consultation with Indigenous Communities in Nunavut, Canada" (2016) 4 Current Developments in Arctic Law 17.

[24] For general analyses of Canada's duty to consult, see Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) and Dwight Newman, "The Section 35 Duty to

arrangements between the Canadian government and Arctic Indigenous peoples undergirding the conclusions on consultation and honour of the Crown. These realities of how the case played out establish certain broader implications from the case.

Notably, without one definitive means established of reconciling Indigenous knowledge and Western scientific knowledge, governments facing judicial review of decisions on how they have done so will operate within a sphere of some judicial deference. In the absence of courts being convinced as to one particular way being most definitively appropriate, there are only limited ways in which they might review such decisions. As a result, the decision likely implies some continued room for governments to operate in that sphere.

That implication does not take away from the significance of efforts to work through appropriate means of resolution on such issues. Indeed, there is important room for the scholarly community to build upon what work has been done and to carry on to the development of more prescriptive approaches, if more prescriptive approaches can appropriately be identified. If well-reasoned, those approaches could guide governments more clearly in this challenging area of policy-making and shape how courts respond in judicial review contexts where they assess the reasonableness of government action.

In the meantime, established agreements between Indigenous communities and non-Indigenous governments may have central roles to play. The modern treaty arrangements in Canada's Arctic regions are a significant accomplishment in having been attained through successful negotiations. One of the most visible signs of their significance is the existence today of the Nunavut territory on a map of Canada, but their effects reach far beyond that in less immediately visible ways that involved the recognition of many rights in various Indigenous peoples of Canada's Arctic. They form an essential part of what we have previously called the "contextualized decolonization" of the North.[25] They are what provided the court a means of review that supported declaratory

Consult", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers (eds) *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017).

[25] Dwight Newman, "International Indigenous Rights Law and the Contexualized Decolonization of the Arctic", in Ken S. Coates & Carin Holroyd (eds) *The Palgrave Handbook of Arctic Law and Politics* (Chaim, Switzerland: Palgrave Macmillan, 2020) 427.

relief in the case at hand. Modern treaties in Canada establish rights in tangible ways agreed by the parties and are thus particularly appropriate to apply in the context of contested issues where they offer a resolution on those issues.

One resulting complexity is that in the context of the somewhat fragmented form of international law on such issues, on which specific international treaty regimes and Indigenous rights may not have been brought into any definitively reconciled relationship, a state like Canada with entrenched commitments on Indigenous rights may be expected to take a different approach to its international treaty commitments. The *ACPB*, with its determinations on polar bear management, is particularly notable in the ways it may be affected by domestic commitments on Indigenous rights, especially given the role of polar bears in the life of Inuit communities located across Canada's Arctic region. Those interested in the *ACPB* need to engage in a new wave of thinking on its intersections with Indigenous rights, both from pragmatic predictive perspectives and for the sake of any contemplation of modifications to future normative guidance.

As in so many other contexts, the Arctic region is a complex place that evokes highly complex governance challenges out of proportion to the size of the population of the region. The Arctic states need to be engaged in challenging ongoing work on these governance challenges in light of the unique characteristics of the Arctic and the challenging issues raised. The latest case from Canada's courts on polar bear management is partly yet another reminder of these realities. While it has some specific implications on the respective roles of generalized approaches and more specifically agreed approaches with Indigenous peoples of the Arctic, it also repeats these broader lessons of the ongoing governance challenges to be faced. As scholars engaged with Arctic law or polar law, our efforts are ever more needed and we must continue to make the best contributions we can to the challenging issues of this region that matters both in and of itself and in its relationship to the world as a whole.

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