REPORT 6:

LEGAL REVIEW OF FIRST NATIONS' RIGHTS TO CARBON CREDITS

Prepared For:

The Assembly of First Nations

Prepared By:

CIER
CENTRE FOR INDIGENOUS ENVIRONMENTAL RESOURCES

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Disclaimer

This is a legal review. It is not a legal opinion and should not be relied upon as such.

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Table of Contents

1.0 INTRODUCTION

A review of possible legal arguments has been provided here to respond to the question of what rights First Nations in Canada might be able to assert to own and to use carbon in trees. This overview is conducted particularly in the context of using the carbon contained within trees to generate offset credits under a trading system to reduce greenhouse gas emissions, and focuses on how Aboriginal, treaty, and land title rights might be exercised so that First Nations can sell these credits to industry or government. While the details of a specific legal argument will vary and must be adopted according to the circumstances of a particular First Nation's social, political, economic and legal situation, as well as with the rules that exist when a concrete offset system is developed by Canada's environmental authorities[1], the legal arguments outlined here draw on the constitutional and legislative entitlements as set out by Aboriginal, treaty and land title rights, judicial interpretations and scholarly arguments. Essentially, the legal arguments presented propose to assert First Nation's jurisdiction to environmental management in territory that can be used as carbon sinks to reduce or sequester greenhouse gas emissions, thus enabling First Nations to claim and sell offset credits, as currently proposed for the development of a future system:

> "Individuals and organizations that reduce or sequester emissions will be able to apply to a body under the authority of the Minister of the Environment for offset credits. To qualify for credits, certain criteria established by the Minister would have to be met. For example, emission reductions would have to go beyond business as usual practices." [2]

How First Nations' practices can qualify for offset credits relates both to the scope of their jurisdiction over their territories, as well as potential ownership rights to carbon (separate from

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[1] The previous government made commitments and set specific goals to fulfill Canada's obligations under the Kyoto Accord to reduce greenhouse gases. The development of an offset system was proposed as a means to achieve these goals. However, how and whether these obligations will be fulfilled will be determined by the new government. The assumption in this discussion is that the proposed offset system will inform future initiatives for reducing greenhouse gases through buying and selling carbon offset credits.

[2] "What is an offset credit?" Environment Canada – *Designing a Greenhouse Gas Offsets System for Canada,* online at: Environment Canada <http://www.climatechange.gc.ca/english/offsets/offset_credit.asp>

their title and ownership of trees and lands). This is discussed in relation to traditional lands claimed through Aboriginal title, reserve lands, and settled land claims. In addition, claims that can be made through Aboriginal and treaty rights to sustainable forest practices that are conducive to claiming, owning and selling carbon offset credits are also discussed.

2.0 OWNERSHIP OF CARBON AS A RESOURCE

This section addresses the ownership of carbon in trees as differentiated from general ownership of the trees. Ownership of carbon can be likened to rights to resources such as subsurface minerals or air, which has been recognised by the Supreme Court of Canada as included in the interests First Nations have in land on reserve.[3] These interests are held in trust by the Crown, thus obligating the Crown to act according to its fiduciary duty in exploiting or using these resources. The justification of this reasoning is demonstrated by the American *Winters* Doctrine that dealt with First Nations' water rights. The court in this case held that the establishment of an Indian Reservation had to imply that sufficient water was also set aside to fulfill the purposes for which the reservation was created.[4] Indigenous peoples in Canada, similarly, have interests in both the land that they occupy and water they use; it is further asserted here that this argument extends to the carbon in the trees also set aside to fulfill the purposes of the reserve created and used by the First Nation. Like rights to water, interests in carbon and its use were not specifically ceded by First Nations through treaty, thus a strong argument can be made that ownership still resides with First Nations.

Water rights have never been ceded through treaties with the British or Canadian Crown, and thus are retained and held by indigenous communities. Treaties, which occupy a significant part of the historical relationship between Europeans and First Nations in Canada, can be understood as agreements dealing with inherent rights; that is, only those things that indigenous

[3] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1994] 4 S.C.R. 344: The Aboriginal interest in reserve land includes an interest in mineral rights, which the Crown holds in trust for Aboriginal peoples therefore requiring the Crown to act according to its fiduciary duty to First Nations. Also, at common law the owner of the surface land owns the subsurface and the air space; see also *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119: the Band has a right to the airspace right-of-way.

[4] *Winters v. United States,* 207 U.S. 564 (U.S. 1908).

peoples' had the right to grant to others.[5] A close look at the treaties made between the Crown and First Nations reveals the absence of a 'clear and plain intention' to extinguish indigenous inherent water rights[6], which is the necessary legal test to prove First Nations water rights no longer exist.[7] The source of Aboriginal rights derives from two facts:

> [T]hat indigenous peoples have been living for thousands of years in what has become Canada, with their own societies, ways of life and governments; and the special relationship that indigenous peoples have with the lands and waters, which in turn defines their identity, rights and responsibilities.[8]

Recognition of the endurance of indigenous water rights from these sources was strongly implied when both Canadian federal and provincial authorities opted for a generous settlement with a First Nation in Alberta, rather than testing the limits of indigenous peoples' claim to water through litigation, in virtually the only case dealing with water rights in Canada.[9]

Nothing has been litigated to date specifically on the carbon rights of First Nations, but its analogy to the argument regarding water rights remaining with First Nations is further strengthened by recognition by Canadian courts of First Nations' rights to subsurface minerals, airspace, and other resources, as well as the expansive land interests associated with the creation of reserves as set out in s. 18 of the *Indian Act*[10]:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

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[5] K. Kempton, "Bridge over Troubled Waters: Canadian Law on Aboriginal and Treaty "Water" Rights and the Great Lakes Annex" (April 2005) Olthius Kleer Townshend at 18-19.

[6] M. Phare "Indigenous Water Rights" - Presentation

[7] *R v. Sparrow,* [1990] 1 S.C.R. 1075.

[8] Kempton, supra note 5 at 13.

[9] *Piikani First Nation v. Alberta* (2002).

[10] R.S.C. 1985, c. I-5.

> (2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed by the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

This sets out a broad purpose for the land set aside for First Nations, such as for the general welfare of the band. Thus, it includes interests in the land towards fulfilling that purpose – which can be argued includes an interest in carbon. Conservation measures to enhance the utility of that carbon ought to then be engaged in the interests of the First Nation's welfare, as it offers a significant economic opportunity as commodities in an upcoming offset system. These interests are similar to and have been likened to interests existing under Aboriginal title[11]; as such interests are not limited to Aboriginal uses of the land that have to be proved according to the pre-European contact test set out in *R* v. *Van Der Peet*. [12] Rather, it is by virtue of the carbon's possibility for providing for the general welfare of the band through economic development, and thus fulfillment of the stated objective of creating the reserve that can arguably justify First Nations' rights to carbon, its use and its sale in an expected Canadian offset system.

3.0 OWNERSHIP AND USE OF CARBON THROUGH EXERCISE OF TERRITORIAL JURISDICTION

Alternatively to arguing that First Nations have a direct right to use, ownership and benefits of carbon as a distinct resource, it is possible to assert jurisdiction over the use of carbon and its sale through offset credit system if First Nations are able to claim ownership and control over the lands, forest and trees the First Nation is seeking to manage as a carbon sink. This control can be manifested in three contexts: a settled land claims agreement, reserve lands authorities, and off reserve jurisdiction flowing from Aboriginal land title. Within each of these contexts, how

[11] *Guerin v. The Queen,* [1984] 2 S.C.R. 335 at 379.

[12] [1996] 2 S.C.R. 507.

effectively the First Nation asserts its right to govern, manage, and protect the environment would determine the extent of the entitlement to control and sell carbon credits.

3.1 SETTLED LAND CLAIMS

In a negotiated land claims agreement between a First Nation and Canadian federal and provincial governments, rights and interests to land are set out in provisions of the agreement. For instance, the *Nisga'a Final Agreement*[13] between the Nisga'a First Nation, British Columbia and Canada sets out that the land is held by the First Nation in fee simple.[14] This agreement also set out the powers of governance, including provisions of environmental regulation and management that the Nisga'a Nation has within its jurisdiction. As such, exercising jurisdiction over forest management practices and conservation initiatives on land within their territory is already defined within the power of the Nisga'a.[15] As it is within their territory, the First Nation exercising control within this negotiated agreement would have the right of ownership of carbon and to sell it in the form of offset credits according to the specific rules of the offset system developed.

3.2 ON-RESERVE AUTHORITIES

As mentioned above, the interests First Nations have in reserve lands are defined broadly by its stated purposes for creation and its intended uses. Governance under the *Indian Act*, provided to Band Councils on reserves, sets out decision-making authority in relation to these interests. Of particular relevance to interests in ownership and control over carbon and its management towards gaining and selling offset credits, section 81 and 83 provide for the band council's power to make by-laws related to the well-being of the band, its protection and development as well as for taxation and business.

For example, s. 81(g) provides for the zoning power of the Band Council. First Nation governments under the *Indian Act* have the power to prohibit the construction of buildings or businesses – which can be a powerful environmental conservation tool.[16] Decision-making authority of this sort allows the First Nation sufficient control over practices towards

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[13] Online at: Indian and Northern Affairs Canada < http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html >

[14] See Chapters 3 & 4 of the *Nisga'a Final Agreement.*

[15] See Chapters 5, 10 & 11 of the *Nisga'a Final Agreement.*

[16] N. Kleer, "Avenues for the Exercise by Walpole Island First Nation of Jurisdiction over Environmental Protection" (November 1999), online at: < www.bkejwanong.com/avenues.html >

conservation and sustainable management, which thus allows them to apply for and extend ownership over resulting carbon offset credits.

3.3 JURISDICTION BASED UPON ABORIGINAL LAND TITLE

Where a First Nation wants to assert jurisdiction outside the reserve – which is most often likely to be the case – to carbon, trees and territories for the purpose of claiming offset credits, they could do so through Aboriginal land title. Again, the goal is to assert control over the management and conservation of trees, establishing their use as a carbon sink and establishing the First Nation's ownership of the offset credits coming out of that practice. To assert Aboriginal land title is to ensure that the benefit of their actions will go to the First Nation. Basically, this entails showing that the land should not be used for the benefit of provincial or federal governments. Section 109 of the Constitution vested underlying title to Crown lands within provincial boundaries in the province at the time of Confederation. However, jurisprudential interpretation has articulated Aboriginal land title as a burden on this underlying title; before a province can derive benefit from the land, it must be freed from that Aboriginal land title.[17]

As such, the conflict between First Nations and federal or provincial jurisdiction over a territory claim under Aboriginal land title would have to be resolved in advance of one of these parties reaping benefit from it under the offset system, for instance. Establishing a claim to Aboriginal land title would have to follow the guidelines set out by the *Delgamuukw*[18] decision; essentially, showing intention of exclusive and continuous occupation considering both common law and Aboriginal perspectives and understandings in determining criteria of such occupation. The advantages of asserting jurisdiction through the route of Aboriginal land title include that it is not limited by the pre-European contact test established by the Supreme Court in *R v. Van der Peet.* This test serves as a barrier to asserting certain practices as constitutionally protected Aboriginal rights because it focuses on what was being done by First Nations at the time of European contact. This will be discussed further in the section dealing with assertion of Aboriginal and treaty rights. Instead, Aboriginal land title – as discussed in *Delgamuukw* – recognises a First Nation's broader interest in land (similar to those interests found on reserve) outside of what is considered traditional Aboriginal uses. The limit the Court did place on Aboriginal land title is that its use cannot be irreconcilable with the special connection or

[17] *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (P.C.) at 58-59.

[18] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 [*Delgamuukw*].

practice with which it is associated and thus claimed. For instance, if it was claimed by a First Nation as a traditional hunting ground, it cannot be put used for a purpose that would make it incompatible with hunting.[19] This is not at odds with the use of the land or trees on that land as a carbon sink to reduce greenhouse gas emissions. Practices involved in enhancing the use of the land towards that end are conservation techniques, forest management, and other actions aimed at preserved ecological stability that are most likely compatible with the use of the land asserted by the First Nation as entitling them to Aboriginal land title.

This limit, it could be argued, could prevent other government authorities – such as the province – from infringing Aboriginal land title in a way that is incompatible with the use of the land. Aboriginal land title rights can be infringed by Canadian governments, so long as the test for justifiable infringement set out in *Sparrow* is satisfied. This limit must be taken into consideration when the province is trying to derive benefit from its underlying title before the burden of Aboriginal land title is dealt with; the land cannot be used in a way that leaves it void of the interest and connection the First Nation has with it.[20] As such, the First Nation's jurisdiction to demand that conservation and environmental management be practiced should be recognised by other authorities; as well, its contribution then to the use of carbon and trees towards greenhouse gas reduction or sequestration ought to be recognised through ownership of offset credits which the First Nation can then sell. Essentially, Aboriginal title then is an all-inclusive property right. "Aboriginal peoples can put their lands to any use they collectively choose. This includes extracting minerals and harvesting timber, whether for their own consumption or commercial purposes."[21]

The exercise of exclusive Aboriginal jurisdiction – and thus ownership of benefits from its management and conservation – over territory claimed under Aboriginal land title is further supported by the characteristics attributed to Aboriginal land title in *Delgamuukw:* Aboriginal title is held communally and it is inalienable to anyone except the Crown. Holding land communally

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[19] Ibid. at 1080, para 111.

[20] *Haida Nation v. British Columbia,* [2004] 3 S.C.R. 511 at para 25: The Honour of the Crown compels consideration and accommodation of First Nations in resource management so that Aboriginal interests are not disregarded.

[21] K. McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" (May 2000), online at:

< www.delgamuukw.org > at p. 17-18.

likens the title First Nations' have to land to the public property held by federal and provincial governments for the benefit of people in Canada. Decision-making authority over Aboriginal title lands, then, is an exercise of a First Nation's right of self-governance.[22] The exercise of their respective authority and jurisdiction in environmental management of the territory entitles the First Nation to create sub-interests in their lands – i.e. carbon offset credits – to trade or sell for the benefit of their members, so long as they retain their communal title.[23]

4.0 OWNERSHIP AND USE OF CARBON THROUGH EXERCISE OF ABORIGINAL AND TREATY RIGHTS

First Nations may be able to argue they are entitled to ownership and use of carbon as offset credits through the exercise of their Aboriginal and treaty rights. Since it is important to establish the practice claimed as an Aboriginal right as originating before pre-European contact, the focus here is on defining the right that is being claimed. The discussion is the same when asserting the existence of treaty rights and entitlements that could result in the ability to own and sell carbon offset credits.

4.1.1 Aboriginal Rights

In *R v. Van der Peet,* as mentioned above, the Supreme Court of Canada set out that First Nations had to establish that the practice being claimed as a constitutionally protected Aboriginal right was a pre-European contact practice and was integral to distinctive Aboriginal culture. The most important question in the context of this discussion then becomes what is the right that is being claimed in the current situation? It would be a difficult argument to make that selling carbon offset credits is the modern evolution of an Aboriginal practice dating back to pre-European contact, however its strength would depend entirely on the evidence a specific First Nation is able to present to support its assertion. In *R v. Sappier*[24]*,* the First Nation was able to demonstrate they possessed both an Aboriginal and treaty right to harvest trees for personal use on Crown lands, which were traditionally occupied by the community. Essentially, the use of timber for building furniture, constructing shelter and for firewood was accepted as an evolution of pre-European contact practices rather than a transformation.[25] First Nations indeed used

[22] *Ibid*. at 31-33.

[23] *Ibid*. at 43.

[24] [2004] 4 C.N.L.R. 252 (N.B.C.A.)

[25] Ibid. at para 18.

trees for a variety of purposes, and courts should not take a 'frozen-in-time' approach to define what constitutes a practice – and thus a right – that is integral to a First Nation's distinctive culture. In the past, First Nations would cut down trees for ceremonial purposes, shelter, transportation and tools. Some trees were left standing for spiritual purposes.[26] These activities were directed to a common end: community health and well-being. It could be argued that the use of trees towards that same end has evolved to rights to store carbon in a way that would result in economic benefit for the community.

A more general and alternative argument could be to assert an Aboriginal right to environmental management and conservation. This could take two forms. First, a First Nation could argue that the content of the actual right is control over environmental management. If evidence can be presented by the First Nation that shows current exercise of forest management techniques, conservation initiatives and other mechanisms of control over environmental resources are rooted in pre-European contact practices, then those practices can be asserted as Aboriginal rights. Since the objective of constitutionally guaranteeing Aboriginal rights under section 35 is to reconcile the historical occupation of Canadian territory with the assertion of European sovereignty, the content of Aboriginal rights ought to recognise the systems of governance and control that were in place in Aboriginal communities before this assertion of foreign sovereignty. Courts have recognised First Nations' inherent right to self-governance,[27] thus it can be argued that expression of self-governance should be protected by Aboriginal rights to manage and conserve the environment within their traditional territories. Exercising these rights results in engaging in activities necessary to assert ownership over resulting carbon offset credits for the reduction of greenhouse gases, thus enabling the First Nation to sell these credits under the proposed system.

Alternatively, good conservation practices and forest management are incidental to the exercise of other protected Aboriginal rights. For instance, if a First Nation can establish the right to hunt as an Aboriginal right, those things that are incidental to the exercise of the right are also

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[26] The duty to consult with First Nations regarding impacts on their rights has related – in a number of cases – to preserving interests in trees by protected old growth forests, and culturally modified trees. See e.g. *Haida Nation v. British Columbia (Minister of Forests),* [2001] 2 C.N.L.R. 83 (B.C.S.C.), rev'd [2002] 6 W.W.R. 243 (B.C.C.A.), rev'd [2004] 3 S.C.R. 511; *Hupacasath First Nation v. British Columbia (Minister of Forests),* [2006] 1 C.N.L.R. 22.

[27] *Campbell v. British Columbia (Attorney General),* [2000] B.C.J. No. 1524.

constitutionally protected.[28] Thus, conservation of forest surface area or wildlife habitat would be incidental to the exercise of Aboriginal rights to hunt. Incidental rights have the same status as the right to hunt for the First Nation, thus any infringement requires justification under *Sparrow.* If the right itself doesn't include management rights, then proper accommodation and consultation could encompass the right of a First Nation to exert their jurisdiction in how the territory should be managed. As such, any conservation practices or forest management the First Nation contributes in managing that increases the territory's use as a carbon sink should result in the First Nation's ability to own and sell offset credits.

4.1.2 Treaty Rights

Arguing the existence of treaty rights to the ownership and use of carbon runs into similar barriers as asserting such activities as Aboriginal rights; it is constrained by what was contemplated by the parties at the time the treaty was signed. In a recent Supreme Court decision,[29] a trading clause within a treaty between the Mik'maq peoples and the Crown was interpreted as not including the right to log for commercial purposes, as it the court determined it was not within the practice was not contemplated by the parties at the time the treaty was signed. What *was* surely in contemplation, however, at the time of signing various treaties, was the guarantee of necessary conditions for the continued exercise of stated treaty rights. It is through this route that it may be possible to put forth an argument for First Nations' rights to extend to forest and conservation practices resulting in ownership of carbon offset credits that can be sold.

In Treaty 8, for example, First Nations ceded vast tracts of land and boreal forests in exchange for reserves and the guarantee of their ability to continue engaging in the same livelihoods and practices they had been before the arrival of Europeans.

> "And Her Majesty the Queen 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 her Majesty, and saving and expecting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

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[28] *R v. Sundown,* [1999] 1 S.C.R. 393.

[29] *R v. Marshall; R v. Bernard,* [2005] S.C.J. No. 44.

Regardless of the fact that the territory was ceded, when the Crown seeks to 'take up' land or exercise regulatory authority according to what is set out in the treaty, it must do so in a way that preserves that practices of First Nations. "First Nation intentions at the time the treaties were negotiated were very clear. They entered into those negotiations to preserve their way of life, not to *extinguish* their rights to the land and their rights to hunt, trap and fish."[30] As such, the regulations that can be imposed by federal or provincial governments – by virtue of the wording of the treaty – have been narrowed to what is compatible to the exercise of First Nations rights and to what can be justified under *Sparrow.*[31] Similarly, the clause entitling the Crown to 'take up' land under Treaty 8 must be read together with the provision preserving First Nations rights. The Crown's right to 'take up' land must not be read to as absolute nor used to render First Nations rights useless.[32] Treaty interpretation then indicates that it is necessary that the Crown ensure sufficient resources are available to meet the needs of First Nations and the exercise of their rights, even when exercising its right to regulate or take up the land under the treaty; the limits of this power is found in the extent that it impairs the exercise of First Nations' rights.[33]

The recent Supreme Court case *Mikisew Cree*[34] also emphasises the importance of negotiating and consulting with First Nations when the Crown seeks to 'take up' tracts of land when it will impact the exercise of First Nations' rights. The Crown's exercise of its power to regulate or take up land without the input and accommodation of First Nation interests would be in contradiction to the honour of the Crown. As such, First Nations can likely find an avenue here to assert its jurisdiction in the management of the territory covered by treaty in a way that is favourable for the exercise of their hunting, fishing and trapping rights.

Similar to the argument asserted above regarding the need to promote sustainable forest management and conservation as incidental to the exercise of Aboriginal rights, the same can be put forward here. The territory ceded by treaty still must be maintained in a way that is

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[30] S. Imai, "Treaty Lands and Crown Obligations: The "Tracts Taken Up" Provision" (2001) 27 Queen's L.J. at 13-14.

[31] *R v. Badger,* [1996] 1 S.C.R. 771 at 810: provincial game laws and its regulatory authority could only be applicable to the Indians so long as it was aimed at conservation.

[32] *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666.

[33] Imai, supra note 27.

[34] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] S.C.J. No. 71.

compatible with the exercise of First Nations' treaty rights; any government action otherwise 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 sold for the benefit of the First Nation.

5.0 CONCLUSION

Three legal arguments have been set out here for First Nations to claim ownership and rights of use to carbon offset credits. The first is claiming ownership to carbon as a resource that was not ceded by First Nations to the Crown specifically, and thus ownership and rights of use is still retained by the First Nation. Its specific cessation is not clearly nor plainly stated in treaties, and First Nations' ownership of other similar resources and minerals have been recognised as being retained by communities or held in trust by federal governments. As such, it is possible to put forward a sound legal argument that First Nations retain ownership of carbon and are therefore entitled to claim, own and sell carbon offset credits under any system developed by environmental authorities for the reduction of greenhouse gases.

Second, First Nations can assert territorial jurisdiction over forests and areas that can be managed and conserved in a way that is compatible with recognising the existence of carbon offset credits. This could happen in areas controlled by First Nations governance structures under settled land claims agreements, on reserves, and off-reserves through assertion of Aboriginal title. Claiming Aboriginal title is essentially asserting interests in land that is similar to interests held on reserves. So long as practices adhere to the inherent limit as defined by the Supreme Court – that the land ought not be used in a way that is irreconcilable with the Aboriginal use for which it was claimed – First Nations are free to use the land towards the benefit of its members. Exercising forest management and environmental conservation towards maintaining the territory as a carbon sink and creating offset credits for sale fits within the rights First Nations holding Aboriginal land title are entitled.

Third, First Nations can argue that they have Aboriginal and treaty rights to or related to the conservation and environmental management practices that would also create for them interests in owning and selling carbon offset credits. The level of environmental conservation and resource management necessary for exercise of other Aboriginal and treaty rights possessed by First Nations likely correlates with the practices compatible with increasing

greenhouse gas emissions through sequestration and reduction. Any infringement on the circumstances incidental to the exercise of these rights must be justified, and First Nations ought to be consulted and accommodated. Therefore, they are able to assert their perspectives and jurisdiction through this means as to how the territory ought to be managed and conserved to adequately allow the exercise of their rights. Following from this input, First Nations should be able to successfully argue the right to benefit from these practices through the grant of carbon offset credits that can be sold in the proposed system.

The outcome would be significantly affected by the particular circumstances of a First Nation, the evidence they would be able to offer in support of these legal arguments and also the specifics of the offset system developed to meet Canada's greenhouse gas reduction objectives. For instance, the result might be a co-management arrangement between First Nations and Canadian government as to how territories concerned will be managed and conserved, and how benefits will be allocated. Given the case law and opinions of legal scholars summarised throughout, it is likely that First Nations would be able to effectively argue the merit of their rights to claim carbon offset credits through their ownership over carbon and their jurisdiction over environmental management resulting in the creation of offset credits.

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