

# RESOURCES

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## THE RIGHT TO A HEALTHY ENVIRONMENT: FEDERAL BILL S-5, 2023 AMENDING THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

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### Introduction

On May 30, 2023, Parliament gave third and final reading to Bill S-5 entitled the *Strengthening Environmental Protection for a Healthier Canada Act*<sup>1</sup> an amendment to the *Canadian Environmental Protection Act, 1999* (CEPA). Royal Assent followed on June 13, 2023. This legislative process ran over two years after the original first reading. The Bill was intended mainly to strengthen the established toxicity assessment and toxic substance regulation provisions of CEPA that have long been central to federal environmental policy.

However, the provision that received the most attention was not substantive. It was an addition to CEPA's preamble that added the following:

**"Whereas the Government of Canada recognizes that every individual in Canada has a right to a healthy environment as provided under the Act"**<sup>2</sup>

This opened a debate about whether this preambular provision really provides a statutory legal right to a healthy environment that can be invoked by Canadian citizens. The debate broadened to whether other environmental rights already existed in Canadian law and if so, whether they can be enforced effectively. This latter question was the focus of *Legal Rights to a Healthy Environment*, by Alastair Lucas and Akinbobola Olugbemi, CIRL Occasional Paper # 82 (2023).<sup>3</sup> The authors concluded that Canada has no free-standing substantive constitutional or statute-based environmental rights. However, international environmental law norms concerning rights to a healthy environment influence Canadian Law, particularly in statutory interpretation and application of common law substantive doctrine and traditional procedural principles. In addition, there are some limited substantive

environmental rights in several provincial and territorial statutes.

This comment focuses on the right to a healthy environment provision of CEPA Amendment Bill S-5. The question is, does this provision establish or advance Canadian environmental rights, and even if not, does it strengthen the interpretive weight in favour of environmental legal rights?

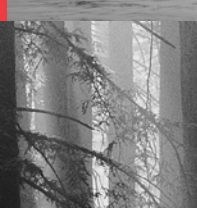
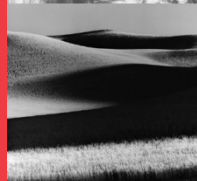
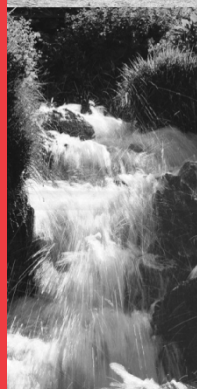
### What Bill S-5 Says

In addition to the preambular right to a healthy environment, the Bill also requires that an implementation framework for this "right" be developed. This is discussed below. The Bill also makes changes to the Part 7 substance toxicity assessment process including requiring the development of a priority system for substance assessment, providing for assessment of substances capable of becoming toxic, requiring consideration of the effects of substances on vulnerable populations in toxicity assessments, and provision for any person to request that the responsible ministers assess a substance. This substance toxicity assessment and regulation system is the core of CEPA.

### Preambular Statutory Provisions

"Preamble" in a law sense has been defined as, "the [introductory](#) part of a [statute](#) or deed, stating its purpose, aims, and [justification](#)".<sup>4</sup> The federal *Interpretation Act* is more functional: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."<sup>5</sup> Ruth Sullivan's *The Construction of Statutes*, Canada's standard statutory interpretation reference, notes<sup>6</sup> that operative effects of preambles include:

- revelation of legislative purpose, thus adding force and legitimizing values; and
- serving as a source of legislative values and assumptions.





## Interpreting This Preamble

What a preamble cannot do is establish enforceable legal rights. As Sullivan puts it, a preamble provides no direct remedy. This describes Bill S-5's preambular provision concerning the right to a healthy environment. It has the same preambular language as the other preamble items in CEPA. It does not mention rights or duties; and, significantly, it specifies that the government "recognizes" and does not simply state that "every individual in Canada has a right to a healthy environment". However, as commentators and the Supreme Court of Canada make clear, a preamble like this can have effect in interpreting the operative provisions of an amended CEPA and arguably on the development of societal norms supporting environmental legal rights.

## What Legislative Effect Does This Preamble Have?

As the commentators and the Supreme Court of Canada have made clear, this kind of preamble can have effect in interpreting the operative provisions of an amended CEPA. This can happen in three ways.

### Domestic Law

**First**, the preamble can influence administrative actions taken under CEPA. This is enhanced by new provisions added to CEPA in two ways: 1. inserting a new definition: "healthy environment" means an environment that is clean, healthy and sustainable", and adding to section 2, CEPA's Government of Canada "Administrative Duties" section; "protect[ing] the right of every individual in Canada to a healthy environment as provided under this Act, *subject to any reasonable limits*"<sup>7</sup>, and 2. adding an "implementation framework" for "the right to a healthy environment". These provisions could give the "right" an element of statutory substance, though only in a procedural and administrative sense.

The responsible ministers are required within two years after coming into force, to develop an "implementation framework", to set out how the right to a healthy environment will be considered in the implementation of this Act".<sup>1</sup> This process must include consultation of "interested persons",<sup>2</sup> and the implementation framework must be included in the Minister's CEPA annual report.<sup>3</sup>

The implementation framework required by the amendments to CEPA must "elaborate on" principles to be "considered in the administration" of the Act, such as, principles of environmental justice – including disproportionate effects on vulnerable populations, and the principles of non-regression and intergenerational equity.<sup>4</sup> Also included must be the "relevant factors" to be considered in determining the reasonable limits to which the right is subject, "including social, economic, health and scientific factors".<sup>5</sup>

**Second**, the preamble and the implementation framework provisions will become a relevant factor in

judicial statutory interpretative decisions on issues arising under CEPA. An example may be if an issue arises concerning compliance with CEPA requirements such as reporting a release of toxic substances "as soon as possible in the circumstances"<sup>6</sup>. CEPA's Part 7 Enforcement Policy identifies this criterion for enforcement action. But the preamble introduces an overarching factor - the right to a healthy environment - in weighing response times by alleged violators.

### International Law

A **third** effect of this additional preamble to CEPA may be to recognize and affirm developing international law environmental rights, and in particular, the July 28, 2022, United Nations General Assembly declaration that access to a clean and healthy environment is a universal human right. The UN called upon States, international organisations, and business enterprises to scale up efforts to ensure a healthy environment for all.<sup>7</sup> This development builds on the success of the UN Human Rights Council's passage of "a resolution recognising access to a healthy and sustainable environment as a universal right."<sup>8</sup> UN Secretary-General Antonio Guterres welcomed what he characterized as an historic action stating that:

"[T]he landmark development demonstrates that Member States can come together in the collective fight against the triple planetary crisis of climate change, biodiversity loss and pollution. ... The resolution will help states to reduce environmental injustices, close protection gaps, and empower people, especially those that are in vulnerable situations, including environmental rights defenders, children, youth, women, and Indigenous peoples."<sup>9</sup>

Thus, the CEPA preamble may be seen as a step in general public norm development, and more specifically, as a legal development in interpreting CEPA. An example of the way this might work can be drawn from the case of *Spraytech, Societe d'arossage v. Hudson (Town)*<sup>10</sup>, which involved whether the town had authority under Quebec's *Municipal Act* to pass a bylaw banning the use of lawn enhancing pesticides. A key issue for the Supreme Court of Canada involved statutory interpretation to determine the scope of the *Municipal Act* enabling provision, and the potential conflict between this provision and other provincial statutes. Public interest intervenors in the case urged the court to go further and to consider international law, particularly the precautionary principle as a principle of customary international law. In its decision, the Supreme Court majority agreed stating:

"To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for this is that the Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R.





817, at para. 70, observed that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review”. As stated in *Driedger on the Construction of Statutes, supra*, at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The interpretation of By-law 270 contained in these reasons respects international law’s “precautionary principle”, which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

‘In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.’

Canada “advocated inclusion of the precautionary principle” during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the [Oceans Act, S.C. 1996, c. 31](#), Preamble (para. 6); [Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2\(1\)\(a\)](#); [Endangered Species Act, S.N.S. 1998, c. 11, ss. 2\(1\)\(h\) and 11\(1\)](#).<sup>11</sup>

Because it is specifically included in CEPA, the new preamble should serve as an even more emphatic interpretive influence than the precautionary principle in *Spraytech*, which the Supreme Court described as a “value reflected in international human rights law” and noted that it is codified in several other Canadian statutes.

CEPA’s new preamble thus is arguably an instrument of norm development in Canada. It lays down a statutory marker that moves Canadian environmental law a step closer to a substantive right to a healthy environment at least as provided under CEPA.

## Are there Provincial Statute-based Environmental Rights?

### Substantive

John Swaigen and Richard Woods characterize a substantive right to environmental quality as:

“...one that ensures and advocates environmental quality in the legal system as a value equivalent to private property rights and a fetter on government discretion to permit environmentally harmful activities; a right that draws lines and sets limits on how much environmental degradation is permissible.”<sup>12</sup>

An example is section 19.1 of the Quebec *Environmental Quality Act*<sup>13</sup>, which provides that:

“Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act and, as regards odours resulting from agricultural activities, to the extent prescribed by any standard originating from the exercise of the powers provided for in subparagraph 4 of the second paragraph of section 113 of the Act respecting land use planning and development”.

Note that unlike the CEPA preamble, this provision is substantive. It is potentially capable of legal enforcement. There are similar statutory substantive environmental rights in the Northwest Territories and Yukon. It has not been an environmental protection panacea; but it has removed standing requirements and produced a few successful judicial decisions.<sup>14</sup>

### Procedural

The Ontario *Environmental Bill of Rights, 1993*<sup>15</sup> is an example of a mainly procedural environmental rights statute. It includes public notification of pending government environment decisions<sup>16</sup>, a right to request ministerial review of decisions<sup>17</sup> as well as review of policies, acts and regulations,<sup>18</sup> and rights to seek leave to appeal ministry decisions<sup>19</sup>. There is also a narrow right to sue concerning contravention of an Act that has caused or imminently will cause harm to public resources in the province.<sup>20</sup>

The Yukon *Environment Act*<sup>21</sup> includes standing to sue but goes further by incorporating the substantive idea of a public trust under which public resources are explicitly held in trust by the government for citizens who have rights of action to enforce the trust. The Supreme Court of Canada (per Binnie J) has mentioned the existence of enforceable fiduciary duties owed to the public by the Crown. However, the Court has not relied on these “duties”.<sup>22</sup>

### Constitutional Environmental Rights

It would be surprising if citizens had not attempted to use sections 7 (legal rights) and 15 (equality rights) of the





*Canadian Charter of Rights and Freedoms* to support rights to a healthy environment. Section 7 seems to have particular promise for environment related rights. It states:

“Every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with fundamental justice”.

The Supreme Court of Canada has referred to section 7’s right to “life” as engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.<sup>23</sup> Arguably, state action authorizing environmental actions that create or continue life threatening health risks may infringe this section 7 right. Similarly, the section 7 “security of the person” protection includes the right to control bodily integrity in the face of state action.<sup>24</sup> None of the cases to date have concerned government environmental action. However, in *Ontario v. Canadian Pacific*<sup>25</sup>, which involved smoke from the railway’s track side burning, the Supreme Court of Canada linked “sanctity of life” and “quality of life” to preservation of the natural environment.<sup>26</sup>

Section 7 judicial analysis, like that for other Charter rights, proceeds stepwise, requiring:

- **Infringement**, a relatively low bar effects test that takes into account significance and directness of effects; and
- Whether in accordance with **fundamental justice**, encompassing impacts found fundamentally in the criminal justice context, including presumption of innocence, self-incrimination protection, and procedural fairness in decisions.

Further, the general Charter section 1 saving clause may justify infringements that are “reasonable and demonstrably justified in a free and democratic society”.<sup>27</sup> The test developed by the Supreme Court of Canada<sup>28</sup> involves balancing four factors: 1. whether the government action or legislation is “pressing and substantial”; 2. whether there is a “rational connection between the objective and the means used to achieve that objective; 3. Whether the means used involves minimal impairment; and 4. whether the positive and negative effects of the action are “proportional”. In the case of section 7 rights, since infringement requires action contrary to fundamental justice, there is little room for section 7 justification.

This judicial analytical scheme supports the careful, conservative approach that courts have taken to recognizing section 7 environmental rights.

In 2008, the Alberta Court of Appeal granted leave to appeal a sour gas well approval decision on the ground that nearby residents’ section 7 rights to life and security

of the person may have been infringed.<sup>29</sup> However, the Court of Appeal concluded that there was no infringement because the company proposing to drill the well had offered to relocate residents with health concerns.

In Ontario, the Court of Appeal ruled that an NGO challenging the validity of the federal *Nuclear Liability Act*<sup>30</sup> had standing and a reasonable cause of action based on infringement of the section 7 right to security of the person.<sup>31</sup> Yet, ultimately the heavy costs of funding the challenge forced the NGO and co-plaintiffs to abandon the appeal.

Overall, considering the judicial history and commentators’ analysis, the prospects for broad section 7 environmental rights are not promising. This is apparent when one looks at how these rights are formulated and applied. They are rights of individual persons (including in some procedural contexts), corporations. They are narrow, arguably inappropriate for protecting broad based societal interests in a healthy environment.

### Related Environmental Rights – Aboriginal Rights and Title

The possibility that constitutionally protected Aboriginal rights and title may have environmental rights traction has been debated.<sup>32</sup> This is based on section 35(2) of the Constitution Act 1982, which states that:

“... existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

Included are rights concerning protection and use of wildlife and its habitat on traditional lands. Rapidly developing Supreme Court of Canada jurisprudence on the duty to consult and accommodate<sup>33</sup>, Aboriginal title<sup>34</sup>, and Aboriginal governance<sup>35</sup> rights may present the strongest constitutional support for rights to a healthy environment.

To establish and protect Aboriginal rights, the Supreme Court of Canada has outlined a two-step formula. This involves:

1. Identifying the nature of the Aboriginal right claimed in view of, “the nature of the action which the applicant is claiming was done pursuant to an Aboriginal right, the nature of the government regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right”<sup>36</sup>; and
2. Proof that the activity or action is an “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>37</sup>





The latter requires the element of distinctive culture to have been practised prior to European settlement and that there is reasonable continuity of practice to the present. There must be clear evidence of infringement.

However, once the right is established, infringement is still possible, but it must be justified<sup>38</sup> as in the public interest, with a compelling and substantial objective, consistent with the Crown's fiduciary obligation to the Aboriginal group, a rational connection between the objective and the impugned action, minimum impairment, and benefits that outweigh the negative effects on the Aboriginal group. Further, the Crown's duty to consult and accommodate must be met. It is apparent that this justification analysis largely mirrors that used in Charter analysis.

**The duty to consult and accommodate** does not create a free-standing Aboriginal right but is the corollary of obligations owed by the Crown to Indigenous peoples of Canada.<sup>39</sup> It arises when the Crown knows of Aboriginal rights and contemplates action that might affect those rights adversely. The Supreme Court of Canada has described a spectrum of Aboriginal rights and impact significance to determine the scope and content of consultation and accommodation required in specific circumstances.<sup>40</sup>

**Aboriginal title** is a communal Indigenous land right that extends beyond Aboriginal rights and includes use and occupation of particular land. The Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*<sup>41</sup> stated that this encompasses economic rights, including mineral rights, and generally, the right to manage the land. Essentially the same prior-to-European settlement test applies, requiring that clear and obvious use and occupation be shown.

*Tsilhqot'in Nation*, decided in 2014, was the first Supreme Court of Canada declaration of Aboriginal title. The litigation began in 1983.<sup>42</sup> In its reasons, the Supreme Court used what it described as a "culturally sensitive" approach to sufficiency of territorial occupation. Its approach goes some way toward balancing resource development objectives and environmentally sensitive land use. This is underlined by the statement in the context of justification that:

"... incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land"<sup>43</sup>

This is consistent with the intergenerational equity elements of environmental sustainability.<sup>44</sup> Following the Supreme Court of Canada's title declaration, the *Tsilhqot'in Nation* proceeded to use the title area to anchor an adjacent Tribal Park designed to protect the ecological values that support their Aboriginal rights and title.<sup>45</sup>

This body of law relating to Aboriginal rights and title suggests support for constitutional environmental rights.

However, the qualification is that these may be limited to defined traditional lands, and the goals of environmental rights litigants do not always line up with First Nations aspirations and strategy.

## Conclusions

The right to a healthy environment in the CEPA preamble does move the needle toward a free-standing national environmental right available to citizens, at least in relation to CEPA requirements. It has rekindled interest in enforceable environmental rights. Some problems could be addressed directly, and in broader policy terms, governments may be nudged in the direction of more attention to environmental values. Statutory environmental legal rights do exist in several provinces and territories, and at least collaterally in Aboriginal rights. But rights enforcement has been problematic. So far, gains have been modest. Maximum impact would come from clear substantive national environmental rights and the broader longer term influence they may have on federal environmental law and policy.

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<sup>1</sup> *Strengthening Environmental Protection for a Healthier Canada Act, Bill C-28, 202* (Bill C-28) died on order paper following first reading and was reintroduced and passed as Senate Bill S-5 before again receiving first reading in the Commons [Bill S-5].

<sup>2</sup> Bill S-5, 2(1).

<sup>3</sup> See Related Environmental Rights – Aboriginal Rights and Title, below.

<sup>4</sup> Oxford Dictionary.

<sup>5</sup> RSC 1985 c I-21, s 13.

<sup>6</sup> Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) at para 14.03 [2] [3].

<sup>7</sup> S. 3(2) adding a new s. 2(1)(a.2).

<sup>8</sup> S. 5, adding s. 5.1.

<sup>9</sup> S. 5.1(3) added.

<sup>10</sup> S. 5.1(4) added.

<sup>11</sup> S.5 adding s. 5.1(2).

<sup>12</sup> S.5 adding s. 5.1 (2)(c).

<sup>13</sup> Part 5, s. 95 (1).

<sup>14</sup> "UN General Assembly declares access to clean and healthy environment a universal human right", (28 July 2022), online: *UN News* <<https://news.un.org/en/story/2022/07/1123482>>.

<sup>15</sup> "The right to a healthy environment: 6 things you need to know", (15 October 2021), online: *UN News* <<https://news.un.org/en/story/2021/10/1103082>>.

<sup>1</sup> *Supra* note 14.

<sup>1</sup> [2001] 2 SCR 241 [*Spraytech*].

<sup>1</sup> *Ibid* at paras 30 - 31.

<sup>1</sup> John Swaigen and Richard Woods, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 195, 197-98.

<sup>1</sup> *Environmental Quality Act*, CQLR c Q-2, s. 19.1.

<sup>1</sup> See *Imperial Oil c. Quebec (Minister of Environment)*, 2003 SCC 58; *Nadon c. Anjou*, 1994 CanLII 5900 (Que CA); *Gestion Serge Lafreniere inc c. Calve*, 1999 CanLII 13814 (Que CA).

<sup>1</sup> *Environmental Bill of Rights, 1993*, SO 1993, c. 28 [Ontario Environmental Bill of Rights].





<sup>1</sup> *Ibid*, ss. 15-18.

<sup>1</sup> *Ibid*, s. 27 (3).

<sup>1</sup> *Ibid*, s. 61.

<sup>1</sup> *Ibid*, s. 38, see *Lafarge Canada v Ontario (Ontario Environmental Review Tribunal)* (2008), 36 CELR 3d 191 (Ont Div Ct).

<sup>1</sup> Ontario Environmental Bill of Rights, *supra* note 22, s. 84.

<sup>1</sup> *Environment Act*, RSY 2002, c. 76, ss. 6-12.

<sup>1</sup> *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38.

<sup>1</sup> *Carter v. Canada (A.G.)*, 2015 SCC 5 at para 62 (medically assisted dying).

<sup>1</sup> *R. v. Monney*, [1999] 1 SCR 652 (bodily integrity – unreasonable search and seizure).

<sup>1</sup> *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031.

<sup>1</sup> *Ibid*.

<sup>1</sup> Charter, s. 1.

<sup>1</sup> *R. v. Oakes*, [1986] 1 SCR 103.

<sup>1</sup> *Domke v. Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232.

<sup>1</sup> *Nuclear Liability Act*, RSC 1970 c. 29 (First Supplement), as amended by RSC 1985, c. N-28.

<sup>1</sup> *Energy Probe et al v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449, leave to appeal refused (1989), 102 N.R. 399 (note) (SCC) [Energy Probe]. The plaintiffs included the City of Toronto and several high-profile individuals.

<sup>1</sup> *Supra* note 3.

<sup>1</sup> See *Gitxaala Nation v. Canada*, 2016 FCA 187 [Gitxaala Nation].

<sup>1</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [Tsilhqot'in Nation].

<sup>1</sup> See *Reference to the Court of Appeal of Quebec in relation to the Act Respecting First Nations, Inuit, and Metis Children, youth, and families*, 2022 QCCA 185.

<sup>1</sup> *R. v. Van der Peet*, [1996] 2 SCR 507 at para 53.

<sup>1</sup> *Ibid* at para 46.

<sup>1</sup> *R. v. Sparrow*, [1990] 1 SCR 1075.

<sup>1</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida Nation]. For Indigenous opposition to pipelines, see: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153; *Gitxaala Nation supra* note 40.

<sup>1</sup> *Tsilhqot'in Nation, supra* note 41.

<sup>1</sup> *Ibid*.

<sup>1</sup> See Nicole Schabus, 'Tsilhqot'in Nation: A Territorial Land-Use Concept of Aboriginal Title and Aboriginal Governance' in William Tilleman *et al* (eds), *Environmental Law and Policy Fourth Edition* (Emond 2020) Ch 8, 127 at 135.

<sup>1</sup> *Tsilhqot'in Nation, supra* note 41 at para 86.

<sup>1</sup> See Lynda Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) Dal L J 79.

<sup>1</sup> The Firelight Group, 'Dasiqox Tribal Park established by the Tsilhqot'in to protect their land and culture', March 31, 2016, <[Dasiqox Tribal Park established by the Tsilhqot'in to protect their land and culture – The Firelight Group](#)>



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