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## Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy

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# Aboriginal Peoples and Legal Challenges to Canadian Climate Change Policy

## **Abstract**

This article explores two litigation strategies for challenging Canadian climate change policy, both of which involve constitutional rights and Aboriginal peoples. First, the authors argue that Canada's climate change policies can be challenged as infringements of the section 7 *Charter* right to security of the person of Canada's most northerly Aboriginal peoples. Second, they argue that the impact of insufficient carbon emissions regulation on Aboriginal peoples may violate section 35 of the *Constitution Act, 1982*, which affirms the rights of Canadian Aboriginal peoples. Although the proposed litigation strategies face a number of challenges, the issues are justiciable. Furthermore, if one of these claims proceeded to trial, the government would be called upon to defend and justify its ongoing failure to reduce Canada's greenhouse gas emissions.

## **Keywords**

Aboriginal Peoples, Climate Change, Charter Challenges, Litigation, Constitutional Rights, Carbon Emissions, Section 7, Charter of Rights and Freedoms, First Nations, Canada, Northern Canada, Inuit, Aboriginal Rights, Indigenous Peoples, Indigenous Rights, Indigenous Law, Oil sands

## **Cover Page Footnote**

The authors would like to thank John Terry, Dennis Mahony, and Kent Roach for their encouragement and advice in writing this paper.

# ABORIGINAL PEOPLES AND LEGAL CHALLENGES TO CANADIAN CLIMATE CHANGE POLICY

ANDREW STOBO SNIDERMAN AND ADAM SHEDLETZKY\*

## INTRODUCTION

This article explores two litigation strategies for challenging Canadian climate change policy. Both involve constitutional rights and Aboriginal peoples. The first concerns the section 7 *Charter* right to security of the person, and the second relates to section 35 Aboriginal rights.<sup>1</sup> Aboriginal peoples are among Canada's most vulnerable to climate change and are owed stringent duties from the federal government, which suggests courts are more likely to recognize climate change as a threat to rights with respect to Aboriginal litigants.

First, we argue that Canada's withdrawal from the *Kyoto Protocol* and failure to effectively reduce greenhouse gas emissions can be challenged as threats to the section 7 right to security of the person of Canada's most northerly Aboriginal peoples, such as the Inuit. Second, we argue that the impact of insufficient carbon emissions regulation on Aboriginal peoples may violate section 35 of the *Constitution Act, 1982*, which affirms the rights of Canadian Aboriginal peoples. We explore two possibilities for section 35 challenges. Arguably, the federal government's efforts to reduce Canadian carbon emissions could lead to unjustifiable infringements on Aboriginal and treaty rights. Alternatively, the planning and execution of federal and provincial emissions policies may be characterized as a failure to fulfill the duty to consult with Aboriginal peoples.

## I. CLIMATE CHANGE AND SECTION 7

Environmentalists have twice tried and failed to challenge the federal government's decision to withdraw in 2011 from the *Kyoto Protocol*, an international

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<sup>1</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, Part I: *Canadian Charter of Rights and Freedoms [Charter]* and Part II: *Rights of the Aboriginal Peoples of Canada*.

treaty limiting carbon emissions that Canada signed in 1997 and ratified in 2002.<sup>2</sup> We explore these failures before returning to an alternative approach rooted in a claim of section 7 rights violations stemming from climate change.

### Failed Approaches

Environmentalist applicants in *Friends of the Earth v Canada (Governor in Council)* argued that a legislative act of Parliament, the *Kyoto Protocol Implementation Act (KPIA)*,<sup>3</sup> bound the executive to make credible plans to meet its international commitments.<sup>4</sup> The applicants sought judicial review of federal efforts to address climate change. The Federal Court, however, declined to intervene. The *KPIA* was passed by opposition parties in a minority Parliament and sought to secure improved federal commitment to emissions reduction by instituting an expansive reporting regime. The federal government responded with a tabled Climate Change Plan that overestimated its projected emissions cuts.<sup>5</sup> After interpreting the *KPIA* and considering its own relative institutional competence, the Court concluded that the legislation displaced any role for judicial scrutiny. The legislation established its own system of public accountability, which meant that the courts could not appropriately “dictate the content of the proposed regulatory arrangement” or provide a remedy for government shortcomings.<sup>6</sup> The Court declined to review the reasonableness of the executive’s actions with respect to its Kyoto commitments.

In *Turp v Canada (Attorney General)*, the applicant adopted a slightly different tactic and argued that the *KPIA* restricted the federal government’s ability to legally withdraw from the *Kyoto Protocol*.<sup>7</sup> The Federal Court conceded that parliamentary legislation could limit the prerogative of the executive but held that such a limit was not achieved in this particular case.<sup>8</sup> The legislation was not interpreted so as to impose a “justiciable duty upon the government to comply with Canada’s Kyoto commitments.”<sup>9</sup> The Court also noted that the *KPIA* was repealed, though this was after withdrawal from the *Kyoto Protocol*. The Court held that the conduct of foreign affairs and international relations fell within the royal prerogative of the executive, and that the *KPIA* was not intended to restrict such discretion. However, the Court acknowledged “the possibility” that “a decision made in the exercise of prerogative powers” could be justiciable in the

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<sup>2</sup> *Status of Ratification of the Kyoto Protocol*, UNFCCC, 2014, online: UN Framework Convention on Climate Change <<https://unfccc.int/2860.php>>.

<sup>3</sup> SC 2007, c 30, repealed, 2012, c 19, s 699.

<sup>4</sup> 2008 FC 1183 [*Friends of the Earth*].

<sup>5</sup> *Ibid* at para 15.

<sup>6</sup> *Ibid* at paras 39 and 45.

<sup>7</sup> 2012 FC 893 at para 19 [*Turp*].

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid* at para 26.

event of a *Charter* challenge.<sup>10</sup> This is the litigation route that we explore below. It targets the same executive decision as *Turp*—the decision to withdraw from the *Kyoto Protocol*—but adopts a section 7 *Charter* approach.

### The Section 7 Approach

A *Charter* challenge to government climate change policy would target government action and inaction. First, the executive act of withdrawing from the *Kyoto Protocol* could be challenged as a threat to section 7 rights. Alternatively, government inaction on reducing greenhouse gas emissions could be challenged as a threat to section 7 rights. To succeed, a claim will have to show two things: first, that government action or inaction causes section 7 violations by contributing to climate change and, second, that these violations are not in accordance with the principles of fundamental justice. We argue that a combination of government action and inaction is contributing to climate change, which may be violating Inuit rights to security of the person in a manner that is grossly disproportionate.

### Justiciability

Canada's withdrawal from the *Kyoto Protocol* was an act of foreign policy within the executive's prerogative, but it is still potentially justiciable. In *Operation Dismantle v The Queen*, in the early years of the *Charter* and the later years of the Cold War, activists sought judicial review of the executive's decision to allow the United States to test cruise missiles on Canadian soil, which they alleged increased the threat of nuclear war.<sup>11</sup> The activists claimed that the threat or eventuality of a nuclear attack constituted a violation of section 7 rights. The application failed, but the Supreme Court noted that "[it had] no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts."<sup>12</sup> In a concurring judgment, Justice Wilson enjoined courts to refrain from too eagerly relinquishing "their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state."<sup>13</sup> Wilson rejected the "political questions doctrine" of the United States, whereby courts abstain from intervening in domains of inherently moral and political considerations out of concern for the appropriate separation of powers.<sup>14</sup> If Canada's withdrawal from the *Kyoto Protocol* caused *Charter* violations, the decision would be subject to judicial review.

Furthermore, the courts are also willing to hold government inaction unconstitutional. In *Vriend v Alberta*, the Supreme Court stated that the distinction

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<sup>10</sup> *Ibid* at para 19.

<sup>11</sup> [1985] 1 SCR 441 [*Operation Dismantle*].

<sup>12</sup> *Ibid* at para 38.

<sup>13</sup> *Ibid* at para 62.

<sup>14</sup> *Ibid* at paras 51-64.

between government action and inaction is “very problematic.”<sup>15</sup> The Court said that section 32 of the *Charter*, regarding the scope of *Charter* application, “is worded broadly so that the *Charter* will be engaged even if the government or legislature refuses to exercise its authority . . . the application of the *Charter* is not restricted to situations where the government actively encroaches on rights.”<sup>16</sup> If it could be shown that government inaction on reducing greenhouse gas emissions caused section 7 violations, courts could intervene.

### Effects of Climate Change in the North

Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty, and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.”<sup>17</sup> Security of the person includes the protection of physical and psychological integrity. This consists of “a notion of personal autonomy involving, at the very least, control over one’s bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress.”<sup>18</sup>

Climate change arguably poses risks to the section 7 rights of Canadians living in the most northerly parts of Canada, notably the Inuit. The argument rests on two factual sub-claims: first, climate change is responsible for threats to the life and security of persons living far in the North; and second, Canada's withdrawal from the *Kyoto Protocol* and failure to effectively regulate greenhouse gas emissions are causing Canada's rising emissions, which in turn contribute to climate change.

Mounting evidence about the extreme effects of climate change in the Arctic helps ground claims that the section 7 rights of Canada's most northerly peoples may be at risk. Scientific studies now show that “anthropogenic climate change is damaging Inuit livelihoods and cultural resources.”<sup>19</sup> Climate-related challenges to the Inuit will increase over time, given that “rapid acceleration in temperature increase over the Arctic is projected to continue throughout the twenty-first century.”<sup>20</sup> The threats in northern Canada, where the climate and temperatures are changing faster than in more southern latitudes, are far more acute.<sup>21</sup>

A Government of Canada report suggests that “[d]ecrease in ice distribution, stability and duration of coverage” may be leading to “[i]ncreased frequency and

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<sup>15</sup> [1998] 1 SCR 493 at para 53 [*Vriend*].

<sup>16</sup> *Ibid* at para 60.

<sup>17</sup> *Charter*, *supra* note 1.

<sup>18</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 136.

<sup>19</sup> James D Ford, “Dangerous climate change and the importance of adaptation for the Arctic's Inuit population”, [2009] *Environ. Res. Lett.* 4 024006, online: IOPscience <<http://dx.doi.org/10.1088/1748-9326/4/2/024006>>.

<sup>20</sup> C Furgal and TD Prouse, “Northern Canada” in Natural Resources Canada, *From Impacts to Adaptation: Canada in a Changing Climate 2007*, (Ottawa: Her Majesty the Queen in Right of Canada, 2008) 57 at 68 [Furgal and Prouse].

<sup>21</sup> *Ibid*.

severity of accidents while hunting and travelling, resulting in injuries, death and psychosocial stress.”<sup>22</sup> Changes in snow composition may be leading to “[c]hallenges to building shelters (igloos) for safety while on the land.”<sup>23</sup> An “increase in permafrost melting” and “decrease in land surface stability” may be causing “[p]sychosocial disruption associated with communication relocation . . . and infrastructure damage.”<sup>24</sup> One study links changes in environmental conditions with increased “symptoms of psychosocial, mental and social distress, such as alcohol abuse, violence and suicide.”<sup>25</sup> As a whole, these facts support an argument that climate change threatens a right to security of the person protected by section 7.

A successful claim would have to show that the harms rise above an “insubstantial or trivial” level.<sup>26</sup> In *Chaoulli v Quebec (Attorney General)*, the Court held that the level of adverse impact on bodily integrity had to be “serious.”<sup>27</sup> Relating to psychological harm, the impact needs to be “sufficiently severe” to qualify as a breach.<sup>28</sup> While the current impact on the bodily integrity of the Inuit would be likely to be found to be greater than “insubstantial or trivial,” it is unclear whether it would be sufficiently “serious.” While it has been claimed that there are increased accidents and death due to climate-related changes, the documentation may be found to be lacking. The Inuit have a greater opportunity to meet the harm threshold regarding psychological integrity. There have been well-documented severe impacts to their mental well-being due to the “deterioration of cultural ties to traditional and subsistence activities related to climate change.”<sup>29</sup> This was found to be especially true for “approximately half of Arctic residents whose culture, language and identity are tied inextricably to the land and sea via their Aboriginal heritage and identity.”<sup>30</sup>

## Causation

The biggest weakness in a potential *Charter* challenge to Canadian climate change policy and the *Kyoto Protocol* withdrawal relates to causation. In *Canada (Attorney General) v Bedford*, the Supreme Court held that a section 7 claim requires a “sufficient causal connection” between the impugned government act or legislation and its effects.<sup>31</sup> This standard is said to be “flexible.”<sup>32</sup> The standard does not require that the “impugned government action or law be the only or the dominant cause of the

<sup>22</sup> *Ibid* at 102.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid* at 105.

<sup>26</sup> *R v Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713 at 765-66.

<sup>27</sup> 2005 SCC 35 at para 123.

<sup>28</sup> *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 98.

<sup>29</sup> Furgal and Prouse, *supra* note 20 at 105.

<sup>30</sup> *Ibid* at 104.

<sup>31</sup> 2013 SCC 72 at para 74 [*Bedford*].

<sup>32</sup> *Ibid* at para 75.

prejudice suffered by the claimant”—rather, the causal link must be “real” and not “speculative.”<sup>33</sup> It is not clear that the links between withdrawal from the *Kyoto Protocol* and Canada’s inaction on rising emissions as contributions to climate change and the resultant effects on northerly Canadians would satisfy this standard.

Canada's decision to withdraw from the *Kyoto Protocol* in 2011 facilitated Canada's rising greenhouse gas emissions. Under the binding international treaty, Canada was committed to a 6 per cent reduction below 1990 levels by 2012 in its emissions relative to 1990 levels. The withdrawal allowed Canada to avoid sanctions for missing its target. The withdrawal was part of a broader policy to take few effective steps to restrain greenhouse gas emissions growth. The Canadian government has preferred to pursue economic growth by exploiting fossil fuel reserves and been reluctant to take measures to reduce greenhouse gas emissions. In 2012, Canada exceeded its original Kyoto commitment by approximately 17 per cent.<sup>34</sup>

Canada currently releases approximately 2 per cent of the world’s carbon emissions and is one of the top ten carbon emitters in the world.<sup>35</sup> Current climate change results from the historical emissions of many countries, and though it is possible to estimate the quantum of Canada’s historical contribution to global greenhouse gases (2.2 per cent), Canada’s share is a relatively small fraction of the whole.<sup>36</sup> Even if a court is willing to recognize the causal chain between climate change and threats to the right to security of the person of the Inuit, the extent of the link between Canada’s contribution to emissions and climate change may seem less compelling.

### **Gross Disproportionality**

Even if the section 7 claim met the required causal thresholds, which appears unlikely, it would still have to be argued that rights violations caused by the government withdrawal from the *Kyoto Protocol* and lack of action on rising emissions were not in conformity with the principles of fundamental justice. These principles will be violated in cases of arbitrariness, vagueness, and gross disproportionality.<sup>37</sup>

The most promising argument would focus on gross disproportionality. This principle relates to situations in which the impugned law or government act’s “effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.”<sup>38</sup> This argument would depend on a court’s

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<sup>33</sup> *Ibid* at para 76.

<sup>34</sup> The Conference Board of Canada, “Greenhouse Gas Emissions”, online: <<http://www.conferenceboard.ca/>> [The Conference Board of Canada].

<sup>35</sup> *Ibid*; Simon Rogers, “World carbon emissions: the league table of every country” (21 June 2012), online: The Guardian <<http://www.theguardian.com/uk>>.

<sup>36</sup> Duncan Clark, “Which nations are most responsible for climate change?” (21 April 2011), online: The Guardian <<http://www.theguardian.com/uk>>.

<sup>37</sup> *Bedford*, *supra* note 31 at para 96.

<sup>38</sup> *Ibid* at para 120.

characterization of the purpose of the government's *Kyoto Protocol* withdrawal and its inaction on rising emissions. Presumably, the objective would be viewed primarily as relating to economic growth. An Inuit litigant could claim that the acute harms caused to the Inuit from climate change are grossly disproportionate to the broad economic purpose advanced by government action and inaction on climate change.

The norm of "gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm."<sup>39</sup> For those Inuit experiencing threats to section 7 rights to their physical security, these effects could be framed as grossly disproportionate to more general economic objectives.

## Remedies

Section 24(1) of the *Charter* requires that courts issue "appropriate and just" remedies in response to rights violations.<sup>40</sup> If a court held that government action or action had sufficiently contributed to section 7 violations through climate change caused by Canadian greenhouse gas emissions, and that these deprivations violated the principle of gross disproportionality, a court would consider two remedies. First, it might rule that Canada's withdrawal from the *Kyoto Protocol* was unconstitutional if the infringement could not be justified under section 1. However, assuming that a court recognized sufficient causation linking Canadian emissions with climate change, it is not clear that the court would single out the withdrawal from the *Kyoto Protocol* as central enough to warrant this approach. The more likely scenario is a finding that the government has positive obligations to stop the Charter violations from occurring. This could include requirements to reduce Canadian greenhouse gas emissions, though the more plausible route would be a finding that Canada has an obligation to protect Canadians whose rights are threatened by climate change. Canada might achieve this objective in many ways, including by taking additional measures to help northerly communities adapt to climate change. Such measures would not stop or reduce climate change, but they would more effectively shield Canadians from the threats of climate change.

## II. CLIMATE CHANGE AND SECTION 35

There is a second way to approach judicial review of Canadian emissions, and it also involves threats to the rights of Aboriginal peoples. The honour of the Crown and the fiduciary relationship between the federal government and Aboriginal people could be invoked to hold the government accountable for the effects of its greenhouse gas emissions on Aboriginal rights. Aboriginal litigants could argue that government

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<sup>39</sup> *Ibid* at para 122.

<sup>40</sup> *Charter*, *supra* note 1.

contributions to climate change are resulting in infringements of section 35 Aboriginal rights, and that these infringements must be curtailed or their impacts mitigated.

Aboriginal rights exist in three forms. First, *R v Van der Peet*, recognized as rights those “practices, customs and traditions” that can be proven as “integral to distinctive cultures.”<sup>41</sup> Second, treaty rights are defined in a series of documents negotiated between the Crown and Aboriginal peoples. Third, Aboriginal title to land was recognized as a kind of right in *Delgamuukw v British Columbia*.<sup>42</sup> Once an Aboriginal right is recognized, litigants must meet legal tests to challenge government infringements.

Various scenarios may be contemplated in which climate change infringes Aboriginal rights. For example, climate change may decimate the wildlife that a particular community relies upon for subsistence hunting, a practice recognized as integral to that community’s distinctive culture or promised in a treaty with the Crown. Another possibility is that climate change could cause flooding of large tracts of Aboriginal title lands, such that they become unusable. In the long term, these are possibilities. The real question is whether the government can be held accountable for the impact of climate change on Aboriginal rights.

The principle of the honour of the Crown, which has now achieved the status of a “constitutional principle” in Canadian law, requires the Crown to act honourably in its dealings with Aboriginal peoples.<sup>43</sup> In Canadian jurisprudence, the principle acts as a unifying concept overlaying the relationship between the Crown and Aboriginal peoples. In certain scenarios, the honour of the Crown gives rise to a fiduciary duty, in others, to a duty to consult.<sup>44</sup>

### **The Honour of the Crown and Fiduciary Duties**

In *Guerin v Canada*, the Supreme Court recognized for the first time the federal government’s fiduciary duty to act in the best interests of Aboriginal people in certain specific circumstances.<sup>45</sup> This duty was said to be *sui generis*, borrowing only certain elements from the private law of trusts. Though the Crown–Aboriginal relationship was said generally to be a fiduciary one, concrete duties only arose in specific contexts. Ernest Weinrib writes that a fiduciary duty crystallizes when parties’ “relative legal positions are such that one party is at the mercy of the other’s discretion.”<sup>46</sup> In *Haida Nation v British Columbia (Minister of Forest)*, the Court stated

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<sup>41</sup> [1996] 2 SCR 507 at para 45 [*Van der Peet*].

<sup>42</sup> [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>43</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 32; *Haida Nation v British Columbia (Minister of Forest)*, 2004 SCC 73 at para 16 [*Haida*].

<sup>44</sup> *Haida*, *ibid* at para 18.

<sup>45</sup> [1984] 2 SCR at 384 [*Guerin*].

<sup>46</sup> Ernest Weinrib, “The Fiduciary Obligation” (1975), 25 UTLJ 1 at 7.

that fiduciary duties arise when “the Crown has assumed discretionary control over specific Aboriginal interests.”<sup>47</sup> In *Wewaykum Indian Band v Canada*, the duty was said to require of the Crown “obligations of loyalty, good faith, full disclosure . . . and acting in what it reasonably and with diligence regards as the best interest of the beneficiary.”<sup>48</sup> Thus far, fiduciary duties have been recognized when the federal government is entrusted with the management of surrendered land,<sup>49</sup> when it is expropriating reserve land,<sup>50</sup> when it manages royalties on behalf of an Aboriginal group,<sup>51</sup> and when it is involved in the process of reserve creation.<sup>52</sup> This list is not exhaustive since categories where the fiduciary duty exists “should not be considered closed.”<sup>53</sup>

Does this list include cases in which the federal government has discretion over the realization of Aboriginal rights to certain customs, practices, and traditions? The Court made clear in *Wewaykum* that although the Crown–Aboriginal relationship may be fiduciary in nature, a fiduciary duty “does not exist at large but in relation to specific [Aboriginal] interests . . . . [N]ot all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature.”<sup>54</sup> Nevertheless, the Court noted that the federal “fiduciary duty was expanded in *R. v Sparrow* . . . to include protection of the aboriginal people’s pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*.”<sup>55</sup> Aboriginal rights qualify as the subject of federal fiduciary duties.

To summarize, the Crown can owe fiduciary duties with respect to specific Aboriginal legal interests over which it has discretionary control. These duties apply to Aboriginal and treaty rights. However, the Crown, as noted in *Wewaykum*, is “no ordinary fiduciary.”<sup>56</sup> The Crown owes obligations to all Canadians as well as Aboriginal peoples, which means the Crown does not necessarily have to act solely in the best interests of Aboriginals.

Government action that violates the Crown’s duties to Aboriginals may survive judicial scrutiny if it can pass proportionality analysis. Section 35 rights, like *Charter* rights, are not absolute and can be balanced by an array of government objectives. Justification of a rights infringement requires a legitimate governmental objective and a proportionality analysis similar to the test for justification of *Charter* violations under

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<sup>47</sup> *Haida*, *supra* note 43 at para 18.

<sup>48</sup> 2002 SCC 79 at para 94 [*Wewaykum*].

<sup>49</sup> *Guerin*, *supra* note 45; *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344.

<sup>50</sup> *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85.

<sup>51</sup> *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9.

<sup>52</sup> *Wewaykum*, *supra* note 48.

<sup>53</sup> *Guerin*, *supra* note 45 at 384.

<sup>54</sup> *Wewaykum*, *supra* note 48 at paras 81-83.

<sup>55</sup> *Ibid* at para 78.

<sup>56</sup> *Ibid* at para 96.

section 1 as articulated in *Oakes*.<sup>57</sup> For example, in assessing whether an infringement is justified, the court will determine “whether there has been as little infringement as possible in order to effect the desired result.”<sup>58</sup> In *Gladstone*, the Court suggested that the limitation of Aboriginal fishing rights could be justified by the “pursuit of economic and regional fairness.”<sup>59</sup> The court observed that Aboriginal groups “are a part of a broader social, political and economic community,” a fact that would guide the court’s analysis for the limitation of rights.<sup>60</sup> With regard to Aboriginal title, the range of valid government objectives described in *Delgamuukw* seemed to expand further to include a “fairly broad” list.<sup>61</sup> These included “the development of agriculture, forestry, mining, and hydroelectric power [and] the general economic development of the interior of British Columbia.”<sup>62</sup> Violations of section 35 rights can be justified.

Now we can proceed to the larger question: how might the fiduciary relationship between the Crown and Aboriginal people and the threat that climate change poses to Aboriginal rights lead to legal challenges to greenhouse gas emissions policy? This type of claim will face the same kind of causation issues as noted above for the section 7 arguments. Furthermore, the government is likely to find a section 35 rights violation easier to justify than a section 7 rights violation. A section 7 violation has never been justified under section 1 analysis. In *Re B.C. Motor Vehicle Act*, the Supreme Court noted that only exceptional circumstances, such as “natural disasters, the outbreak of war, epidemics, and the like” might justify government section 7 violations.<sup>63</sup> Economic objectives would probably not meet this bar. However, in the case of Aboriginal rights, as noted above, economic objectives are much more likely to justify section 35 infringements.

Nevertheless, there is some reason to believe recognition of Aboriginal rights could encourage the government to make some policy changes. In some cases, invocations of fiduciary duty with respect to Aboriginal rights have reined in economic development. For example, in *Saanichton Marina Ltd v Claxton*, a provincial plan for a marina was denied based on its prospective effects on treaty-protected fishing rights.<sup>64</sup>

Furthermore, two Federal Court cases suggest ways for recognizing the government’s obligation to address climate change. *Adam v Canada (Environment)*, a 2011 Federal Court case, concerns the preservation of caribou in northeastern Alberta and provides a partial blueprint for an Aboriginal-rights-related challenge to federal

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<sup>57</sup> *R v Sparrow*, [1990] 1 SCR 1075 at paras 71-83.

<sup>58</sup> *Ibid* at para 82.

<sup>59</sup> *R v Gladstone*, [1996] 2 SCR 723 at para 75.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Delgamuukw*, *supra* note 42 at para 165.

<sup>62</sup> *Ibid*.

<sup>63</sup> [1985] 2 SCR 486 at para 85.

<sup>64</sup> (1987), 43 DLR (4th) (BCCA).

climate change policy.<sup>65</sup> The case arose as an application for judicial review of a minister's decision to decline to take action to avert threats to a declining caribou population. Members of three First Nations possessed treaty rights to hunt in the area. Treaty 8 guarantees members of these First Nations the right to pursue their "usual vocations" of hunting and fishing.<sup>66</sup> Typically, these First Nations hunted caribou, on which they relied as a source of food. In *Adam*, the threat to the caribou population was the result of "habitat loss and increased predation" that was not explicitly attributed to any particular government actions.<sup>67</sup> Under subsection 15(1) of the federal *Species at Risk Act*, the federal Minister of Environment was mandated to assess risk to different species, identify those deemed at risk, and prepare species recovery strategies accordingly.<sup>68</sup> The minister declined to take action with respect to the caribou, despite repeated requests by various First Nations groups. The Court remitted and ultimately overturned the minister's decisions, concluding that the minister had violated the honour of the Crown:

. . . the Minister should not confine his consideration of the honour of the Crown to an assessment of whether any active course of conduct may negatively affect treaty rights of the First Nations . . . such an approach would present an impoverished view of the honour of the Crown. A broader view is required to be taken. This includes assessing the extent to which . . . continued inaction with respect to the boreal caribou...would be consistent with the honour of the Crown.<sup>69</sup>

Remarkably, the federal government's *inaction* was subject to judicial review. The minister did not see Aboriginal rights as relevant to his decision-making, but the Court disagreed. During its analysis of the legislation, the court was mindful of the principle of the honour of the Crown and threats to treaty and Aboriginal rights, even though the Crown was not directly responsible for the declining caribou population.

In *Union of Nova Scotia Indians v Canada (Attorney General)*,<sup>70</sup> we can extract further building blocks for a climate-change-related legal challenge. This case concerned the judicial review of an environmental assessment of a mining company's dredging plan that threatened to disrupt local Aboriginal fishing. The local Mi'kmaq had established fishing rights in the area. A third-party contractor evaluated and approved the mining company's plan. However, the evaluation did not consider

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<sup>65</sup> 2011 FC 962 [*Adam*].

<sup>66</sup> *Ibid* at para 33.

<sup>67</sup> *Ibid* at para 14.

<sup>68</sup> *Ibid* at para 10.

<sup>69</sup> *Ibid* at para 36.

<sup>70</sup> [1997] 1 FC 325 [*Union of Nova Scotia Indians*].

Aboriginal interests, and the Court found that this violated the Crown's fiduciary duty to protect the potentially threatened rights of the Mi'kmaq. Under the guidelines of the *Canadian Environmental Assessment Act*, the Crown is bound to consider "any change that the project may cause in the environment, including any effect of any such change . . . on the current use of lands and resources for traditional purposes by aboriginal persons."<sup>71</sup> The Crown has a duty to take specific Aboriginal rights into account when it makes environmental assessments. These rights are not absolute, and their potential infringement is not the determining factor in ministerial approval of a given project. Yet the government's fiduciary duty does oblige considerations of Aboriginal rights in its development plans.

What lessons can be drawn from *Adam* and *Union of Nova Scotia Indians*? First, government inaction can violate Aboriginal rights, even when the government is not directly responsible for the threat to those rights. Second, the federal government's fiduciary duties to Aboriginal people may require that environmental assessments of economic projects consider potential threats to their rights. *Adam* provides the most compelling model for climate-change-related litigation. Where climate change threatens treaty and Aboriginal rights, the government may be required to take steps to protect these rights. In *Adam*, the right to hunt caribou compelled the government to protect caribou. However, a specific piece of legislation, the *Species at Risk Act*, was present to create a positive obligation. In the case of climate change threatening an Aboriginal right, the finding of a positive obligation may similarly rely on related duties anchored in legislation.

A fiduciary duty analysis with respect to climate change could be bolstered by reference to bad faith of the federal government in its efforts to reduce carbon emissions. As noted above, the principle of good faith inheres in the role of the fiduciary.<sup>72</sup> Over the years, the federal government has committed itself to various emissions reductions targets, most of which it will not meet. In 1998, the government committed to a 6 per cent reduction by 2012.<sup>73</sup> In 2009, at the United Nations COP-15 climate change conference in Copenhagen, the Canadian government committed itself to a 17 per cent reduction from 2005 emissions levels by 2020.<sup>74</sup> It is now clear Canada will miss this goal by a wide margin.<sup>75</sup> Where fiduciary duties are recognized, the fiduciary's bad faith actions strengthen any potential remedial claims.

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Wewaykum*, *supra* note 48 at para 94.

<sup>73</sup> Government of Canada, "Canada's Action on Climate Change" (May 2010), online: Canada's Action on Climate Change <<http://www.climatechange.gc.ca/>>.

<sup>74</sup> *Ibid.*

<sup>75</sup> The Conference Board of Canada, *supra* note 34.

## The Duty to Consult

The provincial and federal governments owe duties to consult Aboriginal peoples over actions that might affect their rights. This approach, first comprehensively articulated in 2004 in *Haida*, provides an alternative avenue for challenging federal climate change policy. The Aboriginal legal interests involved in duty to consult cases are not sufficiently defined to be the objects of a fiduciary duty. The duty to consult applies with respect to rights that are not yet proven<sup>76</sup> and that are typically in the process of being litigated (as with *Van der Peet* Aboriginal rights or Aboriginal title claims) or negotiated (in modern treaties). The duty is thus “prospective, fastening on rights yet to be proven.”<sup>77</sup> Concerning climate change, the duty to consult may require active consultations by governments contemplating and authorizing emissions-intensive development projects, which may in turn lead to concessions to Aboriginal peoples.

In 2004, *Haida* articulated the basic framework of the duty to consult. The duty derived from the honour of the Crown, a constitutional principle “always at stake in [the Crown’s] dealings with Aboriginal peoples.”<sup>78</sup> It would be dishonourable for the Crown to “run roughshod” over rights that are in the process of being proven and established. This duty is applicable to all Aboriginal rights, including traditional practices and title claims. Notably, these duties do not belong to the private third parties who undertake development: “The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests.”<sup>79</sup>

Two principal questions arise in contemplating how federal climate change policy may relate to the duty to consult: What triggers such a duty? And what does this duty entail? *Rio Tinto Alcan Inc v Carrier Sekanwe Tribal Council* contemplated the issue of “what triggers a duty to consult.”<sup>80</sup> There are three elements to the duty analysis: (a) knowledge, actual or constructed, of a potential Aboriginal claim or right, (b) contemplated government conduct, and (c) the potential of that conduct to adversely affect an Aboriginal claim or right.<sup>81</sup> 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.”<sup>82</sup> It includes “strategic, higher level decisions” with potential impacts on rights. Examples include the transfer of tree-cutting licenses and even broader resource development plans.<sup>83</sup> “Higher level decisions” with respect to carbon emissions, such as those relating to oil

<sup>76</sup> Except for potential impacts on aboriginal title, where the duty would apply even after a claim had been proven.

<sup>77</sup> *Rio Tinto Alcan Inc v Carrier Sekanwe Tribal Council*, 2010 SCC 43 at para 35 [*Rio Tinto Alcan*].

<sup>78</sup> *Haida*, *supra* note 43 at para 10.

<sup>79</sup> *Ibid* at para 56.

<sup>80</sup> *Rio Tinto Alcan*, *supra* note 77 at para 2.

<sup>81</sup> *Ibid* at para 31.

<sup>82</sup> *Ibid* at para 44.

<sup>83</sup> *Ibid*.

sands development or withdrawal from the *Kyoto Protocol*, may qualify. Regarding causality, “[m]ere speculative impacts” are said not to suffice, and the potential adverse effects on the exercise of a given Aboriginal interest must be “appreciable.”<sup>84</sup> It is unclear whether scientific predictions about the effects of climate change and Canada’s contribution to them can meet this threshold.

What would this duty entail when it is recognized? The content of the duty “varies with the situation” along a spectrum<sup>85</sup> according to two key variables: the strength of the rights and the seriousness of the infringement.<sup>86</sup> The duty does not necessarily entail a veto right for Aboriginal groups.<sup>87</sup> Though there is no “duty to reach agreement,” the Crown’s efforts at “[c]onsultation must be meaningful.”<sup>88</sup> The Crown is permitted to balance any accommodation of Aboriginal rights against “other societal interests,” with an emphasis on compromise and reconciliation.<sup>89</sup> However, even a “dubious” claim about potential impacts should trigger a “duty of notice.”<sup>90</sup>

The duty to consult may prove useful as a legal tool to challenge climate change policy. A duty-to-consult claim has a relatively lower causality threshold than that required for a finding of a section 7 or section 35 rights violation. The impact on rights need only be possible—not concretely proven. As such, an argument involving climate change policy and impacts is most likely to succeed in the context of a duty to consult. The drawback of this approach, at least with respect to climate change, is that the duty to consult does not necessarily entail equally effective remedies. If any such duty is found to exist with respect to government policy on greenhouse gas emissions, there is no requirement for proportionality analysis to justify government action demonstrably infringing proven rights. The strength of the remedy would depend on the strength of the causal claims.

### **Surrender of Section 35 Rights in the North**

One significant problem with this section 35 litigation strategy is that some Aboriginal peoples living in Canada’s most northern latitudes—the places where climate change has the greatest effect—have signed agreements or treaties surrendering their section 35 rights. In the Northwest Territories and the Yukon, the Inuvialuit extinguished all of their Aboriginal claims, rights, titles, and interests.<sup>91</sup> The Inuit in

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<sup>84</sup> *Ibid* at para 46.

<sup>85</sup> *Haida*, *supra* note 43 at para 43.

<sup>86</sup> *Rio Tinto Alcan*, *supra* note 77 at para 36.

<sup>87</sup> *Haida*, *supra* note 43 at para 47.

<sup>88</sup> *Ibid* at para 10.

<sup>89</sup> *Ibid* at para 50.

<sup>90</sup> *Ibid* at para 37.

<sup>91</sup> Inuvialuit Regional Corporation, *Inuvialuit Final Agreement, As Amended*, (Tuktoyaktuk, NWT: Inuvialuit Regional Corporation, 1987), ss 3(4), (5).

Labrador and Nunavik have done the same.<sup>92</sup> The James Bay Cree have also surrendered their inherent section 35 rights, though their agreement, the *James Bay and Northern Québec Agreement*, has constitutional status as a treaty. This means that some of the rights enumerated in the treaty could still be the source of federal obligations, as in *Adam*.

In the case of Nunavut, a massive land claim was settled in 1992, which established the new administrative territory. The Inuit agreed to surrender all of their Aboriginal claims, rights, titles, and interests in and to lands, other than those federal commitments included in the final agreement.<sup>93</sup> The Inuit negotiators also agreed “on behalf of their heirs, descendants and successors not to assert any cause of action, claim or demand of any nature” based on any of these claims, rights, titles, or interests.<sup>94</sup> It is important to note that this did not cover their section 35 rights unrelated to land, which is why a 2005 *Inuit Action Plan* of the federal government continues to affirm Inuit section 35 rights.<sup>95</sup> This is good news for our claim because the Inuit in Nunavut are particularly vulnerable to the negative effects of climate change and thus likely to suffer section 35 rights infringements.

## CONCLUSION

Over time, the unreasonable can become reasonable. Novel claims fail until one day they become legitimate causes of action. Perhaps that day will come for the above section 7 and section 35 claims. If it does, the Canadian government will become more obligated to address the iniquitous impacts of climate change within Canada, which are striking Aboriginal communities first and hardest.

The litigation strategies explored in this paper face a number of challenges. The greatest one relates to causation. The more concretely Canadian greenhouse gas emissions can be linked to threats to rights caused by climate change, the more likely legal challenges are to succeed.

At present, our proposed litigation strategies are likely to fail. However, the issues we raised are clearly justiciable. Furthermore, they may be sufficiently plausible to proceed to trial. If the case for causation can be sufficiently strengthened to disclose some prospect for success, our claims would proceed beyond a motions hearing. As Justice Wilson noted in *Operation Dismantle*, so long as a claim, though it be novel, raises “issues of real substance” and has “some chance of success,” it can proceed to

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<sup>92</sup> Aboriginal Affairs and Northern Development Canada, *Land Claims Agreement between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, art 2.11.1.

<sup>93</sup> Minister of Indian Affairs and Northern Development and the Tunngavik, *Nunavut Land Claims Agreement*, art 2.7.1(a).

<sup>94</sup> *Aboriginal Law Handbook*, 4th ed, 2012 (Toronto: Thomson Reuters Canada Ltd, 2012) at 153.

<sup>95</sup> *Inuit Action Plan* (Ottawa: Inuit Tapiriit Kanatami and Inuit Circumpolar Council, 2005) at 93.

trial, even if a court entertains “serious doubts that the plaintiffs [would] be able to prove” their allegations.<sup>96</sup> A loss at trial could still provide a political victory for climate change activists—by framing climate change as a threat to rights and by requiring the government to justify its ongoing failure to reduce Canada’s greenhouse gas emissions.

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<sup>96</sup> *Operation Dismantle*, *supra* note 11 at para 79.