

**In the West Coast Environmental Law Supreme Twitter Court of Canada**  
Submitted by the Twitter Court of Canada

REFERENCE RE: PUBLIC RIGHT TO A HEALTHY ATMOSPHERE

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**Factum of The Centre for Indigenous Environmental Resources (CIER)**

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Pippa Feinstein, @orangeipsies, Counsel for CIER

Sam Harrison, @tankersnothanks, Counsel for CIER

**Interveners**

The Government of British Columbia - @TheRyborg, @canadajon

The Government of Canada - @jaymichi, @cjalbinati

The Centre for Indigenous Environmental Resources (CIER) - @orangeipsies,  
@tankersnothanks

The Canadian Institute of Petroleum Companies (CIPC) - @baaarbora, @Willhorn

The Environmental Coalition – @adamharris09, @Gradsen

## **Part I: Overview**

CIER, acting as interveners in this reference case submit:

- 1) The Supreme Twitter Court of Canada should recognize at common law the existence of a public right to a healthy global atmosphere.
- 2) The Supreme Twitter Court of Canada should recognize the above-mentioned right has a corresponding responsibility for all humans to act as stewards of our environments, ensuring the health of water, earth, and atmosphere for future generations.
- 3) Any recognition of a common law right to a healthy atmosphere should also be explicitly recognized as being incidental to section 35(1) Aboriginal rights. Such recognition would be in keeping with the Crown's fiduciary duty to give effect to section 35 rights.
- 4) Courts have fairly recently expressed their desire to facilitate reconciliation between Indigenous and Euro-Canadian laws and cultures in contemporary Canada. Recognizing a right, and corresponding responsibility, to a healthy global atmosphere would be consistent with the goal of Indigenous – non-Indigenous reconciliation.

## **Part II: Statement of the Question at Issue**

- 5) Does a public right to a healthy global atmosphere exist in Canadian common law?

## **Part III: Statement of Facts**

- 6) We must begin by noting that the space constraints of this factum make it impossible to fully recognize the diversity of First-Nation views, opinions, and beliefs regarding the importance of having a healthy global atmosphere. Our comments must necessarily be understood as introducing broad concepts that will hopefully be amenable to the diverse and dynamic voices we may represent.
- 7) Our primary mission at the Centre for Indigenous Environmental Resources (CIER) is to aid First-Nations in building capacity to address environmental issues in order to facilitate a world where the norm is healthy First-Nation communities living in a healthy environment.<sup>1</sup> Because of the interconnection between many Indigenous peoples and natural resources, a healthy atmosphere is imperative.
- 8) Indigenous peoples of what is now called Canada have required a healthy atmosphere for their physical and spiritual sustenance since time immemorial. Indigenous sacred, traditional, and customary laws have recognized and continue to recognize shared responsibility for water, land, and air (see multi-media submissions). None of these things can be separated – the health of one will affect the other two.
- 9) Two contemporary environmental issues highlight the need for recognition and enforcement of the common law right to a healthy atmosphere. Anthropogenic climate change<sup>2</sup> and acid rain<sup>3</sup> both have the potential to produce substantial changes to ecosystems thereby adversely affecting First-Nations that rely on them. Specific impacts depend almost entirely on the location of the First-Nation but it is safe to say that none will be immune.<sup>4</sup>

## **Part IV: Points of Law**

- 10) When 'Aboriginal rights' were enshrined in section 35 of the Canadian constitution, it was in recognition of the continuity of First Nation, Métis and Inuit ways of life and ways of governing their relationships with our earth. These constitutional rights do not arise from the *Royal Proclamation* or section 35.<sup>5</sup> They are sourced in Indigenous communities and systems of thought, beliefs, and governance, and have been developed by these peoples since time immemorial.<sup>6</sup>
- 11) Following the 1982 enactment of the *Canadian Charter of Rights and Freedoms*<sup>7</sup> Aboriginal rights in Canada became entrenched in the Constitution and given substance that cannot be infringed upon without justification<sup>8</sup> or revoked without discussion.<sup>9</sup> Furthermore, when determining what constitutes an Aboriginal right under section 35, the Supreme Court of

Canada has instructed that we do so “in a purposive way”.<sup>10</sup> The Court has also stressed that where any ambiguity exists about the scoping of an Aboriginal right we are to resolve it in ways most favourable to the Indigenous parties.<sup>11</sup> Chief Justice Dickson and LaForest J. noted in *R v Sparrow*, that the wording “recognize and affirm” used in section 35 of the *Charter* incorporates the fiduciary obligation of the Crown towards Indigenous peoples.<sup>12</sup> Ultimately, this requires the Crown to exercise constraint in its assertion of sovereignty when Indigenous peoples’ interests may be affected. Thus, in determining whether the Crown can justifiably infringe on a section 35 right the court must consider in the specific circumstance whether such an infringement would be consistent with the fiduciary duty.<sup>13</sup>

12) The incorporation of the fiduciary obligation and duty to construe Aboriginal rights in section 35 is equally applicable to treaty interpretation.<sup>14</sup> *R v Badger* provided certain factors that must be taken into account when interpreting a treaty, namely, that: (1) the honour of the Crown is at stake when dealing with aboriginals, (2) any limitations restricting treaty rights must be narrowly construed.<sup>15</sup> Justice Binnie, writing for The Court in *R v Marshall* explains this best when he warns a Treaty cannot be interpreted into “an empty shell”.<sup>16</sup> Courts and the Crown should seek to give as much effect to Aboriginal and treaty rights as possible. Recognizing Indigenous interests in a right to a healthy atmosphere would be consistent with this jurisprudence.

13) *R v Sundown* and *R v Marshall* form the keystone of our arch between Aboriginal/treaty rights and the common law right to a healthy atmosphere. *Marshall* recognizes that treaties represent the parties’ understanding of the terms at the time of signing<sup>17</sup> and *Sundown* provides for the existence of rights incidental to the fulfillment of treaty rights.<sup>18</sup> In that case the notion of “reasonably incidental” was developed and applied to allow the Indigenous claimants to build a cabin in a Provincial Park for the purpose of properly exercising expeditionary hunting rights.<sup>19</sup> By virtue of the ubiquity of the atmosphere, the right to a healthy atmosphere is incidental to the rights granted in most if not all of the treaties and Aboriginal rights in existence in Canada. Thus, recognition of a right to a healthy atmosphere should be recognized in order to ensure section 35 rights can continue to be exercised.

14) To conclude, we would stress that the court is bound to consider all the preceding arguments while keeping in mind an obligation to develop Canadian case law in a way that furthers Indigenous – non-Indigenous reconciliation. An important aspect of this task is using both Indigenous and non-Indigenous perspectives on issues to be decided by the courts. This weighing of perspectives has been affirmed in *Van der Peet*.<sup>20</sup> The strongest statement of this principle comes towards the end of the *Van der Peet* judgment, when Lamer CJ states that courts must take into account relationships of Indigenous peoples to the land when deciding on matters going to the heart of Aboriginal rights. Binnie J. in *Marshall* also discusses the significance of extrinsic evidence (i.e. oral history) to elucidate Indigenous peoples’ conceptions of what is contained in treaty agreements.<sup>21</sup> These concepts have perhaps been best developed in *Delgamuukw* where oral testimony and forms of Indigenous culture-specific forms of presenting information figured prominently in court proceedings.<sup>22</sup> Indigenous laws, conceptions of connection with the land, and corresponding responsibilities to rights (see multi-media submissions) must all be considered when determining whether or not there should be a public right to a healthy atmosphere and how such recognition should be sensitive to Indigenous peoples’ worldviews and interests.

#### **Part V: Nature of Relief Desired**

15) We seek a declaration by the Supreme Twitter Court of Canada of the existence of a public right to a healthy atmosphere. Included in this right should be a corresponding responsibility to be stewards of this earth, and ensure the health our global atmosphere. Both the right and responsibility should be declared necessarily incidental to section 35 constitutional rights.

## Part VI: List of Authorities

*R v Badger*, [1996] 1 SCR 771 at 41, 2 CNLR 77,  
<<http://www.canlii.org/en/ca/scc/doc/1996/1996canlii236/1996canlii236.pdf>>.

*Calder et al v Attorney General of British Columbia*, [1973] SCR 313. <http://canlii.ca/t/1fn4>

*Canadian Charter of Rights and Freedoms*, s 35(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11,  
<<https://www.canlii.org/en/ca/const/const1982.html>>.

“Climate Change 2007 Synthesis Report” *Intergovernmental Panel on Climate Change*, at 30  
<[http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf)>.

*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1 CNLR 14,  
<<http://www.canlii.org/eliisa/highlight.do?text=delgamuukw&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html>>.

Edward C. Krug, and Charles R. Frink “*Acid Rain on Acid Soil: A new Perspective*” (2010) 221 *Science* 520 at para 1 <<http://gen2.ca/DBHS/ScholarlyArticles/Katherine%20Leiva.pdf>>.

IPCC Fourth Assessment Report AR4, *Intergovernmental Panel on Climate Change*,  
<[http://www.ipcc.ch/publications\\_and\\_data/publications\\_ipcc\\_fourth\\_assessment\\_report\\_synthesis\\_report.htm](http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm)>.

*R v Marshall*, [1999] 3 SCR 456 at 52, 4 CNLR 161,  
<<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii665/1999canlii665.pdf>>.

*R v Sparrow*, [1990] 1 SCR 1075 at 4, 3 CNLR 161,  
<<http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.pdf>>.

*R v Sundown*, [1999] 1 SCR 393 at 29, 2 CNLR 289,  
<<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii673/1999canlii673.pdf>>.

*R v Van der Peet*, [1996] 2 SCR 507 at 28, 4 CNLR 177,  
<<http://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.pdf>>.

## Part VII: Legislation Relied Upon

### RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

#### Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

#### Definition of “*aboriginal peoples of Canada*”

(2) In this Act, “*aboriginal peoples of Canada*” includes the Indian, Inuit and Métis peoples of Canada.

#### Land claims agreements

(3) For greater certainty, in subsection (1) “*treaty rights*” includes rights that now exist by way of land claims agreements or may be so acquired.

#### Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

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- <sup>1</sup> About Us: Our Vision, Mission, and Values, online: *Centre for Indigenous Environmental Resources* <<http://www.cier.ca/about-us/about-us.aspx?id=48&linkidentifier=id&itemid=48>>.
- <sup>2</sup> IPCC Fourth Assessment Report AR4, *Intergovernmental Panel on Climate Change*, online: IPCC <[http://www.ipcc.ch/publications\\_and\\_data/publications\\_ipcc\\_fourth\\_assessment\\_report\\_synthesis\\_report.htm](http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm)>.
- <sup>3</sup> Edward C. Krug, and Charles R. Frink “*Acid Rain on Acid Soil: A new Perspective*” (2010) 221 *Science* 520 at para 1 <<http://gen2.ca/DBHS/ScholarlyArticles/Katherine%20Leiva.pdf>>.
- <sup>4</sup> “Climate Change 2007 Synthesis Report” *Intergovernmental Panel on Climate Change*, online: at 30 <[http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf)>.
- <sup>5</sup> *Calder et al. v Attorney General of British Columbia*, [1973] SCR 313. <http://canlii.ca/t/1nfn4>
- <sup>6</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para 28, 4 CNLR 177, <<http://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.pdf>>.
- <sup>7</sup> *Canadian Charter of Rights and Freedoms*, s 35(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, <<https://www.canlii.org/en/ca/const/const1982.html>>.
- <sup>8</sup> *R v Sparrow*, [1990] 1 SCR 1075 at 4, 3 CNLR 161, <<http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.pdf>>.
- <sup>9</sup> *Supra*, note 7 at s 35.1(b).
- <sup>10</sup> *Supra* note 8 at para 34.
- <sup>11</sup> *Supra* note 6 at para 25.
- <sup>12</sup> *Supra* note 8 at para 36.
- <sup>13</sup> *Ibid*.
- <sup>14</sup> *R v Badger*, [1996] 1 SCR 771 at para 41, 2 CNLR 77, <<http://www.canlii.org/en/ca/scc/doc/1996/1996canlii236/1996canlii236.pdf>>.
- <sup>15</sup> *Ibid*.
- <sup>16</sup> *R v Marshall*, [1999] 3 SCR 456 at para 52, 4 CNLR 161, <<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii665/1999canlii665.pdf>>.
- <sup>17</sup> *Ibid* at 12.
- <sup>18</sup> *R v Sundown*, [1999] 1 SCR 393 at para 29, 2 CNLR 289, <<http://www.canlii.org/en/ca/scc/doc/1999/1999canlii673/1999canlii673.pdf>>.
- <sup>19</sup> *Ibid* at 33.
- <sup>20</sup> *Supra* note 6 at paras 31, 43, 49, 50.
- <sup>21</sup> *Supra* note 16 at para 81.
- <sup>22</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1 CNLR 14, <<http://www.canlii.org/eliisa/highlight.do?text=delgamuukw&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html>>.