Treaty Rights to Carbon Offsets within the Proposed Cap-and-Trade Regime in Ontario

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Foreword

This paper represents one of the strategies I have used to achieve the learning objectives set out in my Plan of Study. The components of my Plan of Study are: Aboriginal law, Canadian climate change policy and legislation, and Interrelationships between climate change and aboriginal people. While my research on this paper did certainly enhance my learning within all of these components, the ultimate question was mainly focused on the last component – Interrelationships between climate change and aboriginal people. One of the main objectives under this component was to learn about how aboriginal law can affect how governments create policies or legislation concerning climate change so that I can determine whether there are gains to be made in both reconciliation and climate change mitigation. This paper explores one application of that question. The broader aim of this paper was to provide an example of how reconciliation and climate change mitigation can work together to produce mutual gains. Specifically, I sought to determine whether there is a legal obligation on the Crown to ensure reconciliation and climate change mitigation work together in the context of Ontario's proposed cap-and-trade legislation and regulations. This work is a capsule of my entire Plan of Study.

Abstract

The Government of Ontario has announced that it will join the Western Climate Initiative's cap-and-trade program, with the first compliance period starting as soon as January 1, 2017. The program will include the use of carbon offsets and establish an offset registry. This paper examines the question of whether Ontario's treaties with First Nations in Northern Ontario create a right to ownership and control of carbon offsets situated on traditional territories. First, I discuss the cap-and-trade regime as a whole, and the criteria for carbon offsets specifically. Then I explore some of the overarching obligations of the Crown in relation to aboriginal communities generally and the more specific rights of First Nations communities in Northern Ontario. Finally, I provide three arguments that First Nations could use to assert a right to a *sui generis* ownership of the carbon sequestration capabilities of their traditional territories. The first argument relies on an incidental right to the enumerated treaty rights, the second is framed as a right to harvest carbon offsets, and the third deals with the expansion of the interpretation of the treaties to include sharing in the benefits of the land. Though tenuous, these arguments provide some tools for First Nations to use in negotiations with the Crown during the development of offset protocols and regulations surrounding the offset market.

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I. Introduction

The Ontario government has recently set out a vision for how it will help to combat climate change. The Climate Change Strategy Report sets out the province's target of reducing greenhouse gas emissions reduction target of 80 per cent below 1990 levels by 2050, with mid-term targets of 15 per cent below 1990 levels by 2020 and 37 per cent below 1990 levels by 2030.[1] In discussing the strategy for how Ontario will get to its mid-term target in 2030, the report states that Ontario will "work with First Nations and Metis communities to help implement the climate change strategy and to inform development of the action plan"[2]. It goes on to state:

> Our strategy recognizes that impacts of climate change are keenly felt in First Nations and Métis communities. We will work in partnership to address the challenges, and to develop a greater understanding of the key role First Nations and Métis communities can play in advancing our broader climate change approach using traditional knowledge, while recognizing the sovereignty and autonomy of First Nations and Métis communities. [3]

This indicates the provincial government's awareness of the need to collaborate with aboriginal communities in Ontario while planning and implementing its greenhouse gas reduction strategies.

The Strategy Report also confirmed the April 2015 announcement[4] that Ontario will join the cap-and-trade system under the Western Climate Initiative (WCI), partnering with Quebec and California. The first compliance period is set to start in 2017, with the cap in line with the

[1] Government of Ontario, "Climate Change Strategy Report 2015" online: <http://www.ontario.ca/page/climate-change-strategy>.
[2] *Ibid* at 21.
[3] *Ibid* at 21.
[4] Government of Ontario, Office of the Premier, "Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario" 13 April 2015, online: <https://news.ontario.ca/opo/en/2015/04/cap-and-trade-system-to-limit-greenhouse-gas-pollution-in-ontario.html>.

best estimate of emissions in that year, and declining at a rate that would ensure that the province achieves its 2020 emissions reduction target.[5]

My paper will explore one of the ways that aboriginal law and climate change law can be integrated such that there are benefits for both reconciliation with aboriginal people and climate change mitigation. I will use the example of a cap-and-trade system in Ontario to explore whether the law provides aboriginal communities in Northern Ontario with a right to the use and control of carbon sinks on their traditional territories for offset credits. First I will examine cap-and-trade and the possible offset projects that aboriginal communities could put in place on their traditional territory in a way that is consistent with the exercise of aboriginal cultures in Ontario, such as in forests, peat bogs, and plant rich ecosystems. Because I am using Ontario as the jurisdiction guiding my research, I will need to consider the effects of existing treaties and the current dialogue surrounding these treaties. I will use the example of Treaty 9 when necessary because it covers the majority of Northern Ontario.

This topic is important because Ontario is currently designing a cap-and-trade system that will incorporate carbon offsets, and the extent to which the government is integrating aboriginal law into their system is unclear. The cap-and-trade mechanism must be designed to be compatible with any historic, current and future aboriginal rights to carbon sinks. In her mandates to her ministers, Premier Kathleen Wynne has emphasized both the importance of climate change action and the well-being of aboriginal communities.[6] Ontario's climate change

[5] Climate Change Strategy Report, *supra* note 1.
[6] Don Richardson, "Premier Wynne's Priorities for Ontario: Aboriginal Community Wellbeing" 26 September 2014, Shared Value Solutions, online: <http://info.sharedvaluesolutions.com/blog/premier-wynne%E2%80%99s-priorities-for-ontario-aboriginal-community-wellbeing>;
Government of Ontario, "2014 Mandate letter: Environment and Climate Change", online: <https://www.ontario.ca/page/2014-mandate-letter-environment-and-climate-change>; Government of Ontario, "2014 Mandate letter: Aboriginal Affairs", online: <https://www.ontario.ca/page/2014-mandate-letter-aboriginal-affairs>.

discussion paper of 2015 made it clear that it plans to "engage First Nations and Metis communities across Ontario in a focused conversation to work together to address climate impacts and climate change." It is important to hold the government to this commitment and explicitly recognize the rights and obligations of aboriginal communities and the crown in this context. Furthermore, this will provide an example of how reconciliation and climate change mitigation can work together to achieve outcomes that are greater than the sum of their parts.

The specific research question is whether the treaties create a right to ownership and control of carbon sequestration projects on First Nations' traditional territories within the proposed cap-and-trade regulation in Ontario. Would this be consistent with the current jurisprudence on treaty rights? Can carbon sinks be conceptualized such that they would fit into the test set out by the jurisprudence?

As an introduction, I will briefly note the relevant principles of aboriginal law and cap-and-trade regimes, and then review some of the literature that has integrated the two.

Aboriginal communities have a special relationship with the Crown that creates rights and obligations for both parties. The principle of the honour of the Crown requires that the Crown act honourably in all its dealings with Aboriginal peoples, "from the assertion of sovereignty to the resolution of claims and the implementation of treaties".[7] The amendment of the Constitution in 1982 recognized and affirmed the existing aboriginal and treaty rights of the aboriginal peoples of Canada.[8] In the Ontario context, the most relevant are treaty rights which are defined in negotiated agreements between the Crown and aboriginal peoples. Older treaties are to be given a large and liberal interpretation, with ambiguities in wording resolved in favour

[7] *Haida Nation v British Columbia (Minister of Forest)*, 2004 SCC 73 at para 17 [*Haida*].
[8] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 35(1).

of the Aboriginal party, and limitations restricting rights narrowly construed.[9] Aboriginal and treaty rights can be infringed by the Crown in certain circumstances.[10]

A cap-and-trade system constrains the total amount of emissions of regulated sources by creating a limited number of tradeable emission allowances. The most important requirement of a cap-and-trade system is that the cap on emissions must be sufficiently tight to create a real demand for emission allowances.[11] The tighter the supply of emissions allowances, the higher the market price, and the greater the incentive to invest in abatement technology.[12] Cost uncertainty based on unexpectedly high or volatile allowance prices can undermine political support for climate policy, make business planning difficult, and discourage investment in new technologies.[13] This concern has led to incorporating "cost-containment" measures, such as offsets, allowance banking and borrowing, and safety valves.[14] For the purpose of this paper, I will focus on carbon offsets.

Most emissions trading systems allow regulated entities to use credits purchased from offset projects to meet their commitments.[15] The specific rules regarding offsets vary widely between systems. There has been some debate over the legitimacy of the offset market, especially with respect to the quality and integrity of greenhouse gas offsets, along with worry over the appropriateness of buying “indulgences” to absolve carbon guilt.[16] Rigorous screening

[9] *R v Badger*, [1996] 1 SCR 771 at para 41 [*Badger*]; *Marshall v Canada* [1999] 3 SCR 456 [*Marshall I*].
[10] See for example, *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
[11] Christie J Kneteman, "Building an Effective North American Emissions Trading System: Key Consideration and Canada's Role" (2010) 20 Journal of Environmental Law and Practice 127.
[12] *Ibid.*
[13] Joseph E Aldy & Robert Stavins, "The Problems and Promise of Pricing Carbon: Theory and Experience" (2011) NBER Working Paper No 17569 at 6; Gilbert E Metcalf, “A Proposal for a US Carbon Tax Swap: An Equitable Tax Reform to Address Global Climate Change” (2007) Discussion Paper: The Hamilton Project at 26.
[14] Aldy, *ibid* at 6.
[15] *Ibid*.
[16] Steven Bernstein et al, "A Tale of Two Copenhagens: Carbon Markets and Climate Governance" (2010) 39(1) Millennium: Journal of International Studies 161 at 169.

of offsets is expensive and diminishes potential cost savings created by offsets.[17] The alternative view is that offsets add a necessary flexibility mechanism and also allow for innovation in unregulated sectors.[18] I will explore whether offset systems have the added benefit of including aboriginal communities in the cap-and-trade program in a way that is mutually beneficial. The Ontario cap-and-trade system will include offsets echoing that of the other jurisdictions that make up the WCI – currently California and Quebec.[19] For example, Quebec allows the use of offsets to a maximum of 8% of compliance, in projects such as manure storage facilities, waste disposal sites, and ozone-depleting substances projects.[20] Projects must take place in California or Quebec to qualify as an offset in Quebec's system.[21]

In 2006, the Centre for Indigenous Environmental Resources prepared a report for the Assembly of First Nations called, "Legal Review of First Nations' Rights to Carbon Credits".[22] The review focused broadly on three possibilities. The first is through the claim that carbon as a resource was not ceded by First Nations to the Crown specifically, and thus ownership and rights of use still lie with the First Nations. The second is ownership and use of carbon through the exercise of territorial jurisdiction through settled land claims, on-reserve use, and aboriginal title. The third is ownership and use of carbon through the exercise of aboriginal and treaty rights. The legal arguments assert First Nation's jurisdiction to environmental management in territories that can be used as carbon sinks, thus enabling First Nations to claim and sell offset credits. In the

[17] Richard G Newell, William A Pizer & Daniel Raimi, "Carbon Markets 15 Years after Kyoto: Lessons Learned, New Challenges" (2013) 27(1) The Journal of Economic Perspectives 123.
[18] Kneteman, *supra* note 11.
[19] Ontario Ministry of Environment and Climate Change, "Cap and Trade Program Design Options" November 2015, online: <http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2015/012-5666_Options.pdf>.
[20] Canada's Ecofiscal Commission, "The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions" (April 2015), online: <http://ecofiscal.ca/reports/wayforward/> at 39.
[21] *Ibid*.
[22] Centre for Indigenous Environmental Resources and the Assembly of First Nations, 2006. "Legal Review of First Nations' Rights to Carbon Credits" 2006, online: <http://www.yourcier.org/uploads/2/5/6/1/25611440/report_6_-_legal_review_of_first_nations_rights_to_carbon_credits.pdf>.

context of Ontario, where the argument would need to be framed in terms of aboriginal or treaty rights, the authors argue that claims can be made through rights to sustainable forest practices that are conducive to claiming, owning and selling carbon offset credits.

In the first argument, interests in carbon are likened to rights to water, which are asserted to not have been specifically ceded by First Nations through treaty, and therefore an argument can be made that ownership still resides with First Nations.[23] However, the authors discuss this in the context of reserve land, and therefore wouldn't apply to all of the First Nation's traditional territories. In the second argument, the authors suggest that in areas controlled by First Nations governance structures under settled land claims agreements, on reserves, and off-reserve through assertion of Aboriginal title, forests and other areas can be managed and conserved in a way that is compatible with the creation of carbon offset credits.[24] First Nations are free to use these lands towards the benefit of its members as long as the land is not used in a way that is irreconcilable with the Aboriginal use for which it was claimed. Again, this argument relies on a very small portion of the land in Ontario being available for First Nations use as carbon sinks. Finally, with respect to aboriginal rights, the authors suggest that a First Nation might be able to demonstrate that the traditional use of trees directed toward a common end, community health and well-being, could be extended to rights to store carbon in a way that would result in economic benefit for the community.[25] An alternative that was also mentioned was the right to environmental management and conservation. Exercising these rights would result in "engaging in activities necessary to assert ownership over resulting carbon offset credits for the reduction of greenhouse gases,"[26] enabling the First Nation to sell the credits under an offset system. Finally, good

[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*.
[26] *Ibid* at 9.

conservation practices and forest management could be said to be incidental to the exercise of other protected aboriginal rights, such as hunting.[27] Within the discussion of treaty rights, the authors stated that the treaties contemplated the guarantee of necessary conditions for the continued exercise of the treaty rights. They suggest that there would be a need to incorporate First Nation's perspectives into how the territory should be managed in order for them to continue to exercise their treaty rights, and that this consultation could lead to the creation of carbon offset credits that would then be used and sold for the benefit of the First Nation.[28] The arguments put forth in this report were preliminary and require further examination. In particular, this final argument based on exercising treaty rights within a First Nation's traditional territory is under-developed. The authors state that

> the territory ceded by treaty still must be maintained in a way that is compatible with the exercise of First Nations' treaty right; any government action to the contrary requires satisfaction of a duty to consult and accommodate. This *implies* the need to incorporate First Nations' perspectives on how the territory *should* be managed in order for them to be able to continue to exercise their rights. Since these perspectives would *likely* correlate with conservation initiative and forest management measures that also increase the territory's use as a carbon sink, a First Nation's role in practices towards that end *could* result in obtaining carbon offset credits that could then be used and sole for the benefit of the first Nation" (emphasis added).[29]

This argument results in a very weak conclusion. It seems to rely on the goodwill of the provincial government, not on legal grounds. I will attempt to strengthen the argument for a treaty right to ownership of carbon offset credits within a First Nations' traditional territory.

[27] *Ibid*.
[28] *Ibid*.
[29] *Ibid* at 11-12.

II. Cap-and-Trade and the Offset Market

A. Principles of Cap-and-Trade

In this section I will examine cap-and-trade generally, and then the possibilities for an offset market more specifically. A cap-and-trade system constrains the total amount of emissions of regulated sources by creating a limited number of tradeable emission allowances. The efficiency created by this kind of system is that the firms that have a low cost of compliance will do so first, trading their extra credits with those who would have a higher cost of compliance. This way, allowances are put their highest-value use -- covering the emissions that are the most costly to reduce, and providing incentive for the least costly reductions.[30]

This system is more complicated than a straight carbon tax. Policy makers will need to decide on how many allowances to issue, the scope of the cap's coverage, including whether to regulate based on the sale of fuels or based on monitored emissions (upstream or downstream emissions), how do distribute allowances, which "cost containment measures" to include, and how to regulate offsets. Furthermore, it requires the creation of a complex and costly trading sector.

The most important requirement of a cap-and-trade system is that the cap on emissions must be sufficiently tight to create a real demand for emission allowances.[31] The tighter the supply of emissions allowances, the higher the market price, and the greater the incentive to invest in abatement technology.[32] Even if there is a floor price in the trading scheme, and permits are actioned off, without a tight enough cap, the result would simply be a carbon tax that is too low to effect change.

[30] Aldy, *supra* note 13 at 5.
[31] Kneteman, *supra* note 11.
[32] *Ibid.*

Cost uncertainty based on unexpectedly high or volatile allowance prices can undermine political support for climate policy, make business planning difficult, and discourage investment in new technologies.[33] This concern has led to incorporating "cost-containment" measures, such as offsets, allowance banking and borrowing, and a safety valve.[34]

Emission allowances can be either given away (known as "grandfathering") or auctioned off. Historically they have been given away to industry as part of a process to obtain support for the system.[35] This practice has been criticized for a few reasons.[36] Firstly, it is a loss of substantial revenues, which could be used to lower other taxes as well as for investment in clean technologies. Secondly, the free allocation of permits can undermine the goal of discouraging the consumption of carbon-intensive energy. Furthermore, it decreases transparency in the system.[37] Metcalf argues that a cap-and-trade scheme with grandfathered permits create windfalls that accrue to shareholders.[38] This results in a regressive system, because equities are predominantly owned by wealthier households.[39] A study modelling the welfare implications of different climate policies demonstrated that grandfathering creates significantly worse welfare outcomes compared to a system employing per-capita allocation of associated revenues.[40] The allocation of permits also creates significantly more complexity in the design of the system. If allocations are based on historical emissions, benchmarking is required.[41]

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[33] Aldy, *supra* note 13 at 6; Metcalf, *supra* note 13 at 26.
[34] Aldy, *ibid* at 6.
[35] Metcalf, *supra* note 13.
[36] *Ibid* at 22.
[37] Kneteman, *supra* note 11.
[38] Metcalf, *supra* note 13 at 23.
[39] Ibid.
[40] Andrew J Leach, "The Welfare Implications of Climate Change Policy" (2009) 57 Journal of Environmental Economics and Management 151.
[41] Metcalf, *supra* note 13 at 24.

The free allocation of permits is argued to be a device that would reduce carbon leakage caused by firm relocations to other countries with less stringent emissions targets.[42] One study has demonstrated through modelling that grandfathering can be an effective tool to discourage relocation in the long run, even when the practice is terminated in a finite amount of time.[43] The authors suggest that the driving force behind this result are sunk investments into low-carbon technologies or emission-saving equipment that create a lock-in effect, preventing relocation even after phasing-out the free allocation of permits.

Recently there has been a preference for auctioning off at least some of the permits within a system in order to send a clear price signal and to avoid charges of windfall profits.[44] This preference likely developed from lessons learned from the European Union Emissions Trading Scheme (EU ETS) experience, where free allocation along with an over-allocation of permits led to a dramatic collapse in permit prices. It also allows for funds to be raised for recycling back into the system to offset consumer price increases or to invest in research.

Another way to provide certainty over time is to allow the "banking" of emission credits between trading periods. This practice allows firms to reduce emissions below their allowance allotment in one year and then save, or "bank" the surplus allowances for use or trade in future years.[45] This provides an incentive to make early reductions to smooth out the transition to more strict regulations in the future as the cap decreases.[46] One of the problems with banking is that it can solidify any early mistakes in the supply of emissions credits.[47] If there is an over-supply of

[42] Robert C Schmidt & Jobst Heitzig, "Carbon Leakage: Grandfathering as an Incentive Device to Avert Firm Relocation" (2014) 67 Journal of Environmental Economics and Management 209.
[43] *Ibid.*
[44] Matthew J Hoffman, "Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto" (2011), Oxford Scholarship Online: Constructing Carbon Markets at 5.
[45] Metcalf, *supra* note 13.
[46] *Ibid*.
[47] *Ibid*.

emission credits and banking is allowed, that miscalculation will affect subsequent periods of a trading scheme.[48] Therefore, if banking is permitted, setting the appropriate emissions cap from the beginning becomes even more important. Furthermore, banking links expectations over time, so the price today depends on expected prices tomorrow. [49]

Most emissions trading systems allow regulated entities to use credits purchased from offset projects to meet their commitments.[50] The specific rules regarding offsets vary widely between systems. For example, the EU ETS allows the use of CDM credits, although often limited to certain sectors or percentages of total emissions covered.[51] The Regional Greenhouse Gas Initiative (RGGI), on the other hand, places specific limitation on the geographic locations where offset credits may be generated -- the majority of offsets must come from projects within the US.[52] There has been some debate over the legitimacy of the offset market, with contestation over the quality and integrity of greenhouse gas offsets.[53] There has been worry over whether emissions reductions projects are credible and the appropriateness of buying 'indulgences' to absolve carbon guilt.[54] One of the problems often cited is that in unregulated countries, there is no baseline against which one can unequivocally prove that emissions are reduced.[55] Even domestic offsets are subject to verification and leakage concerns -- especially for agricultural and forestry projects such as reforestation and manure methane capture.[56] Rigorous screening of offsets creates transaction costs that eat into the potential cost savings.[57] The alternative view is

[48] *Ibid*.
[49] Newell, *supra* note 17.
[50] Hoffman, *supra* note 44.
[51] *Ibid*.
[52] *Ibid*.
[53] Bernstein, *supra* note 16 at 169.
[54] *Ibid*.
[55] James W Coleman, "Unilateral Climate Regulation" (2013) online: <http://ssrn.com/abstract=2237623>.
[56] Kneteman, *supra* note 11.
[57] Newell, *supra* note 17.

that offsets have value not just for the flexibility mechanism, but also the capacity to stimulate innovation and shifts in common practices in unregulated sectors.[58] This would allow emission trading schemes with a narrow scope in terms of sectoral coverage to have a broader societal impact.[59]

Safety valve provisions in cap-and-trade systems are one way to limit volatility in the price of emissions allocations. This allows firms to purchase an unlimited number of permits at a set price, therefore setting a ceiling on the price of allocations.[60] If the market price for emissions allocations is below the safety-valve price, then firms will purchase allocations in the open market, but once allocation prices reach the safety valve price, firms will purchase any needed permits directly from the government.[61] This effectively changes the system into a carbon tax once the price reaches a certain limit. While the safety valve increases certainty for businesses, it severely decreases the certainty in the amount of emissions reductions, which would have been one of the main benefits of the cap-and-trade system.

Linkages between cap-and-trade systems will allow permits generated in one system to be sold and used for compliance in another system. This is beneficial because it allows for the reductions in emissions to occur in the most efficient way -- in the firms and locations where it is cheapest to do so. Linkages with other systems create improved market liquidity by combining many participants from varying sectors.[62] Insufficient trading activity can lead to temporary shortages of emissions credits, which may scare regulators into raising the cap, or force emitters

[58] Kneteman, *supra* note 11.
[59] *Ibid*.
[60] Metcalf, *supra* note 13 at 27.
[61] *Ibid*.
[62] Kneteman, *supra* note 11.

to undertake their own technological investments, leading to inefficiency.[63] It is important that a linked cap-and-trade system has a similarly stringent cap across all partners and enforcement of those caps. Otherwise, there would be a powerful incentive to adopt a less stringent cap or under-enforce its cap, which would, in effect, subsidize its own industries.[64] This is one of the problems that occurred in the EU ETS.

B. Lessons from other Jurisdictions

The EU ETS adopted the downstream regulation approach and included large sources such as oil refineries, combustion installations over 20MWth, coke ovens, cement factories, ferrous metal production, glass and ceramics production, and pulp and paper production.[65] The process for setting caps and allowances was initially decentralized to the EU member states. This created incentives for individual countries to overestimate their emissions to protect their economic competitiveness, resulting in an aggregate cap that exceeded the EU's business-as-usual emissions. This led to a dramatic decrease in allowance prices. The volatility in the prices has been attributed to the absence of transparent, precise emissions data at the beginning of the program, a surplus of allowances, energy price volatility, and a program feature that prevented banking of allowances from the first phase to the second phase of the program.[66] The system's cap was tightened for phase II (2008-2012) and its scope expanded to cover new sources. The price fell again by 2011 with the economic recession. Phase III is underway with a decreased

[63] *Ibid*.
[64] Coleman, *supra* note 55.
[65] Aldy, *supra* note 13 at 10.
[66] Market Advisory Committee to the California Air Resources Board, "Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California" (2007) online: <http://www.climatechange.ca.gov/market_advisory_committee/>.

cap, a larger share of the allowances subject to auctioning, tighter limits on offsets, and unlimited banking of allowances between Phases II and III.[67]

RGGI is also a downstream cap-and-trade program, but it is limited in scope to the power sector. It is also unambitious in its emissions reduction objectives -- the ultimate goal is 10 percent below 2009 emissions.[68] Some issues with this program have been noted: leakage due to the inter-connected nature of the electricity markets, it is limited in scope, lack of safety-valve mechanism, and limits to the number and geographic origin of offsets.[69]

Quebec's cap-and-trade system applies to multiple points of regulation to enable broad coverage. The regime auctions off most permits, with the exception of 27% allocated for free. The number of free permits is scheduled to decline by 1-2% annually. It is linked to the WCI, so trading of emissions credits currently occurs between firms in Quebec and California. As of February 2015, the price of permits in the joint Califonia-Quebec auction was $15.14 per tonne CO_2e -- only slightly above the price floor of $15. Quebec's floor price will rise by 5% (plus inflation) per year, and the emissions cap will fall by 3-4% annually, thus becoming more stringent over time.[70] Quebec's system has both upstream and downstream regulation. It covers upstream carbon content of fuels and electricity, as well as downstream industrial processes and electricity generation emissions above a 25,000 tCO_2e threshold. It includes fuel distributer and importers beginning in 2015. This correlates to about 85% of Quebec's total emissions.[71] Quebec is the only jurisdiction in Canada that covers non-combustion process emissions, and achieves

[67] Aldy, *supra* note 13 at 11.
[68] *Ibid* at 11-12.
[69] *Ibid* at 12.
[70] Ecofiscal Commission, *supra* note 20 at 35.
[71] *Ibid* at 42.

the highest coverage of the three Canadian carbon pricing policies currently running.[72] Quebec allows the use of offsets to a maximum of 8% of compliance, in projects such as manure storage facilities, waste disposal sites, and ozone-depleting substances projects.[73] Only offset projects that take place in California or Quebec are allowed for compliance reporting.[74] The revenues that are generated from the auctions are used mostly to support emissions reductions in the transportation sector, but also support technology and other emissions-reducing projects.[75] It is too early in the implementation period to discuss how effective this policy has been at reducing emissions.

C. Offsets in Ontario

California and Quebec both currently only allow for a maximum of 8% of the reductions needed for a particular business[76] and the WCI has released lengthy guidelines for the offsets system.[77] These guidelines are meant to offer design recommendations for the WCI offset system to WCI Partner jurisdictions. Under these guidelines, an offset certificate is a compliance instrument that is awarded by the program authority in the partner jurisdiction under the jurisdiction's cap-and-trade program to the sponsor of a greenhouse gas offset project. An offset certificate represents a reduction or removal of one metric tonne of carbon dioxide equivalent, and the project must meet the criterial for reductions and removals to be real, additional, permanent, and verifiable. Reductions and removals must also be clearly owned, adhere to

[72] *Ibid* at 37.
[73] *Ibid* at 39.
[74] *Ibid* at 39.
[75] *Ibid* at 40.
[76] C2ES: Centre for Climate and Energy Solutions, "California Cap and Trade" (2013) online: <http://www.c2es.org/us-states-regions/key-legislation/california-cap-trade#Details>; Ecofiscal Commission *supra* note 20.
[77] Western Climate Initiative, "Design for the WCI Regional Program" (2012), online: <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/program-design> [WCI Offset Design].

recommended protocols, and result from a project located in a qualifying geographic area. I will examine some of these criteria in more detail.

The requirement that greenhouse gas reductions and removals must be clearly owned is important because reporting requirements and other responsibilities related to the maintenance of the offset certification must fall to a specific entity. Disputes about ownership of the offset certification could delay registration of the offset. Therefore, it is especially important to define early on who retains the rights to carbon credits or how rights will be apportioned.[78]

The requirement that offsets be "real" ensure that the reduction or removal of CO_2e results from a clearly identified action or decision, and it must be quantified using accurate and conservative methodologies that appropriately account for all relevant greenhouse gas sources and sinks and leakage risks.[79] The reductions or removals must take place at sources controlled by the project proponent. The quantification must be done in a reliable and repeatable manner that is appropriate to the GHG source or sink, current at the time of quantification, consider local conditions whenever applicable, and account for uncertainty. Quantification methodologies and measurement techniques shall set standards for acceptable statistical precision and be based on the best available science. When uncertainty is above the defined threshold, it must apply the principle of conservativeness which means that quantification methods should use more conservative quantification parameters, assumptions, and measurement techniques that minimize the risk of overestimating emission reductions and removals credited for a given project.

To address leakage, the protocol must provide a quantitative assessment of leakage whenever possible, and when it is not feasible, a qualitative risk assessment will determine

[78] Scott A Smith & Mark L Madras, "Forest Offset Credits: A Cornerstone of Sustainable Development on Aboriginal Lands" (2009) 1:3 Climate Change @ Gowlings, online: <http://documents.lexology.com/c47984a3-4742-47a2-8a51-76147dd1e60e.pdf>.
[79] WCI Offset Design, *supra* note 77.

whether the risk of systematic leakage is significant or not. The protocol must also include a threshold to identify significant leakage.[80]

In order for an offset project to qualify as additional under the WCI guidelines, it must represent an emission reduction or removal that would not have happened under a baseline scenario.[81] The baseline must reflect conservative assumptions that are consistent across all WCI Partner jurisdictions. When possible, the baseline will be set using a sector-specific or activity-specific performance standard which is set in offset protocols based on a regional assessment of project performance or common practice. When it is not possible to set a baseline using a performance standard, a project-specific baseline may be used.

An offset will be considered permanent if either the reductions or removals are not reversible, or if the reductions or removals are reversed, the project developer must either replace the certificates representing reversed reductions with other compliance units from within the system or return certificates that were issued to the project.[82] The project shall follow or establish effective monitoring systems, risk mitigation approaches, and contingency plans that address how, in the event of an intentional or negligent reversal, any affected offset certificates will be replaced. WCI Partner jurisdictions must establish mechanisms to address reversals that are not the result of intention or negligence and where proponents' contingency measures prove inadequate. Sequestration projects must be designed so that the net atmospheric effect of their greenhouse gas removal is comparable to the atmospheric effect achieved by non-sequestration projects. The standard currently set by the UNFCCC is currently set at a sequestration timeline of 100 years.[83]

[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid*.
[83] *Ibid*.

Finally, the WCI guidelines for offsets require that a greenhouse gas reduction or removal must be verifiable. This means that the reduction or removal must be well documented and transparent, such that an independent and qualified verifier can review the offset.[84]

The cap-and-trade program design options released by the Ontario government in November of 2015 contained a number of proposals for its own carbon offset market, though it contains much less specificity than the WCI guidelines at this stage. Offset credits within Ontario would recognize real, additional, enforceable, verifiable, permanent reductions, and they "may produce co-benefits including health, social, and benefits in addition to greenhouse gas reductions."[85] The proposal explained that the WCI recommended limiting the use of offsets for compliance of an individual firm to 8% so that offsets represent no more than 49% of emission reductions needed to achieve the cap, which amounted to 4% of the overall emissions cap.[86] The limit of 4% was increased to 8% to account for the fact that some of the allowances under the cap had been diverted to create the strategic reserve.[87] The Ontario government proposed to establish an offset credit registry, issue offset credits for emissions reductions and removals from eligible projects within Canada, recognize offset credits issued by California and Quebec, in anticipation of linking to Ontario's program, and to adopt the WCI recommendation to limit the use of offsets to up to 8% of the total compliance obligation.[88] The emissions reductions and removals would be quantified using an Ontario-approved offset protocol that sets out the requirements with respect to the criteria of being real, additional, verifiable, validated, enforceable, and permanent.[89] Ontario and Quebec are contracting through a request for bids

[84] *Ibid*.
[85] Cap and Trade Program Design Options, *supra* note 19 at 23-24.
[86] *Ibid* at 24.
[87] *Ibid* at 24.
[88] *Ibid* at 24.
[89] *Ibid* at 24-25.

process for the adaptation of existing protocols for use in Canada.[90] Three protocols have been adopted for use in Quebec and/or California and will be evaluated for adaptation to the Ontario system on an expedited basis: mine methane capture and destruction, landfill gas capture and destruction, and ozone depleting substances capture and destruction. A further ten project types will be subject to a more comprehensive development process: N_2O reductions from fertilizer management in agriculture, emission reductions from livestock, organic waste digestion, organic waste management, forest project, afforestation, urban forest project, grassland, conservation cropping, and refrigeration systems.[91]

D. Ability of Ontario's North to fit within the Offset Regime

Although the protocols for land-based projects that could occur in Northern Ontario have not yet been developed, there is reason to expect that the protocols will be applicable. As mentioned above, Ontario is already contemplating the use of forest projects and afforestation. The arguments with respect to treaty rights will be most applicable to land-based projects, such that they can be attached to the ecosystem services of the traditional territory.

The Offset Committee of the Western Climate Initiative released a review that identifies how well existing protocols satisfy the WCI criteria, so that they could concentrate on modifications to existing protocols for priority project types, which were determined to be agriculture, forestry, and waste management.[92] The WCI contracted Det Norske Veritas, following a competitive and open RFP process, to evaluate the existing offset protocols. The evaluation found that there are protocols for afforestation and reforestation, forest management,

[90] *Ibid* at 25.
[91] *Ibid* at 33.
[92] Western Climate Initiative, "Offset Protocol Review Report", April 2010, online: <http://www.westernclimateinitiative.org/component/remository/Offsets-Committee-Documents/WCI-Review-of-Existing-Offset-Protocols>.

and forest preservation and conservation that are likely to meet the requirements of the WCI Guidelines with some modifications.[93] Therefore it is likely that the Ontario government will find that the forest projects that are being contemplated[94] will be able to fit within the requirements of the WCI Offset Guidelines. These types of land-based projects will be the simplest to endorse as an exercise of a treaty right to carbon sequestration, since treaty rights are typically territory-based. They also might be the most likely types of projects for First Nations to be able to make use of traditional ecological knowledge and activities that are in line with many First Nations' belief systems. Therefore, forestry-based projects are what are contemplated for the legal analysis below.

It is unfortunate that there seems to be no place for peatland sequestration in Ontario's proposal. This is likely due to the lack of understanding surrounding the measurement of baseline carbon storage across peatlands. One of the proposals contained in Ontario's Climate Change Strategy Report is that by 2030, "we will have improved our understanding of the roles of forests, peatlands, wetlands and grasslands in climate change mitigation and adaptation. This knowledge will enable us to manage our lands in a sustainable way and design green infrastructure in the built environment to better support the absorption and storage of carbon."[95] There is some scientific literature on this topic within the contexts of both Ontario and the UK,[96] but it is my understanding that there are no offset protocols that would be applicable to peatland restoration and conservation.

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[93] *Ibid* at 4-7. The applicable protocols were found in the Chicago Climate Exchange and the Climate Action Reserve.
[94] As shown in the Cap and Trade Program Design Options, *supra* note 19.
[95] Climate Change Strategy Report 2015, *supra* note 1.
[96] See, for example, Jim McLaughlin & Kara Webster, "Effects of Climate Change on Peatlands in the Far North of Ontario, Canada: A Synthesis" (2014) 46:1 Arctic, Antarctic, and Alpine Research 84; Aletta Bonn et al, "Investing in Nature: Developing Ecosystem Service Markets for Peatland Restoration" (2014) 9 Ecosystem Services 54; Christian Dunn & Chris Freeman, "Peatlands: Our Greatest Source of Carbon Credits?" (2011) 2:3 Carbon Management 289.

II. Treaty Rights in Ontario

Section 35 of the *Constitution Act, 1982* states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[97] These rights can exist in three forms. In *R v Van der Peet*, the Supreme Court of Canada recognized the right to "practices, customs and traditions" that can be proven as "integral to distinctive cultures"[98]. These are sometimes called "aboriginal rights". Second, treaty rights are those that have been defined in a negotiated agreement between the Crown and Aboriginal peoples, such as in Treaty 9, which covers most of Northern Ontario. Finally, aboriginal title to land was recognized as a type of aboriginal right in *Delgamuukw v British Columbia*.[99] If an aboriginal group has a recognized right, they must meet legal tests to challenge government infringements of those rights.

If the right is affirmed, the Court will look to whether the infringement can be justified according to the test in *Sparrow*.[100] In determining whether an interference has occurred, the Court considers whether the limitation is reasonable, whether it causes undue hardship, and whether it denies the holders of the right their preferred means of exercising it. Then the court moves on to the justification analysis by determining if there is a valid legislative objective, and whether the Crown has upheld its fiduciary duty, and the honour of the Crown. Considerations might include whether the infringement was as minimal as possible, whether priority was given to the aboriginal right, whether the aboriginal group was consulted, and whether there was fair compensation.

[97] *Constitution Act, 1982*, *supra* note 8.
[98] *R v Van der Peet*, [1996] 2 SCR 507 at para 45 [*Van der Peet*].
[99] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].
[100] *Sparrow*, *supra* note 10.

For the purpose of this paper, aboriginal title will not be discussed, because most of Ontario is covered by treaties that surrender aboriginal title. I will also examine whether aboriginal rights are in play in Ontario, but I conclude that they have also been ceded by the specific treaties that are relevant in Northern Ontario. I will focus my analysis on treaty rights after outlining the ongoing overarching obligations that typically arise in Ontario.

A. Honour of the Crown

It is important to note the principle of the "honour of the Crown" because it underlies all of the Crown's interactions with aboriginal people, and many, if not all, of the legal obligations that the Supreme Court of Canada has placed on the Crown are said to flow from this principle. The honour of the Crown requires the Crown to act honourably in its dealings with Aboriginal peoples.[101] The concept was discussed at length in *Haida*, [102] and has been called a "constitutional principle.[103] The Supreme Court of Canada stated in *Haida* that "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably".[104] Although *Haida* was not a treaty case, McLachlin CJ pointed out that "The honour of the Crown also infuses the process of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing"."[105] The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with

[101] *Badger*, *supra* note 9.
[102] *Haida*, *supra* note 7.
[103] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42 [*Little Salmon*].
[104] *Haida*, *supra* note 7 at para 17.
[105] *Haida*, *supra* note 7at para 19, quoting *Badger*, *supra* note 9 at 41.

the assertion of Crown Sovereignty.[106] This statement of the ultimate purpose of the honour of the Crown has been made over and over again in the Supreme Court judgements.[107]

The obligation to act honourably is one that is explicitly owed to an Aboriginal group. It will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest, or by a constitutional obligation owed to a group partially composed of Aboriginal peoples. A constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown.[108] In the case of Ontario, this constitutional obligation arises through the treaty that applies to a specific group or groups of First Nations.

It is noted in *Manitoba Metis Federation Inc v Canada (Attorney General)* that the honour of the Crown is not a cause of action in itself, but it speaks to "how obligations that attract it must be fulfilled".[109] In certain cases, the honour of the Crown gives rise to a fiduciary duty, a duty to consult, or a duty of diligent fulfillment and informs treaty interpretation and treaty implementation.[110] However, this is not an exhaustive list of duties that might arise under the honour of the Crown.[111]

B. Duty to Consult

In *Haida*, the Supreme Court of Canada affirmed and expanded on the duty to consult, which is required by the honour of the Crown in certain circumstances.[112] The duty arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right

[106] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 66 [*Manitoba Metis*].
[107] See for example, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24; *Van der Peet*, *supra* note 98 at para 248; *Haida*, *supra* note 7 at para 25; *Little Salmon*, *supra* note 103 at para 62; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 SCLR (2d) 433 at 436.
[108] *Manitoba Metis*, *supra* note 106 at para 72.
[109] *Ibid* at para 73.
[110] *Ibid* at para 73.
[111] *Ibid*.
[112] *Haida*, *supra* note 7.

or title and contemplates conduct that might adversely affect it.[113] It is helpful that in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the Court commented that the type of conduct that can trigger a duty to consult is "not confined to decisions or conduct which have an immediate impact on lands and resources…[A] potential for adverse impact suffices".[114] It includes "strategic, higher level decisions" with potential impacts on rights.[115] The higher level decisions that require a duty to consult could include decisions relating to Ontario's cap-and-trade system, offset system, or land use issues. Another requirement for the trigger of the duty to consult is that the potential adverse effects on the exercise of a given Aboriginal interest must be "appreciable…mere speculative impacts" will not suffice.[116]

The content of the duty to consult depends on the circumstances. In general, the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.[117] There is no duty to agree, but there must be a commitment to meaningful consultation, and both sides must act in good faith. Good faith consultation may reveal a duty to accommodate. This is not to say that Aboriginal groups have a veto over what can be done by the Crown – even in the case of established rights, the Crown does not necessarily need consent from the affected Aboriginal group. However, the Crown does need to show an effort to address the group's concerns. The Crown is permitted to balance any accommodation against other societal interests, but must maintain the emphasis on compromise and reconciliation.[118]

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[113] *Ibid* at para 35.
[114] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44.
[115] *Ibid* at para 44.
[116] *Ibid* at para 46.
[117] *Haida*, *supra* note 7 at para 39.
[118] *Ibid* at para 50.

In 2005, the Supreme Court of Canada affirmed the duty to consult in situations where the Crown relies on the "taking up" clause in the numbered treaties to remove lands from the scope of treaty hunting and fishing rights.[119] "The honour of the Crown infuses every treaty right and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights)."[120] This means that Ontario must consult before engaging in any resource development on treaty land, and I would submit, this includes the ecosystem service of carbon sequestration. This means that the government of Ontario may be required to consult First Nations communities on the development of some of their forthcoming offset protocols because they could adversely impact First Nations rights to carbon on their territories. At the very least, even if the right to control carbon offsets is rejected, the government must still consult First Nations regarding offsets and cap-and-trade more generally, because the program has the potential to adversely impact the enumerated treaty harvesting rights. However, the duty to consult is certainly a lesser form of protection than many of the other duties discussed in this paper. It doesn't require consent or accommodation, and doesn't give rise to any substantive rights. Therefore, though consultation is a major focus of the Ontario government, and is likely to play a role in the development of the cap-and-trade offset scheme, it will not be helpful to the assertion and confirmation of a right to ownership over the carbon sequestration on traditional territories.

[119] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 [*Mikisew*].
[120] *Ibid*, at 57.

C. Duty of Diligent Fulfillment

The recent case of *Manitoba Metis* expanded the scope of duties emanating from the honour of the Crown.[121] It can be seen as another description of the application of the honour of the Crown, and reminds the Crown that the scope of this "honour" is not limited to the duties that have already been recognized by the Court. The majority of the Supreme Court of Canada held that the obligation contained in the *Manitoba Act, 1870* did not impose a fiduciary duty on the Crown, but it did engage the honour of the Crown. The majority notes that "when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it."[122] The first requirement ensures that the interpretation of the relevant provision "cannot be a legalistic one that divorces the words from their purpose,"[123] and it is not controversial. This type of purposive interpretation has long been recognized as flowing from the honour of the Crown, and the majority of the Supreme Court of Canada noted several other cases that have mentioned this requirement.[124] The second requirement ensures that the Crown act diligently in "pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests".[125] In order to fulfill this duty, the "Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise".[126]

The majority judgement of the Supreme Court of Canada performs some strategic analysis to demonstrate that, despite the dissenting opinion, this duty is in fact "not a novel

[121] *Manitoba Metis*, *supra* note 106.
[122] *Ibid* at para 75.
[123] *Ibid* at para 77.
[124] *Ibid* at para 76.
[125] *Ibid* at para 78.
[126] *Ibid* at para 80.

addition to the law".[127] The court asserted that this duty has already arisen in the treaty context in *Mikisew Cree First Nation*, and in *Little Salmon*, where the Crown's honour is assured by diligently carrying out its promises.[128] Further, the court notes that in *Haida*, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations. The Supreme Court asserts that it is logical that if the honour of the Crown is pledged to the fulfillment of its obligations, then the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled.[129] The court pointed out the explicit mention of due diligence in *Quebec (Attorney General) v Moses*, where it was stated that in review proceedings under the James Bay and Northern Quebec Agreement, the participants are expected to "carry out their work with due diligence".[130] The majority then added that the duty applies whether the obligation arises in a treaty, or in the Constitution.[131]

The court is also careful to point out that "not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people" is dishonourable.[132] However, "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise."[133] Also, it's not a substantive duty. There is no guarantee that the diligent efforts will achieve the fulfillment of a promise.

While the duty of diligent fulfillment discussed in *Manitoba Metis* may not be a novel addition to the law, the case does bolster the established principles of treaty interpretation,

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[127] *Ibid* at para 81.
[128] *Ibid* at para 79, and see *Mikisew*, *supra* note 119 at para 51, and *Little Salmon*, *supra* note 103 at para 12.
[129] *Ibid* at para 79.
[130] *Quebec (Attorney General) v. Moses*, 2010 SCC 17, at para. 23, as quoted in *Manitoba Metis*, *supra* note 106 at para 79.
[131] *Manitoba Metis*, *supra* note 106 at para 79.
[132] *Ibid* at para 82.
[133] *Ibid* at para 82.

discussed in more detail below. It also opens the argument that the Crown's diligent efforts to fulfill the treaty promises should include proactively trying to determine whether there is a treaty right to the carbon on traditional territories. The government of Ontario might not be considered by the courts to be upholding the honour of the Crown if it waits for a claim of infringement before examining this issue.

D. Treaty Rights

Principles of Treaty Interpretation

The principles of treaty interpretation that must be used when examining historical treaties reflect "the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which the Indians were unfamiliar. In the interpretation of these documents, therefore, it is only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them."[134] This concept is reiterated by the Supreme Court in *Badger*: "…any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed."[135] However, while the language must be construed generously, courts may not alter the terms of the treaty by exceeding what "is possible on the language" or realistic.[136]

The goal in reading historical treaties is not to identify a meeting of the minds as in typical contracts, but rather to "choose from among the various possible interpretations of the

[134] *Mitchell v Sandy Bay Indian Band*, [1990] 2 SCR 85 at para 117.
[135] *Badger, supra* note 9 at para 41.
[136] *Ibid* at 76.

common intention the one which best reconciles the interests of both parties at the time the treaty was signed."[137] In searching for the common intention of the parties, it must be presumed that in concluding the treaty, the Crown sought to act honourably.[138] In determining the respective understandings and intentions of the parties, one must be sensitive to the unique cultural and linguistic differences between the parties, and the words of the treaty must be given the meaning which they would naturally have held by the parties at the time.[139]

Beyond looking at the treaty terms themselves, the court must examine extrinsic evidence, such as the immediate historical record, the stated objectives of the Aboriginal parties and the Crown; and the political and economic context in which those objectives were reconciled.[140] "Where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms."[141]

Finally, "treaty rights are not frozen in time"[142] but are capable of evolution in response to modern circumstances. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.[143]

There was a debate for many years about whether the provincial governments had the authority to "take up lands" for the purposes of the historic treaties.[144] The clause that enumerates harvesting rights in the treaties typically ends with the phrase, "subject to such regulations as may from time to time be made by the government of the country, acting under the

[137] *Marshall I*, *supra* note 9 at para 78.
[138] *Badger*, *supra* note 9 at 41.
[139] *Ibid*, at 52-54.
[140] *Marshall I*, *supra* note 9 at paras 5, 11-14 and 41.
[141] *Ibid* at para 12.
[142] *Ibid* at para 25.
[143] *R v Sundown*, [1999] 1 SCR 393 at para 32 [*Sundown*].
[144] Shin Imai, "Treaty lands and crown obligations: the tracts taken up provision" (2001) 27 Queens Law Journal.

authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."[145] The treaties that affect lands extending from Ontario through to the Northwest Territories include identical or similar provisions, and provinces have relied on them to exploit natural resources in the traditional territories of First Nations.[146] Shin Imai has argued that the provinces power to "take up" treaty lands is not well supported in law.[147] This issue has recently been cleared up by the Supreme Court of Canada in *Grassy Narrows First Nation v Ontario (Natural Resources)*.[148] The Court found that Ontario does have the power to take up lands under Treaty 3, and in fact the federal government does not.[149] The treaty is an agreement between the First Nations and the Crown. The level of government that exercises the rights and obligations under the treaty is determined by the division of powers in the Constitution.[150] The Constitution Act, 1867 gives Ontario exclusive authority to take up crown lands in Ontario for forestry, mining, settlement, and other exclusively provincial matters.[151] The provincial Crown is also bound by the duty to exercise its powers in conformity with the honour of the Crown, is subject to fiduciary duties of the Crown in dealing with Aboriginal interests, and any taking up of land must meet the conditions set out by the Supreme Court of Canada in *Mikisew*.[152] That is, the province has a duty to consult with Aboriginal people and possibly accommodate their concerns, and the province is subject to the burden to prove any infringement is "justifiable."

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[145] Indigenous and Norther Affairs Canada, "Treaty Texts – Treaty No. 9: The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930", online: < http://www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864> [Treaty 9].
[146] Imai, *supra* note 144.
[147] *Ibid*.
[148] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*].
[149] *Ibid* at para 50.
[150] *Ibid* at para 30.
[151] *Ibid*.
[152] *Ibid* at para 50-51.

Specific Treaty Provisions: Hunt, fish, and trap

In many cases, certain treaty rights will be obvious on the face of the treaty itself. The treaties of Northern Ontario guarantee the rights of the treaty signatories to hunt, fish and trap. For example, Treaty 9, which covers the majority of Northern Ontario, states:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[153]

The reports of the treaty commissioners for the numbered treaties indicate that most First Nation signatories understood the treaties to mean that their traditional livelihood would be secured. For example, regarding the negotiations of hunting and fishing rights, the Treaty 9 Commissioners reported:

> Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy.
>
> On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with, the Indians talked the matter over among themselves.[154]

Commercial Harvesting Rights

The historical treaties do not explicitly protect First Nations' right to harvest game, fish, or other resources for a commercial purpose. However, courts have sometimes inferred commercial harvesting rights from treaty language and evidence of community practice at the

[153] Treaty 9, *supra* note 145.
[154] Treaty 9, *supra* note 145.

time of the treaty signing. In *R v Marshall*, the treaty in question had a clause that amounted to a promise that the Mi'kmaq would not trade with anyone other than the British. The Mi'kmaq were found to have historically "sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century... What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes."[155] Because the community had traded fish at the time of the treaties, the majority of the Supreme Court concluded that the community would be allowed to engage in traditional trade activities so as to obtain a moderate livelihood, and since Marshall was engaged in selling eels, this could be characterized as a traditional activity.[156]

In *R v Marshall; R v Bernard*, the claimants relied on this interpretation of commercial activity and commenced logging activities on Crown lands in Nova Scotia and New Brunswick without authorization.[157] They argued that they used forest products for a number of purposes at the time of the treaties, including housing, heat, sleds, snowshoes, and occasionally traded products made of wood to sustain themselves. They argued that *Marshall I* and *Marshall II* confer a general right to harvest and sell all natural resources which they used to support themselves in 1760 – whether for trade or for their own needs. The Court, however, agreed with the Crown, that the ruling in *Marshall I* was based on *fishing for trade* as a traditional practice of 1760, and therefore the treaty conferred a right to continue to obtain a moderate livelihood through the traditional Mi'kmaq activity of trading fish, and not trading any other item they hadn't traditionally traded. McLachlin states that while treaty rights are not frozen in time, the

[155] *Marshall I*, *supra* note 9 at para 2, and at para 25 quoting Dickson J. in *Jack v The Queen*, [1980] 1 SCR 294 at 311.
[156] *Ibid.*
[157] *R v Marshall; R v Bernard*, 2005 SCC 43.

modern activity should represent a logical evolution from the traditional trading activity at the time the treaty was made – meaning "the same sort of activity, carried on in the modern economy by modern means"[158] She states that the activity must be essentially the same. "While treaty rights are capable of evolution within limits, ... their subject matter ... cannot be wholly transformed."[159] Therefore the question was "whether the logging here at issue is the logical evolution of a traditional Mi'kmaq trade activity, in the way modern eel fishing was found to be a logical evolution of a traditional trade activity of the Mi'kmaq in *Marshall I*."[160] The court found that trade in wood products was not analogous to logging, and that logging was not a traditional activity of the Mi'kmaq. In the case of a right to "trade" carbon sequestration for the purpose of creating carbon offsets, there would likely be no space for a similar attack, because the First Nations in Ontario may be able to demonstrate that they historically did manage the lands such that it sustainably sequesters carbon.

In *R v Horseman* dealt with the right to hunt for the purposes of commerce in Treaty 8, which includes an identical provision on hunting, fishing and trapping to Treaty 9. The majority of the Supreme Court of Canada found that "the original treaty right clearly included hunting for purposes of commerce."[161] This was affirmed in *Badger*,[162] although both cases found that the right to commercial hunting was extinguished by the *Natural Resources Transfer Agreement* of 1930, which does not affect Ontario. Therefore, in Ontario, Treaty 9 would be found to uphold the right to commercial hunting.

[158] *Ibid* at para 25.
[159] *Ibid* at para 25.
[160] *Ibid* at para 26.
[161] *R v Horseman*, [1990] 1 SCR 901 at para 54.
[162] *Badger*, *supra* note 9.

Indeed, in examining the notes of the Treaty Commissioners for Treaty 9, it is clear that hunting for the purposes of commerce were to be included in the right to hunt. They write about a conversation with an aboriginal man they referred to as "Yesno", where they explicitly tell him that their traditional harvesting activities should still provide lucrative sources of revenue:

> Yesno had evidently travelled, and had gathered an erroneous and exaggerated idea of what the government was doing for Indians in other parts of the country, but, as the undersigned wished to guard carefully against any misconception or against making any promises which were not written in the treaty itself, it was explained that none of these issues were to be made, as the band could not hope to depend upon agriculture as a means of subsistence; that hunting and fishing, in which occupations they were not to be interfered with, should for very many years prove lucrative sources of revenue.[163]

The phrase "lucrative sources of revenue" implies that the occupations would provide more than one would require for sustenance. This can be interpreted to mean that any benefit from the treaty rights under Treaty 9 can be protected even if it is exercised for a commercial benefit.

If modern carbon sequestration activities can be found to be a logical evolution of the historic forest management practices of First Nations in Ontario, the commercial nature of the cap-and-trade system will not prevent the practice from being upheld as a treaty right. Courts have generally found the relevant numbered treaties to protect the right to harvest for commercial purposes.

Right to Conservation

The Ontario Court of Appeal has opined on the question of conservation within treaty rights. In *R v Shipman*, the court was dealing with the question of whether a member of the Walpole Island First Nation can rely on the sharing of hunting rights by a Robinson-Superior Treaty signatory while hunting in the Robinson-Superior territory. The Court of Appeal held that the rights holders of the treaty could, in theory, share their hunting rights by giving permission to

[163] Treaty 9, *supra* note 145.

non-rights holders, based on their traditional custom of sharing. However, the particular facts of that case did not involve appropriate permission and therefore Mr. Shipman's convictions were upheld. In explaining why the permission must be more specific and recent than was the circumstance here, the court noted that "in Aboriginal custom, protection and conservation of harvesting resources is paramount and it would be unusual if this was not reflected in the granting of consent to share in it."[164] While this does not grant a right to conservation specifically, it is a good example of judicial notice of the importance of conservation to the exercise of rights and the traditional nature of the protection of the environment.

Another example of judicial notice of the importance of the ecosystem to treaty rights occurred in *Halfway River First Nation v British Columbia (Ministry of Forests)*.[165] The case arose in the context of Treaty 8, in an application to quash a forest cutting permit on the First Nation's traditional territory. While the Court did not explicitly consider whether treaty rights to hunt, fish and trap included an implicit right to conservation, it did accept without question that the destruction of the forest at issue would result in the infringement of treaty rights to harvest. This limits the ability of the Crown to justify the destruction of ecosystems on which protected resource activities rely.[166]

Finally, although *Mikisew Cree* was ultimately decided on based on the duty to consult, it is a clear recognition of the conservation dimension of treaty rights to hunt, fish, and trap.[167] The Court stated that it is apparent that the proposed road would adversely affect Mikisew hunting and trapping rights, due to a decline in the quantity and quality of wildlife harvest for reasons

[164] *R v Shipman*, 2007 ONCA 338 at para 45.
[165] *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470.
[166] Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canda: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47 Alta L Rev 959 at 979.
[167] *Mikisew Cree, supra* note 119.

such as fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area, and increased wildlife mortality due to motor vehicle collisions.[168]

The implicit right to conservation will inform one of the arguments I suggest below for asserting a right to ownership of the carbon offsets on traditional territories in Ontario. The right to conservation could potentially lead to a requirement that First Nations be involved in land use planning and sustainability practices. This activity could then result in a right to the carbon that First Nations are helping to sequester.

Incidental Rights

According to the Supreme Court of Canada in *R v Simon*, "the right to hunt to be effective must embody those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[169] Mr. Simon had been charged with illegal possession of a rifle and ammunition upon a road passing through or by a forest, wood or resort of moose or deer contrary to s 150(1) of the *Lands and Forests Act*. The Court simply stated without discussion that it is implicit in the right granted by the Treaty that the appellant has the right to possess a gun and ammunition in a safe manner in order to be able to exercise the right to hunt.[170]

In *R v Sundown*, the Supreme Court of Canada elucidated the test set up in *R v Simon*:

> How should the term "reasonably incidental" be defined and applied? In my view it should be approached in this manner. Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing? It may seem old fashioned to apply a reasonable person test but I believe it is both useful and appropriate."[171]

[168] *Ibid* at para 44.
[169] *R v Simon*, [1985] 2 SCR 387 at para 28.
[170] *Ibid* at para 28.
[171] *Sundown*, *supra* note 143 at para 28.

The case involved an individual whose community is a party to Treaty 6 by adhesion. Mr. Sundown is entitled to hunt for food on crown land, and cut down trees to build a cabin in Meadow Lake Provincial Park without Crown consent, contrary to *The Parks Regulations, 1991*. He testified that he needed the cabin both for shelter and as a place to smoke fish and meat and to skin pelts. Evidence was presented at trial that showed a long-standing Band practice to conduct extended expedition hunts in the area using shelters at the hunting sites – originally they were lean-tos covered with moss, and later tents and log cabins. The Court stated that the test's focus

> …is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked.[172]

The Court found that some form of shelter is reasonably incidental to Mr. Sundown's method of hunting, and the permanency of the shelter did not make a difference in this case.

The right to construct a cabin as an incidental right to the right to hunt was also affirmed in the context of Treaty 9.[173] However, the court in this case made particular reference to the fact that the cabin was built for personal use, and not for a commercial use. Presumably, this is because if the cabin was built for the purpose of renting out to people who are not treaty signatories, the defendants would not have been able to establish that they were exercising their treaty rights. That is, the issue with "commercial use" was with the use of the cabin, not with whether the proceeds of the hunt would have been sold commercially versus consumed by the First Nation community.

[172] *Ibid* at para 30.
[173] *R v O'Sullivan Lake Outfitters Inc*., [2011] 2 CNLR 307.

The existence of incidental rights will be helpful to the argument that carbon sequestration practices should be protected as a treaty right. Carbon sequestration could be found to be reasonably incidental to the practice of the enumerated harvesting rights, meaning that it would be protected by section 35(1) of the Constitution, and the honour of the Crown.

E. Aboriginal Rights

The presence of a treaty or a treaty right does not necessarily preclude the existence of an Aboriginal right. One example of this proposition can be found in *R v Sappier*.[174] The Supreme Court of Canada in that case held that an aboriginal community in New Brunswick had an aboriginal right to harvest wood for domestic use. Although the Court of Appeal had found that the community held both an aboriginal right and treaty right to harvest timber for personal use,[175] the Supreme Court of Canada stated that having found an aboriginal right, it was not necessary to comment on the existence of the treaty right.[176] This implies that the potential existence of a treaty or a treaty right does not interfere with the claim to an aboriginal right.

More recently, the British Columbia Court of Appeal held that the Kwakiutl First Nation should be consulted based not only on their treaty rights, but also their claims to aboriginal right and title.[177] The crown could not meet the duty to consult by consulting only about treaty rights. Again, the existence of a treaty did not preclude the existence of aboriginal rights.

Unfortunately, the jurisprudence is not absolutely consistent on this point. In the context of the Robinson-Huron Treaty, the Supreme Court of Canada refused to examine the nature of an aboriginal right because

> Whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that

[174] *R v Sappier*, 2006 SCC 54 [*Sappier*].
[175] *Ibid* at para 13.
[176] *Ibid* at para 3.
[177] *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 [*Chartrand*].

> treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. It is conceded that the Crown has failed to comply with some of the obligations under this agreement … It does not alter the fact, however, that the aboriginal right has been extinguished.[178]

The Court does not go on to explain the nature of that surrender.

Also, in discussing what kind of justification would be required for the taking up of lands in Treaty 8, the Supreme Court of Canada stated,

> In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up *from time to time* for settlement, mining, lumbering, trading or other purposes."[179]

The Court expressly states that aboriginal rights were surrendered and extinguished in Treaty 8.

These judgements can be reconciled by examining the treaty language in each situation. The language in the treaties involved in *Sappier* and *Chartrand* do not specifically deal with the cession of rights. The treaty at issue in *Sappier* was a Peace and Friendship Treaty, and did not involve the surrender of rights, lands, or resources.[180] In *Chartrand*, the one of the Douglas Treaties was at issue, which included the surrender of land.[181] They do not surrender rights or interests in the land – only the land itself – and they specifically uphold some of their aboriginal rights.[182] In contrast, the language in the Robinson-Huron Treaty at issue in *Bear Island* includes that the aboriginal signatories "hereby fully, freely, and voluntarily surrender, cede, grant, and convey unto Her Majesty, her heirs and successors for ever, *all their right, title, and interest to,*

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[178] *Ontario (Attorney General) v Bear Island Foundation*, [1991] 2 SCR 570 at para 7 [*Bear Island*].
[179] *Mikisew*, *supra* note 119 at para 31.
[180] Indigenous and Northern Affairs Canada, "Peace and Friendship Treaties (1725-1779)", online: <https://www.aadnc-aandc.gc.ca/eng/1360937048903/1360937104633>.
[181] Indigenous and Northern Affairs Canada, "Treaty Texts - Douglas Treaties", online: <http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>.
[182] *Ibid.*

and in the whole of, the territory above described…" (emphasis added.)[183] Similarly, Treaty 8 has a clause reading "…the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits…" (emphasis in original)[184] The cession of all rights, titles and privileges to the land seems to have been understood by the Court in *Mikisew* to extinguish all aboriginal rights not mentioned in the treaty. The language in Treaty 9, at issue in Northern Ontario, is identical to the language in Treaty 8.[185] Therefore, it is likely that a court would interpret the First Nation signatories to Treaty 9 to have surrendered their aboriginal rights through the treaty, or at least their aboriginal rights that have a connection to land. One assumption in my position is that the carbon sequestration that is most likely to be engaged in in Northern Ontario is connected to the land itself. For the purposes of this paper, I will not examine aboriginal rights because the treaties in Ontario will be interpreted by the courts as extinguishing aboriginal rights based in land beyond those that can be described as treaty rights.

F. Imposition of Positive Obligations

One of the challenges to this types of claim is the question of whether the state protection of section 35(1) rights can give rise to positive obligations. The arguments here would require the provincial government to act in that the ownership of ecosystem services would need to be recognized either explicitly or implicitly in the cap-and-trade regulations, especially when taking into account the duty of diligent fulfillment.

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[183] Indigenous and Northern Affairs Canada, "Treaty Texts - Ojibewa Indians of Lake Huron", online: <http://www.aadnc-aandc.gc.ca/eng/1100100028984/1100100028994>.
[184] Indigenous and Northern Affairs Canada, "Treaty Texts – Treaty No. 8", online: <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>.
[185] Treaty 9, *supra* note 145.

In *Haida*, the Court stated that section 35(1) obligations are highly context specific and that the "honour of the Crown gives rise to different duties in different circumstances".[186] The Court in *Haida* noted that "the controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation".[187] Although the scholarly work and jurisprudence is limited on this issue, it has been suggested that Crown obligations arise when honour, in a very practical sense, requires them to arise, when their absence would undermine the possibility of rights being meaningfully reconciled with Crown sovereignty.[188]

Beyond the principles stated above with respect to the question of whether inaction can be subject to judicial scrutiny, there are also specific cases where a minister's decision not to take action has been ruled to be a violation of either the fiduciary duty, or more generally, the honour of the Crown. In *Adam v Canada (Environment),* the failure to avert threats to a declining caribou population was found to be in violation of the honour of the Crown due to the First Nation's right to pursue their usual vocations of hunting and fishing.[189] In *Union of Nova Scotia Indians v Canada (Attorney General)*, the Crown's failure to consider Aboriginal interests after having contracted out the evaluation of the dredging plan of a mining company violated the Crown's fiduciary duty to protect the potentially threatened fishing rights of the Mi'kmaq.[190] However, both of these cases additionally involve federal legislation such as the Species at Risk Act and the Canadian Environmental Assessment Act, which in themselves create positive obligations, though not necessarily in relation to First Nations. Justice Strayer of the Federal Court has even mentioned in obiter that the Crown's fiduciary duty may require the government

[186] *Haida*, *supra* note 7 at para 18.
[187] *Ibid*, at para 45.
[188] Constance MacIntosh, "On Obligations and Contamination: The Crown-Aboriginal Relationship in the Context of Internationally-Sourced Infringements" (2009) 72 Sask L Rev 223 at 253.
[189] *Adam v Canada (Environment)*, 2011 FC 962.
[190] *Union of Nova Scotia Indians v Canada (Attorney General)*, [1997] 1 FC 325.

to enact legislation, in light of the decision in *Guerin*.[191] Therefore, the general principle that the Crown's failure to act is not actionable in court may become more flexible.

With respect to the implementation of the treaties, the arguments relating to the honour of the Crown are still in play, but there is an added element of the duty of diligent fulfillment enumerated in *Manitoba Metis*.[192] It is unclear at this point whether *Manitoba Metis* has in fact created a positive duty, but it does require that the Crown pursues its constitutional obligations with diligence, so it seems to imply that a positive obligation can arise in the circumstance of upholding treaty rights.

III. Proposals for Aboriginal Carbon Offset Rights in the Ontario Context

Every claim to a treaty right to enjoy the benefits of carbon offsets will have to be argued on the specific historical facts surrounding the treaty in question and the community in question. However, I have made some cautious generalizations in order to explore the arguments that might be useful.

Before describing the three mechanisms I foresee being potentially useful in acknowledging a treaty right to the carbon sequestration capabilities of the traditional territories of treaty signatories, it is important to note that when discussing "ownership" in this context, it does not refer to ownership in the common law sense of the term. Aboriginal rights have been described as "*sui generis*". The term has long been used in aboriginal law to describe the unique fiduciary relationship between the Crown and aboriginal peoples.[193] And it is also used to describe the bundle of rights that come with aboriginal title, which confers proprietary rights that

[191] *Alexander Band No 134 v Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 FC 3 at para 17.
[192] *Manitoba Metis*, *supra* note 106.
[193] *Guerin v R*, [1984] 2 SCR 335.

are distinct from a fee simple interest in the land.[194] The proposed treaty right to carbon does not entail the full *sui generis* proprietary right that comes with aboriginal title.[195] After all, ownership of carbon, or the carbon sequestration capacity of an ecosystem is different from a general ownership of the trees or a general ownership of the land. The aboriginal right to fish was also described as *sui generis* in *Sparrow*.[196] In *Sappier*, the Supreme Court noted that "an aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right. In characterizing aboriginal rights as *sui generis*, this Court has rejected the application of traditional common law property concepts to such right."[197] The Court characterized aboriginal rights as founded in practices, customs, or traditions.[198] The *sui generis* nature of aboriginal rights can be extended to treaty rights. It would be impossible to argue that treaty rights confer an absolute fee simple ownership of the carbon on their traditional territories. This is why it is important to understand that the right being proposed is not a right to ownership of the carbon itself, but a right to the carbon sequestration services of the land. The details of what this kind of *sui generis* right would include would likely need to be the subject of negotiation.

Keeping in mind the principles of treaty interpretation described above, I will turn to three potential arguments for affirming the treaty right to ownership of carbon on traditional lands. The first is as an incidental right to the enumerated treaty rights, the second is framed as a right to harvest carbon offsets, and the third is the expansion of the interpretation of the treaties to include sharing in the benefits of the land.

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[194] *Delgamuukw*, *supra* note 99.
[195] In accordance with *Van der peet*, *supra* note 98 at para 121.
[196] *Sparrow*, *supra* note 10 at 68.
[197] *Sappier*, *supra* note 174 at 21.
[198] *Ibid* at 21.

A. An Incidental Right to the Enumerated Treaty Rights

As described above, some have argued that the right to hunt, fish and trap contains an incidental right to the protection of the environment. Without going through the evidence in detail in this paper, Patrick Malcklem has presented a strong argument that protection and conservation of their environment and its resources was the primary motivating factor for the First Nations to sign Treaty 9.[199] Due to the building of the Canadian Pacific Railway line in their territory and the resulting increase in settlers who were putting pressure on the First Nations' resources, aboriginal groups petitioned for a treaty. Macklem concludes that

> "when one begins to examine the reasons for protecting rights to hunt, fish, and trap, it becomes clear that what Aboriginal people were seeking to protect was their traditional ways of life from non-Aboriginal erosion…As such, [Treaty 9 hunting, fishing and trapping rights] ought to be viewed as not only conferring the right to engage in the activity listed by the terms of the treaty but also to include the right to expect that such activity will continue to be successful, measured by reference to the fruits of past practice."[200]

I believe it is uncontroversial that Treaty 9 harvesting rights include the right to the protection of the environment in their traditional territories. Firstly, it falls within the "reasonably incidental" test set out by *R v Sundown*: "Would a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing?"[201] Certainly the existence and protection of the habitat of the animals or plants which are the subject of harvesting is included as something that is reasonably related to the exercise of harvesting rights. The exercise of these rights depend entirely on the conservation of the natural landscape. Secondly, the Supreme Court of Canada has recently reiterated the point that if the taking up of land leaves a First Nation with no meaningful right to

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[199] Patrick Macklem, "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 97.
[200] *Ibid* at 117.
[201] *Sundown*, *supra* note 143 at para 28.

hunt, fish, or trap in areas over which they traditionally hunted, fished, or trapped, a potential action for treaty infringement will arise.[202] Therefore, there must be some level of conservation of the environment in the treaty signatories' traditional territory in order for the Crown to even purport to be upholding the treaty and the honour of the Crown. Finally, the right to conservation has been implicitly recognized by various courts, as discussed above.

While it would be quite possible that a right to conservation would be successful in court, something more is required in order to arrive at the conclusion that a right to conservation could give rise to the ownership of the ecosystem services of carbon sequestration. One way to make this leap is to assert that the management of the ecosystem is an incidental right based on the harvesting and conservation rights. As discussed above, the test for an incidental right is whether a reasonable person, fully apprised of the relevant manner of hunting or fishing, consider the activity in question reasonably related to the act of hunting or fishing? It could be argued that the exercise of harvesting rights requires conservation, which can only be achieved through discussions and learning from First Nations communities on their traditional territories, due to the explicit rights to harvesting. If the right to some level of co-management can be affirmed, it is possible that this might give rise to some form of ownership over the services that come out of this management. It will be important to establish that current environmental management practices are rooted in pre-contact practices. Assuming that the management by the First Nations communities involved is a good fit with the protocols that are to be set up for forestry projects to be included in the cap-and-trade system, it could be asserted that they should be given the right to sell the ecosystem services on their traditional territories as offset credits. This argument

[202] *Grassy Narrows*, *supra* note 148 at 52.

requires a number of steps, which means that the relationship between hunting, fishing and trapping and ownership of carbon sequestration processes could easily be found to be too distant.

B. A Right to "Harvest Carbon Offsets"?

The right to harvest explicitly includes the right to hunt, fish, and trap, as noted above. It could be possible to assert treaty rights that are not explicitly mentioned, but fit well enough within the category of harvesting that they are not deemed to have been ceded by the Treaty. Many First Nations communities would be able to show that they traditionally used wood products from the forest in order to build shelter, provide heat, build transportation devices, et cetera. If the treaty rights to harvesting are interpreted to mean that the traditional manner of making their livelihood would be undisturbed, as the treaty commissioners insisted when meeting reluctance from the chief of one of the bands,[203] then it may be determined by analogy that First Nations have a treaty right to "harvest" sequestration capabilities from the land. If the treaty is interpreted broadly, harvesting carbon offsets from the land could be a modern evolution of harvesting products from the land for use or sale.

Also, carbon sequestration specifically is a benefit that was certainly not contemplated by either of the parties at the time of the treaty signing, and therefore one could argue that it was not ceded by the Treaties. Other forms of resource development, such as mining and lumbering, had been enumerated in the treaties as reasons that the Crown might take up land in the future. The interest in harvesting on traditional territories could reasonably be argued to give rise to a right access the unforeseen "harvest" that may now emanate from the land.

Certainly this would be a difficult argument to make. One of the challenges with making this argument to a court or even in a negotiation room is that treaty rights to harvest involve

[203] Treaty 9, *supra* note 145.

rights to benefit from take things off of the land, whereas a treaty right to "harvest" carbon is a right to benefit from keeping things in the land. This might be a distinction that is too vast for a court to find that these two rights are analogous and arise out of the same provisions of the treaty. Others might argue that if you are keeping something in the land, you are inherently not "harvesting".

There is an argument to be made regarding the examination of the core of the treaty right to determine how it might have evolved or developed into the modern context. For example, the Federal Court in *Beattie v R* dealt with Treaty 11, and the right to "agricultural assistance", which is enumerated in the text of the treaty.[204] The judge held that the

> core of the treaty right to agricultural assistance… is the development of a capacity for self-sufficiency based on the use of the land base. This could involve assistance with different modalities of food production or expanding the definition of agriculture to include other renewable resources whose cultivation could be the basis of self-sufficiency.[205]

Ms. Beattie lost her case because she was asserting rights outside of her traditional territory, so the above statement opining about the expansion of the definition of agriculture to include other renewable resources was not a necessary component of the judgement. However, this is still a helpful statement. The broad interpretation of Treaty 11 in this case suggests that a broad interpretation of Treaty 9 could expand treaty rights to hunt, fish and trap to a core right to self-sufficiency based on the sustainable use of treaty lands.[206] In this sense, the harvesting rights set out in Treaty 9 could be said to have evolved into the modern right to harvest other resources from the land, including carbon sequestration, provided that they are harvested sustainably.

[204] *Beattie v R*, [2001] FCJ No 62, [2001] 2 CNLR 26.
[205] *Ibid* at 34.
[206] Smith & Madras, *supra* note 78.

Another challenge to this proposition is that First Nations in Ontario have long been frustrated with their lack of access to commercial forestry opportunities, which would be the closest analogy to carbon offset opportunities in the context of forestry-related offset projects. At the time of contact with Europeans and when most of the treaties in Ontario were signed, aboriginal people lived off the resources of the forest. Medicinal plants, berries, wood for fuel, shelter, hunting tools, canoes and trade were all harvested from the forest.[207] For example, the Ojibwe of Northern Ontario were actively involved in selling lumber to non-Aboriginal enterprises prior to entering into Treaty 3.[208] The Environmental Assessment Board's 1994 assessment of forest management on Crown lands in Ontario, concluded that aboriginal communities have largely been excluded from the forestry industry as a whole since the treaties were signed.[209] As a condition of its assessment approval, the Board ordered that MNR District Managers negotiate with aboriginal peoples to "implement ways of achieving a more equal participation by aboriginal peoples in the benefits" of forest management planning."[210] The Board also recommended that Ontario review its timber licensing policy as it relates to aboriginal peoples, investigate any barriers to their obtaining timber licenses, and consider what remedies may be required.[211] Furthermore, the Board recommended that Ontario and Canada do "whatever is necessary to conclude various processes under way to define treaty and aboriginal rights."[212] However, it appears that Ontario has not established any negotiations to determine the

[207] Michael Coyle, "Respect for Treaty Rights in Ontario: The Law of the Land?" (2008) 39 Ottawa L Rev 405 at 427.
[208] *Decision of the Environmental Assessment Board on the OMNR Timber Class Environmental Assessment for Timber Management on Crown Lands in Ontario* (May 1994), Environmental Assessment Board Decision EA-87-02, online: <http://www.web2.mnr.gov.on.ca/mnr/forests/timberea/decision_pdfs/intro.pdf> at 347-9, See Coyle, *Ibid* at 427.
[209] *Ibid* at 428.
[210] *Ibid* at 428.
[211] *Ibid* at 428.
[212] *Ibid* at 428.

treaty rights of Aboriginal communities in relation to the forestry industry. In the *Crown Forest Sustainability Act, 1994*, the Crown has provided only that the Act not derogate from Aboriginal or treaty rights recognized by the Constitution and it permits agreements with First Nations in the area of forestry planning.[213] The Ministry of Natural Resources has developed a consultation program including Aboriginal representatives on forest management planning teams, but they are aimed at protecting medicine plants and unique Aboriginal values during timber harvesting, and does not address the issue of treaty rights.[214] Meanwhile, the *Far North Act* contains objectives for land use planning in the Far North that include: a significant role for First Nations in the planning, the protection of areas of cultural value in the Far North, the maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the Far North, and enabling sustainable economic development that benefits the First Nations.[215] The Act also includes a section delineating a role for First Nations: "First Nations may contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act."[216] However, the First Nations in Nishnawbe Aski Nation, occupants of the far north, have since asserted that the government of Ontario is excluding First Nations from any meaningful involvement in policy discussions on carbon storage and carbon credits.[217]

On the other hand, it has recently been reported that the Ontario Ministry of Natural Resources and Forestry approached Grassy Narrows and two other First Nations in the area to consider taking an active role in forest management planning and operations in the Whisky Jack

[213] *Crown Forest Sustainability Act, 1994,* SO 1994, c 25.
[214] Coyle, *supra* note 207 at 428.
[215] *Far North Act, 2010*, c 18 at s 5.
[216] *Ibid* at s 5.
[217] Nishnawbe Aski Nation, "Ontario's Far North Act", no date, online: <http://www.nan.on.ca/article/ontarios-far-north-act-463.asp>.

Forest.[218] The parties are negotiating the possibility of the bands assuming responsibility for the Sustainable Forestry Licence in the area. This would represent a step towards allowing First Nations to have control over the resources in their traditional territory – at least those that are related to forestry.

C. Expanding the Interpretation of Treaties

A final argument that can be made concerning the treaty right to a ownership of carbon sequestration capabilities on the traditional territories in Ontario's North is related to a broad form of treaty interpretation, and is therefore somewhat related to the previous argument. It has been argued that the treaties constitute an agreement to share in the benefits of the land[219] I will not examine this argument in detail because it would go well beyond the jurisprudence as it now stands, and would require a extensive examination into the history of Ontario, which would be beyond the scope of this paper. However, there are some challenges to this proposition that should be discussed.

The major challenge to this argument is that the First Nations do not currently have the right share in the benefits of any of the resources on their traditional territories. They don't have the right to benefits from extracting minerals, lumber, data, water, et cetera. First Nations do sometimes benefit from these projects though Impact Benefit Agreements, or they might incorporate a logging company of their own, but they have no recognized right to benefit.

The question of rights to share in the benefits of the land recently came before the Ontario divisional court. The issue was whether the Wabauskang First Nation (WFN) was owed

[218] Reg Clayton, "Band councils consider ministry proposal for sustainable forestry licence" 21 March 2016, online: <http://www.kenoradailyminerandnews.com/2016/03/21/band-councils-consider-ministry-proposal-for-sustainable-forestry-licence>.
[219] Murray Klippenstein, "Oral Promises/Broken Promises" (2010) Presentation at a meeting of the Ontario Mining Action Network. Online: <http://miningwatch.ca/blog/2011/2/25/oral-promisesbroken-promises-shows-alternative-interpretation-ontarios-treaty-9>; John S Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen's University Press, 2010).

a duty to consult and accommodate in relation to a mining project on their traditional territory.[220] The province of Ontario had delegated the procedural aspects of consultation to the company, and there was consultation regarding the rights to hunt and fish. However, WFN argued that they had asserted treaty rights to "share in the decisions and benefits of the resources,"[221] and that the consultations with respect to those rights could not be delegated to the company. The Court decided however, that "Treaty 3 makes no express or implied reference to shared decision-making and revenue sharing."[222] The judgement went on:

> I am not persuaded that Ontario had a duty to consult and accommodate with respect to revenue-sharing and shared decision-making. On the record before me, I do not accept that WFN had such rights arising from Treaty 3. The evidence makes it clear that WFN understood and agreed that the issue of revenue-sharing (and shared decision-making) was to be negotiated between WFN and Rubicon. It was only at the penultimate moment that WFN took the position that Ontario had a duty to consult on those issues. I conclude that WFN's assertion that Ontario failed to consult and accommodate on those issues is without foundation.[223]

The Court points to little evidentiary record on the issue of the asserted rights to shared decision-making and benefit-sharing. Because of this, it has been suggested that perhaps the First Nation attempted to reach for a broad reading of the treaty rights without putting an adequate foundation to the court.[224] In the Notice of Application for Judicial Review, WFN relied on its *prima facie* claim of their right to hunt and fish under Treaty 3, not on a right to shared decision-making or benefit-sharing. However, their factum did not address a failed duty to consult and accommodate on treaty rights to hunt and fish. In the factum and submissions, WFN suggested that Ontario failed to consult on shared decision-making and revenue-sharing. The Court

[220] *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424 [*Wabauskang*].
[221] *Ibid* at 184.
[222] *Ibid* at 212.
[223] *Ibid* at 217.
[224] Dwight Newman, "Is the Sky the Limit? Following the trajectory of Aboriginal legal rights in resource development" (2015) Aboriginal Canada and the Natural Resource Economy Series, MacDonald-Laurier Institute at 20.

statement that "it was only at the penultimate moment that WFN took the position that Ontario had a duty to consult on those issues"[225] indicates that the court was of the opinion that WFN had come up with this new argument without spending the time to develop a good historical grounding for it. It is possible that WFN has pursued the case in a non-strategic way, and that this could now negatively impact claims of other first nations on this issue, because the text of Treaty 3 is similar to the text of most of the other numbered treaties.[226] This case was appealed by Wabauskang First Nation, but has since been withdrawn after a settlement with Rubicon Minerals Corporation.[227] It is perhaps for the best that this case did not go in front of higher courts, because it might have hurt the chances of others who could produce the evidentiary record to support a similar claim. It is also possible that it would have negatively impacted the two arguments made above.

IV. Conclusion

Ultimately the arguments proposed here are relatively weak, but they can be used as one part of the effort in ensuring that First Nations in Ontario are given the opportunity to benefit from the sequestration of carbon on their traditional territory, if not the right to ownership. Ultimately this could occur through negotiations and agreements with the provincial government, impact benefit agreements, or litigation. It may be that the best way to achieve recognition of this right is through negotiation, because it would be less costly and could generate more inventive solutions. The parties could then determine the details of what is included in the *sui generis* ownership of carbon. Two approaches that might be considered for the purpose of upholding the

[225] *Wabauskang*, *supra* note 220 at 217.
[226] Newman, *supra* note 224 at 21.
[227] Canadian Mining Journal Editor "GOLD: Rubicon and WFN reach settlement, exploration deal", 2014 November 24, online: <http://www.canadianminingjournal.com/news/gold-rubicon-and-wfn-reach-settlement-exploration-deal/>.

potential right are a requirement that offset licences are granted to First Nations projects at no cost, or a requirement that projects on traditional territories give equity in the project to First Nations in the territory. Certainly there are many other approaches that can be taken by the parties that would result in a proper recognition of the treaty rights of First Nations and the honour of the Crown more generally.[228]

Even if the right to ownership of carbon offsets within a First Nation's traditional territory is affirmed, the Crown is likely to be able to justifiably infringe that right based on the public benefit that could come out of the cap-and-trade program. It's likely that regulating the offset market and the rules within it may constitute a reasonable infringement, but exclusion from the system would be difficult for the Crown to justify. Assuming that Ontario is trying to uphold the honour of the Crown and trying to effect reconciliation, then the arguments contained in this paper give them a reason not to ignore or infringe the potential right.

I have focused mainly on offset projects involving the forestry sector, but given the large amount of carbon stored within Ontario's peatlands, and other potential sequestration projects that are less dependent on the land itself, it would be useful for future research to examine whether an argument can be made for a variety of types of carbon sequestration. Could these arguments extend to other forms of offset projects based on the abstract notion of carbon molecules rather than just carbon sequestration capacity within forests? It seems that the argument would be difficult to make, but that doesn't mean that it should not be considered by the Ontario government in deciding how the offset system will work within the cap-and-trade regime.

[228] See generally Stephen Wyatt et al, "Collaboration between Aboriginal peoples and the Canadian forest sector: A typology of arrangements for establishing control and determining benefits of forestlands" (2013) 115 Journal of Environmental Management 21.

The arguments that I am proposing here depend completely on any given First Nation's desire and capacity to get involved in the offset market. There is reason to believe that there would be considerable interest from First Nations in Ontario. Some First Nations in Canada are already implementing projects specifically for the purpose of carbon sequestration, including some in Ontario.[229] On July 8, 2015, Larry Sault, former Councillor and Chief of the Mississaugas of the New Credit and former Grand Chief of the Iroquois and Allied Indians, made a speech to the Climate Change Summit of the Americas. I will defer to his own words:

> **These two pathways – fighting climate change and revitalizing treaty relationships – are now coming together. And that's a good thing for everybody.**
>
> When you're battling climate change, you need warriors.
>
> **We are those warriors.** Our weapons are not guns. We're armed with wisdom and love for the natural world. We are Stewardship Warriors.
>
> For thousands of years, our communities have been stewards of the complex ecological systems that support our wellbeing. We had a thriving culture and a sophisticated, sustainable economy with trade routes that reached as far as Mexico.
>
> In our recent history (the last 200 years or so) people have tried to take that role of Stewardship away from us.
>
> ***Let me be clear – we will never stop being the stewards of our traditional territory***
>
> In fact, we are working harder than ever as Stewardship Warriors to protect and enhance ecosystems.
>
> …
>
> We are deeply committed to being leaders in the fight against climate change.
>
> Often - that means fighting against the establishment. But we're also willing to fight ***alongside*** worthy initiatives.

[229] International Institute for Sustainable Development, "First Nations Carbon Collaborative – Indigenous Carbon Leadership: Voices from the Field" (2011) online: <https://www.iisd.org/pdf/2011/fncc_voices_from_the_field.pdf>.

> Cap and Trade is a prime example. The Mississaugas of the New Credit First Nation will be fully engaged in developing Cap and Trade. AND we expect to use our share of the revenues generated to support initiatives and economic development by and for our people.
>
> Our plans for land and water ecosystem stewardship will be based on appropriate carbon management and offset strategies.
>
> We'll make sure we're fully compensated for our work protecting, repairing and managing ecosystems: historically, today and looking into the next seven generations. **We all know that proper financial incentive is one of the most powerful drivers of positive change.**
>
> We'll ensure that our people have the tools and training to deal with potentially disastrous weather related events and to deal with the long-term ecosystem impacts of climate change.
>
> None of us can do this alone. Effectively combating climate change and managing ecosystems will take firm agreements with our First Nation and other Tribal Nations throughout North America.[230]

Larry Sault is now the CEO of a company called Anwaatin, which is "an indigenous business working with Indigenous communities in linked Cap and Trade markets that include Ontario, Quebec, Manitoba and California."[231] One of the things this company is working on is an Indigenous Carbon Offset certification based on the standards set up by the Western Climate Initiative. The Indigenous Offset would include additional certification to verify offsets generated on lands stewarded by indigenous peoples and/or via an indigenous partnership with private/public/NGO entities.

Another example of the desire to learn about and be involved in the offset market is represented through the First Nations Carbon Collaborative (FNCC). The FNCC is a community-driven project that aspires to build capacity within First Nations so they can participate in and

[230] Larry Sault, "We are Stewardship Warriors", Climate Change Summit of the Americas, Toronto Ontario, 8 July 2015, online: <http://info.sharedvaluesolutions.com/blog/we-are-stewardship-warriors> (emphasis in original).
[231] Anwaatin, online: <anwaatin.com>.

benefit from carbon markets.[232] The initiative is led by the International Institute of Sustainable Development, the Centre for Indigenous Environmental Resources, and three First Nations representing the different First Nation governance structures within Canada (Poplar River First Nation, Carrier Sekani Tribal Council, and T'licho Nation).[233] In 2011, the University of Toronto's Centre for Environment, in collaboration with FNCC, presented a free webinar series "to bring together First Nations, carbon specialists, government and environmental groups to share information regarding their projects and policies for carbon and emissions trading, science and financing."[234] While not representative of all First Nations in Ontario, there is a clear interest by some First Nations to fully exercise their treaty rights in the stewardship of the land while gaining the economic benefit from the offset market.

If a *sui generis* right to ownership of the carbon sequestration capacity of the land is recognized and First Nations want to participate in the offset market, it is possible that they will require some government support to build up their own capacity. The Government of Ontario recently posted to its website a list of ways that it will be spending the "Green Investment Fund", which they are describing as a "down payment on Ontario's pending Cap-and-Trade program."[235] One of the ways the government proposes to spend this money is to support indigenous communities. This includes "building technical capacity so Indigenous communities are able to take advantage of economic opportunities from Ontario's proposed cap and trade program."[236] It is not immediately clear what is meant by this proposition, but it seems likely that

[232] Carrier Sekani Tribal Council, "First Nation Carbon Collaborative", online: <http://www.carriersekani.ca/programs-projects/fncc/>.
[233] *Ibid.*
[234] Chiefs of Ontario, "Climate Change", online: <http://www.chiefs-of-ontario.org/node/368>; Carrier Sekani Tribal Council, "Webinar Presentations", online: <http://www.carriersekani.ca/programs-projects/fncc/webinar-presentations/>.
[235] Government of Ontario, "Green Investment Fund", 17 March 2016, online: <https://www.ontario.ca/page/green-investment-fund>.
[236] *Ibid.*

this funding could be used, or perhaps is intended to be used to help First Nations become partners in the carbon offset market. Whether or not ownership of the carbon sequestration capacity on traditional territory is what is contemplated, this is a step in the right direction.

While I have found no clear and obvious treaty right to carbon offsets on traditional territories, the recognition of this right by the government of Ontario would constitute a valuable step towards reconciliation, and would support the efforts of Ontario to do its part to mitigate climate change. The recognition would be about more than managing litigation risk. It would be about the benefits that could come to all Ontarians by sharing the work of reducing carbon emissions and learning from Traditional Ecological Knowledge. It would be about upholding not just the law of the honour of the Crown, but the spirit of it.

Table of Authorities

LEGISLATION

JURISPRUDENCE

Ontario (Attorney General) v Bear Island Foundation, [1991] 2 SCR 570.

Quebec (Attorney General) v. Moses, 2010 SCC 17.

R v Badger, [1996] 1 SCR 771.

R v Horseman, [1990] 1 SCR 901.

R v Marshall; R v Bernard, 2005 SCC 43.

R v O'Sullivan Lake Outfitters Inc., [2011] 2 CNLR 307.

R v Sappier, 2006 SCC 54.

R v Shipman, 2007 ONCA 338.

R v Simon, [1985] 2 SCR 387.

R v Sparrow, [1990] 1 SCR 1075.

R v Sundown, [1999] 1 SCR 393.

R v Van der Peet, [1996] 2 SCR 507.

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

Union of Nova Scotia Indians v Canada (Attorney General), [1997] 1 FC 325.

Wabauskang First Nation v. Minister of Northern Development and Mines, 2014 ONSC 4424.

SECONDARY MATERIALS

Aldy, Joseph E & Robert Stavins. "The Problems and Promise of Pricing Carbon: Theory and Experience" (2011) NBER Working Paper No 17569.

Anwaatin, online: <anwaatin.com>.

Bernstein, Steven et al. "A Tale of Two Copenhagens: Carbon Markets and Climate Governance" (2010) 39(1) Millennium: Journal of International Studies 161.

Bonn, Aletta et al. “Investing in Nature: Developing Ecosystem Service Markets for Peatland Restoration” (2014) 9 Ecosystem Services 54.

C2ES: Centre for Climate and Energy Solutions. “California Cap and Trade” (2013) online: <http://www.c2es.org/us-states-regions/key-legislation/california-cap-trade#Details>.

Canada's Ecofiscal Commission. "The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions" (April 2015), online: <http://ecofiscal.ca/reports/wayforward/>.

Canadian Mining Journal Editor. “GOLD: Rubicon and WFN reach settlement, exploration deal”, 2014 November 24, online: <http://www.canadianminingjournal.com/news/gold-rubicon-and-wfn-reach-settlement-exploration-deal/>.

Carrier Sekani Tribal Council. “First Nation Carbon Collaborative”, online: <http://www.carriersekani.ca/programs-projects/fncc/>.

Carrier Sekani Tribal Council. “Webinar Presentations”, online: <http://www.carriersekani.ca/programs-projects/fncc/webinar-presentations/>.

Centre for Indigenous Environmental Resources and the Assembly of First Nations, 2006. “Legal Review of First Nations’ Rights to Carbon Credits” 2006, online: <http://www.yourcier.org/uploads/2/5/6/1/25611440/report_6_-_legal_review_of_first_nations_rights_to_carbon_credits.pdf>.

Chiefs of Ontario. “Climate Change”, online: <http://www.chiefs-of-ontario.org/node/368>.

Clayton, Reg. “Band councils consider ministry proposal for sustainable forestry licence” 21 March 2016, online: <http://www.kenoradailyminerandnews.com/2016/03/21/band-councils-consider-ministry-proposal-for-sustainable-forestry-licence>.

Coleman, James W. "Unilateral Climate Regulation" (2013) online: <http://ssrn.com/abstract=2237623>.

Collins, Lynda M & Meghan Murtha. “Indigenous Environmental Rights in Canda: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap” (2010) 47 Alta L Rev 959.

Coyle, Michael. “Respect for Treaty Rights in Ontario: The Law of the Land?” (2008) 39 Ottawa L Rev 405.

Decision of the Environmental Assessment Board on the OMNR Timber Class Environmental Assessment for Timber Management on Crown Lands in Ontario (May 1994), Environmental Assessment Board Decision EA-87-02, online: <http://www.web2.mnr.gov.on.ca/mnr/forests/timberea/decision_pdfs/intro.pdf>.

Dunn, Christian & Chris Freeman. “Peatlands: Our Greatest Source of Carbon Credits?” (2011) 2:3 Carbon Management 289.

Government of Ontario. “2014 Mandate letter: Environment and Climate Change”, online: <https://www.ontario.ca/page/2014-mandate-letter-environment-and-climate-change>.

Government of Ontario. “2014 Mandate letter: Aboriginal Affairs”, online: <https://www.ontario.ca/page/2014-mandate-letter-aboriginal-affairs>.

Government of Ontario. “Climate Change Strategy Report 2015” online: <http://www.ontario.ca/page/climate-change-strategy>.

Government of Ontario. “Green Investment Fund”, 17 March 2016, online: <https://www.ontario.ca/page/green-investment-fund>.

Government of Ontario, Office of the Premier. “Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario” 13 April 2015, online: <https://news.ontario.ca/opo/en/2015/04/cap-and-trade-system-to-limit-greenhouse-gas-pollution-in-ontario.html>.

Hoffman, Matthew J. “Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto” (2011), Oxford Scholarship Online: Constructing Carbon Markets.

Imai, Shin. “Treaty lands and crown obligations: the tracts taken up provision” (2001) 27 Queens Law Journal 1.

Indigenous and Northern Affairs Canada. “Peace and Friendship Treaties (1725-1779)”, online: <https://www.aadnc-aandc.gc.ca/eng/1360937048903/1360937104633>.

Indigenous and Northern Affairs Canada. “Treaty Texts - Douglas Treaties”, online: <http://www.aadnc-aandc.gc.ca/eng/1100100029052/1100100029053>.

Indigenous and Northern Affairs Canada. “Treaty Texts - Ojibewa Indians of Lake Huron”, online: <http://www.aadnc-aandc.gc.ca/eng/1100100028984/1100100028994>.

Indigenous and Northern Affairs Canada. “Treaty Texts – Treaty No. 8”, online: <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853>.

Indigenous and Norther Affairs Canada. “Treaty Texts – Treaty No. 9: The James Bay Treaty - Treaty No. 9 (Made in 1905 and 1906) and Adhesions Made in 1929 and 1930”, online: < http://www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864>.

International Institute for Sustainable Development. “First Nations Carbon Collaborative – Indigenous Carbon Leadership: Voices from the Field” (2011) online: <https://www.iisd.org/pdf/2011/fncc_voices_from_the_field.pdf>.

Klippenstein, Murray. “Oral Promises/Broken Promises” (2010) Presentation at a meeting of the Ontario Mining Action Network. Online: <http://miningwatch.ca/blog/2011/2/25/oral-promisesbroken-promises-shows-alternative-interpretation-ontarios-treaty-9>.

Kneteman, Christie J. "Building an Effective North American Emissions Trading System: Key Consideration and Canada's Role" (2010) 20 Journal of Environmental Law and Practice 127.

Leach, Andrew J. "The Welfare Implications of Climate Change Policy" (2009) 57 Journal of Environmental Economics and Management 151.

Long, John S. *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen’s University Press, 2010).

MacIntosh, Constance. “On Obligations and Contamination: The Crown-Aboriginal Relationship in the Context of Internationally-Sourced Infringements” (2009) 72 Sask L Rev 223.

Macklem, Patrick. “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 97.

Market Advisory Committee to the California Air Resources Board. "Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California" (2007) online: <http://www.climatechange.ca.gov/market_advisory_committee/>.

McLaughlin, Jim & Kara Webster. “Effects of Climate Change on Peatlands in the Far North of Ontario, Canada: A Synthesis” (2014) 46:1 Arctic, Antarctic, and Alpine Research 84.

Metcalf, Gilbert E. “A Proposal for a US Carbon Tax Swap: An Equitable Tax Reform to Address Global Climate Change” (2007) Discussion Paper: The Hamilton Project.

Newell, Richard G, William A Pizer & Daniel Raimi. “Carbon Markets 15 Years after Kyoto: Lessons Learned, New Challenges” (2013) 27(1) The Journal of Economic Perspectives 123.

Newman, Dwight. “Is the Sky the Limit? Following the trajectory of Aboriginal legal rights in resource development” (2015) Aboriginal Canada and the Natural Resource Economy Series, MacDonald-Laurier Institute.

Nishnawbe Aski Nation. “Ontario’s Far North Act”, no date, online: <http://www.nan.on.ca/article/ontarios-far-north-act-463.asp>.

Ontario Ministry of Environment and Climate Change. “Cap and Trade Program Design Options” November 2015, online: <http://www.downloads.ene.gov.on.ca/envision/env_reg/er/documents/2015/012-5666_Options.pdf>.

Richardson, Don. “Premier Wynne’s Priorities for Ontario: Aboriginal Community Wellbeing” 26 September 2014, Shared Value Solutions, online: <http://info.sharedvaluesolutions.com/blog/premier-wynne%E2%80%99s-priorities-for-ontario-aboriginal-community-wellbeing>.

Sault, Larry. “We are Stewardship Warriors”, Climate Change Summit of the Americas, Toronto Ontario, 8 July 2015, online: <http://info.sharedvaluesolutions.com/blog/we-are-stewardship-warriors>.

Schmidt, Robert C & Jobst Heitzig. “Carbon Leakage: Grandfathering as an Incentive Device to Avert Firm Relocation” (2014) 67 Journal of Environmental Economics and Management 209.

Slattery, Brian. “Aboriginal Rights and the Honour of the Crown” (2005), 29 SCLR (2d) 433.

Smith, Scott A & Mark L Madras. “Forest Offset Credits: A Cornerstone of Sustainable Development on Aboriginal Lands” (2009) 1:3 Climate Change @ Gowlings, online: <http://documents.lexology.com/c47984a3-4742-47a2-8a51-76147dd1e60e.pdf>.

Western Climate Initiative. “Design for the WCI Regional Program” (2012), online: <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/program-design>.

Western Climate Initiative. “Offset Protocol Review Report”, April 2010, online: <http://www.westernclimateinitiative.org/component/remository/Offsets-Committee-Documents/WCI-Review-of-Existing-Offset-Protocols>.

Wyatt, Stephen et al. “Collaboration between Aboriginal peoples and the Canadian forest sector: A typology of arrangements for establishing control and determining benefits of forestlands” (2013) 115 Journal of Environmental Management 21.