To:	Ducks Unlimited Canada c/o Mary-Kate Craig
From:	Resilient LLP
Date:	June 28, 2022
Re:	Indigenous Carbon Rights and the Federal GHG Offset System

Issue:

You have asked us to provide high-level comments from a legal perspective on Environment and Climate Change Canada's (**ECCC**'s) "Carbon Pollution Pricing: Considerations for facilitating Indigenous participation in the Federal Greenhouse Gas Offset System" discussion paper (the "**Discussion Paper**") and related issues.

Approach:

This memo broadly considers the current status of Indigenous Carbon Rights, barriers faced by Indigenous communities seeking to facilitate recognition of Indigenous Carbon Rights, and methods that may assist in grounding Indigenous Carbon Rights in the Federal Greenhouse Gas Offset System (the "**GHG Offset System**"). We also provide brief comments on the decision to exclude Crown lands from the GHG Offset System and high-level comments on Indigenous Carbon Rights in the broader context of reconciliation and Indigenous resurgence.

Assumptions and Limitations:

The analysis is limited by the scope of instruction and the paucity of jurisprudence related to Indigenous Carbon Rights in Canada. Indigenous Carbon Rights have not yet been expressly recognized under federal and/or provincial laws, and this analysis may therefore need to be updated as the law develops.

We have used the term "Indigenous" throughout this memo to refer to the First Nations, Métis and Inuit peoples of Canada.[1]

[1] We note that the Discussion Paper refers to "Indigenous peoples" without elaborating upon the groups and communities ECCC has included in that term. We assume that ECCC has equated Indigenous peoples with the Aboriginal peoples of Canada, being the First Nations, Inuit, and Métis. This should be expressly clarified.

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Comments:

(i) Current status of Indigenous Carbon Rights

Carbon rights, typically with respect to GHG emissions, are predominantly defined as a "bundle" of rights, including any of:

(i) the authority to implement a project or programme related to GHG emissions;

(ii) the authority to reject and/or participate in such a programme;

(iii) rights to conserve or enhance biological sinks;

(iv) the right to generate, transact, or otherwise monetize carbon credits and related instruments ("**Carbon Credits**") ; or

(v) the right to receive proceeds of Carbon Credits (collectively "**Carbon Rights**").

Carbon Rights are subject to redefinition and additional refinement when held by Indigenous peoples, since Indigenous rights are *sui generis* rights that are inalienable, held communally and have existed since time immemorial.

The Carbon Rights of various Indigenous peoples in Canada may differ depending on the nature of their recognized and asserted rights pursuant to section 35 of the *Constitution Act, 1982,* any Treaty(ies) that they have entered into, and their traditional Aboriginal rights. There also may be contiguous and overlapping claims to Carbon Rights by Indigenous communities in much the same way that there are overlapping land claims to treaty lands and the traditional territories of Indigenous communities across Canada.

We respectfully submit that it is necessary to first assess any and all *sui generis* Indigenous Carbon Rights before allocating and ascribing any exclusive entitlement to Carbon Credits generated by a project under the GHG Offset System. This may require the assessment of applicable:

- Aboriginal territories;
- Rights claims;
- Treaties; and
- Land claims.

In the absence of a uniform and consistent outcome of such assessments, the provincial and federal governments may wish to pursue collaborative efforts with Indigenous rights holders in order to achieve a harmonized and consistent approach to Indigenous Carbon Rights that is conducive to both maximizing climate change mitigation and adaptation, as well as reconciliation Indigenous resurgence.

The GHG Offset System requires project proponents to have exclusive entitlement to Carbon Credits generated by a project. The Discussion Paper notes that in circumstances where land tenure is unclear regarding forest-based offset projects on Crown land, for example, project proponents would be required to enter into agreements with the provincial or territorial governments managing the relevant Crown land in order to meet the requirement to

demonstrate entitlement. This should also require free, prior and informed consent of affected Indigenous groups.

The Discussion Paper recognizes that Indigenous communities would be able to undertake offset projects or assign entitlement to a project proponent where they hold title to the land or have the right of exclusive use and occupation of the land. The Discussion Paper notes that this is the case with respect to First Nation reserve lands, lands purchased by a First Nation under a Treaty Land Entitlement Agreement prior to transfer to reserve status, proven Aboriginal title land, and fee simple settlement land under a land claims agreement.

However, the Discussion Paper fails to address *sui generis* Indigenous Carbon Rights, which do not fit within the mould of Canadian common law rights. Similarly, the proposed approach is conducive to uncertainties that may not appropriately facilitate climate change mitigation, climate change adaptation, or Indigenous reconciliation as a function of the fact that the "ownership" and guardianship of Indigenous traditional territory and/or treaty lands remains the subject of ongoing dispute settlement.

(ii) Barriers to recognizing and establishing Indigenous Carbon Rights

Indigenous peoples' rights to the carbon stored on their lands and its potential revenues through Carbon Credits are largely not the subject of common law or treaties, and remain to be elucidated in accordance with the tenets of Aboriginal law and the common law.

It will be challenging for Indigenous peoples to fully participate in any opportunities under the GHG Offset System without clear and defined property rights, secured and legally upheld. In the areas where Indigenous peoples have an interest in creating offset-generating projects on their traditional territory, outstanding and sometimes long-standing disputes over who has the right to manage land are impediments requiring negotiations and agreements such as an Atmospheric Benefit Sharing Agreement ("**ABSA**"), as used and developed in British Columbia. Accordingly, the GHG Offset System should support creative rights and financing mechanisms that can function alongside open discussions about Carbon Rights and the creation of carbon management agreements with Indigenous communities.

The *Indian Act* governs the use and development of "Indian" reserve lands (held by the federal Crown in trust for the use and benefit of an Indigenous community) and resources. The *Indian Act* also imposes a prohibition on removal of trees, timber, minerals, stone, soil and other materials from reserve lands without the permission of the Minister of Indigenous Services. On the traditional territory of Indigenous peoples, where a significant portion of Canada's large-scale carbon stocks are situated, federal and provincial governments have generally recognized only very limited jurisdiction of Indigenous peoples to manage, use, and benefit from their traditional and ancestral lands, and, instead, Canadian common law views these lands as "Crown land", public land that is administered nearly exclusively by federal and provincial governments, often without Indigenous participation or in accordance with Indigenous Traditional Ecological Knowledge (**TEK**).

In this regard, ECCC may wish to consider work already undertaken by other federal agencies and ministries to include TEK, including work currently being undertaken by the Impact Assessment Agency of Canada (**IAAC**), Canada Energy Regulator (**CER**), Transport Canada,

and Fisheries and Oceans Canada, in collaboration with Indigenous peoples, to develop an Indigenous Knowledge Policy Framework as well as CER's Indigenous Advisory Committee, which advises CER on improving and enhancing the involvement of Indigenous peoples and organizations. The Discussion Paper notes but does not firmly advance a similar commitment to including Indigenous voices and perspectives at all stages of protocol development, project development, and ongoing monitoring, measurement, reporting, and verification activities. A firm commitment with actionable measures to ensure the inclusion of Indigenous knowledge and TEK would support the spirit of reconciliation and advance economic reconciliation and resurgence of Indigenous communities.

Treaties between the Crown and Indigenous peoples may also provide uncertainty as to ownership of Carbon Rights, especially where treaties do not contain clauses that extinguish certain rights. Section 35 of the *Constitution Act*, *1982* recognizes and affirms the Aboriginal and treaty rights of Canada's Indigenous peoples. The jurisprudence supports the proposition uncertainty and ambiguities as to ownership or Carbon Rights in treaties should be interpreted in favour of the Indigenous community asserting ownership[2] and that treaties with Indigenous peoples must be given a fair, large and liberal construction in their favour.[3] Specifically, treaties are to be interpreted in a manner that (a) upholds the honour of the Crown; (b) avoids the appearance of sharp dealings; (c) resolves any ambiguity in favour of the Indigenous Nation; and (d) considers the parties' understanding of the terms of the treaty when it was signed.[4]

The honour of the Crown infuses every treaty and the performance of every treaty obligation and requires the Crown to act with honour and integrity in the interpretation of treaties.[5] Where treaties have not been signed, the honour of the Crown requires it to negotiate with the object of obtaining a just settlement of Aboriginal rights.[6] The honour of the Crown requires that section 35 rights must be determined, recognized and respected. Importantly, in the context of a claim to resources, such as carbon, the honour of the Crown would not be upheld if it sought to "unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource" as this may deprive the affected Indigenous claimants of some or all of the benefit of the resource.[7]

The duty to consult and accommodate (**DTCA**) is grounded in the honour of the Crown and arises whenever the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right and contemplates conduct that might adversely affect it.[8] The DTCA ensures that the Crown acts honourably without undermining section 35 rights, promotes reconciliation, provides procedural protections, and encourages negotiations and just settlement as alternatives to costly litigation.[9] The DTCA is likely to be applicable where projects contemplated under the GHG Offset System may affect the rights of Indigenous peoples, inclusive of their

[2] See *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), where Dickson J states "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians"
[3] See *Simon v. The Queen*, 1985 CanLII 11 (SCC), at para 27.
[4] T Isaac, Aboriginal Law, 5th ed., p 113.
[5] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), para 57.
[6] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), paras 19-20.
[7] *Ibid*., para 27.
[8] *Ibid*., para 35.
[9] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (CanLII), para 26.

Carbon Rights and cultural rights, connected to treaty and traditional forested lands, including Crown and public lands.

Canadian courts have found that the DTCA was engaged in several forest-related government actions that had an adverse impact the Aboriginal rights, including the transfer of tree licences which would have permitted the cutting of old-growth forest and the approval of a multi-year forest management plan for a large geographic area, as well as high-level management decisions or structural changes to a resources' management.[10] Forest management projects developed and approved pursuant to an offset protocol under the GHG Offset System may adversely impact rights recognized under section 35, including Indigenous Carbon Rights, and therefore engage the DTCA.

ECCC may wish to ensure that any offset protocol promulgated under the GHG Offset System adequately addresses treaty rights and how they may affect offset projects on Crown lands and where Indigenous communities assert ownership of Carbon Rights. Importantly, where it cannot be explicitly determined that an Indigenous community ceded its Carbon Rights through treaty, offset projects should not be allowed to proceed without proponents first obtaining the free, prior, and informed consent of the affected Indigenous community(ies). ECCC should support, whether through the development of Indigenous-led offset protocols or institutionally as a ministry of the Crown, the interpretation of treaties and treaty rights in a way that resolves ambiguity over the ownership of Carbon Rights in favour of Indigenous communities.

(iii) Methods to ground Indigenous Carbon Rights

Recognition and enforcement of Indigenous Carbon Rights is dependent on the nature of the Indigenous group, the area over which Carbon Rights are claimed, corresponding or competing treaty rights, settled or unsettled land claims, claims to Aboriginal title, and whether Carbon Rights are to be exerted on reserve lands or in the traditional territory of an Indigenous group. Aboriginal rights, Aboriginal treaty rights, Indigenous rights, and negotiated and settled land claims may provide for forestry rights, and rights associated with land use planning participation. Further, the inclusion of Carbon Rights as Aboriginal rights or specified rights in negotiated modern treaties may also support the use of and participation in projects under the GHG Offset System.

ECCC may wish to give serious consideration to the possibility of grounding Carbon Rights in Crown land as *sui generis* Aboriginal rights on the basis that they are, without limitation, rights incidental to enumerated Aboriginal treaty rights, subject to an inherent unceded Indigenous right to harvest Carbon Credits, and consistent with an interpretation of historic or modern treaties to include sharing in the benefits of the land. Historical documentation in and around an Indigenous nation's accession to a treaty and related historical customs, practices and traditions may all be relevant in this determination and should be taken into consideration when developing nature- and forest-based offset protocols that deal with Crown land and territorial public lands.

(iv) Exclusion of Crown lands from the GHG Offset System

[10] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 (CanLII)*, paras 44 and 47; see also *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 and *Haida Nation*.

The Discussion Paper notes that the forest-based offset protocol currently under development will only apply to projects on private lands or land where Indigenous entitlement is clear and forest-management requirements are not impacted by provincial or territorial forest management requirements. This excludes the vast majority of Canada's forested land, as noted in the Discussion Paper, as over 88 percent of Canada's forested land is on provincial Crown land and public land in the territories. The Discussion Paper does not discuss how the federal government intends to treat the two percent of federal Crown land that could be made available for Indigenous-led offset project development and why the forest-based offset protocol currently under development does not include federal Crown lands.

The Discussion Paper also notes the technical challenges for projects on provincial Crown lands and public lands in the territories, including the different approaches to forest management practices and policies in each province and territory and how this affects the applicability of forest-based GHG offset protocols. Where Indigenous entitlement to Carbon Credits is unclear in Crown and public lands, it will be necessary for project proponents to demonstrate clear entitlement through provincial and territorial mechanisms such as ABSAs. ECCC has decided, as a result of the uncertainty as to entitlement and protocol applicability, to take a hands-off approach to encouraging Indigenous participation in forest-based offset projects on Crown lands in circumstances where Indigenous peoples do not clearly hold title to the land or have the recognized right to exclusive use and occupation of the land. It is difficult to reconcile this approach with an approach that is Indigenous-led and aims to support and encourage the participation of Indigenous peoples and communities in the GHG Offset System.

ECCC may wish to consider facilitating the inclusion of federal Crown land within the same forest-based protocol currently being developed through a whole-of-government approach, as a means to support the recognition of Indigenous Carbon Rights in the traditional territories of Indigenous communities. This approach would be beneficial to subsequent protocol development for provincial Crown lands and public lands in territories by supporting and providing real world examples of offset projects that include successful partnerships with Indigenous communities. Further, recognizing Indigenous Carbon Rights within the traditional territories of Indigenous communities supports broader notions of reconciliation and ameliorating the relationship between Indigenous peoples and the federal government as a result of the historical context in which Crown land was obtained.

(v) Reconciliation and Indigenous resurgence

The Discussion Paper proposes several "social safeguards" as part of protocols for land-based offset projects including: identification of impacted communities; identification of impacts from the project; and implementation of mitigation measures. However, the Discussion Paper does not address reconciliation as it pertains to the recognition and promotion of Indigenous rights by the federal government, including recognizing Indigenous Carbon Rights in treaty and Crown lands. Further, these 'safeguards' do not address the issue of ensuring Indigenous economic partnership so that Indigenous communities benefit from the resources and carbon sequestration potential of their traditional territories and treaty lands. In addition, true reconciliation and Indigenous resurgence requires project proponents and governments to respect Indigenous rights, including Indigenous Carbon Rights (whether clearly entitled or asserted).

The Truth and Reconciliation Commission of Canada (**TRCC**) has issued Calls to Action calling on all levels of government to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.[11] Policies such as the GHG Offset System should ensure that Indigenous rights are respected, including rights inherent to forested lands such as Carbon Rights. The TRCC has also issued calls to action to recognize and develop Indigenous law. ECCC may wish to consider how developing protocols and projects under the GHG Offset System could be made consistent with Indigenous law principles related to land and resource management, environmental protection, TEK, and cultural practices.

The TRCC has issued Calls to Action that direct all orders of government in Canada to recognize and implement the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).[12] Canada has affirmed its support for UNDRIP[13] and is in the process of implementing UNDRIP into Canadian law and reviewing all laws for their compatibility with UNDRIP.[14]

Articles 8, 11, 15, 31 of UNDRIP provide for the protection Indigenous peoples' and individuals' culture, cultural practices, and cultural property and the right of Indigenous peoples to not be subjected to forced assimilation or the destruction of their culture. Indigenous peoples also have the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

Article 18 of UNDRIP provides that Indigenous peoples have the right to participate in decision-making in matters that affect their rights, through representatives chosen by themselves in accordance with their own procedures.

Article 19 of UNDRIP provides that governments must consult and cooperate in good faith with Indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Similarly, Article 27 of UNDRIP provides that governments must ensure that Indigenous peoples have the right to participate in fair, independent, impartial, open, and transparent processes giving due recognition to indigenous peoples' laws, traditions, customs and *land tenure system*s, to recognize and adjudicate their rights pertaining to their lands, territories, and resources, including those which were traditionally owned or otherwise occupied or used. UNDRIP calls on Canada to consider and recognize Indigenous land tenure systems when taking decisions which impact on the rights of Indigenous peoples in lands which they have traditionally owned or occupied.

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[11] Truth and Reconciliation Commission of Canada, *Calls to Action*, Call to Action 47, available online at: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

[12] *Ibid.*, Call to Action 42.

[13] United Nations, *Continuing Session, Speakers in Permanent Forum Call upon Government to Repeal Oppressive Laws, Practices that Encroach on Rights of Indigenous Peoples*, (10 May 2016), HR/5299, available online at: <https://www.un.org/press/en/2016/hr5299.doc.htm>.

[14] See *United Nations Declaration on the Rights of Indigenous Peoples* (S.C. 2021, c. 14), available at: <https://www.laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html>.

ECCC's approach to protocol development, Indigenous participation and partnership, and allowing offset generating projects on lands traditionally owned and occupied by Indigenous peoples should be consistent with UNDRIP and ensure that Indigenous peoples are consulted with the objective of obtaining their free, prior, and informed consent. In addition, protocols developed under the GHG Offset System must ensure that the cultural rights of Indigenous Peoples are respected and protected, including mitigating or minimizing the effects of offset projects on cultural practices. ECCC may wish to provide support, both institutionally and economically, for Indigenous communities that have asserted or intend to assert ownership of Carbon Rights in their treaty lands and/or unceded lands to participate in protocol development and offset projects and in negotiations regarding affirming entitlement and Indigenous Carbon Rights.