SCC Court File No. 38663
(38781 Continued on next page)

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012,* SS 2012, c C-29.01

BETWEEN:

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APPELLANT

- and –

ATTORNEY GENERAL OF CANADA

RESPONDENT

- and –

(Continued on next page)

FACTUM OF THE INTERVENER, ATHABASCA CHIPEWYAN FIRST NATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada)*

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PART I. OVERVIEW

1. The Aboriginal peoples of Canada have lived here since time immemorial. Particularly in the North, their survival has depended on mastering the challenges of an extremely harsh environment to find reliable food, resources, navigation, and shelter—to outwit death by knowledge of practices, customs, and traditions learned from the ancestors.

2. Anthropogenic climate change now threatens those Aboriginal practices, customs, and traditions, and threatens to push Aboriginal peoples past the edge of survivability into oblivion.

3. The Athabasca Chipewyan First Nation ("ACFN") are *Dënesųłiné* people, who have lived in the North for thousands of years. ACFN have rights under s. 35 of the *Constitution Act, 1982* and Treaty 8 to live, hunt, trap, fish, and practice other traditional land uses in a vast area. Their interest in this case springs from their natural desire to continue surviving as a people and culture.

4. But ACFN's survival is now in doubt because of industrial activity that emitted more carbon dioxide ("CO_2") and other greenhouse gases ("GHGs") than is normal or safe. Pollution since the Industrial Revolution three centuries ago has created a climate that is literally unprecedented in the history of *Homo sapiens*. The World Meteorological Organization warns:

> [T]oday's CO_2 concentration of 400 ppm exceeds the natural variability seen over hundreds of thousands of years… Periods of the past with a CO_2 concentration similar to the current one can provide estimates for the associated "equilibrium" climate. In the mid-Pliocene, 3–5 million years ago, the last time that the Earth's atmosphere contained 400 ppm of CO_2, global mean surface temperature was 2–3 °C warmer than today, the Greenland and West Antarctic ice sheets melted and even some of the East Antarctic ice was lost, leading to sea levels that were 10–20 m higher than they are today.[1]

5. The Aboriginal peoples of the North are tough—but not invincible. It is a genuinely open question whether peoples who have lived by mastering the environmental cycles of the land for thousands of years can survive anomalous climatic conditions last occurring "3-5 million years ago". For once the Northern environment is made hotter and more extreme, will it still furnish ACFN people reliable food, resources, and domicile for their subsistence, economy, and culture? Will ACFN's Aboriginal and Treaty 8 rights (collectively, "Rights") to hunt, fish, and trap still be exercisable? Or will climate change extinguish the hunting, fishing, and trapping—and in turn their ability to survive? These are existential questions for ACFN and other Aboriginal peoples.

[1] Canada's Record ["**CR**"], Vol I, Tab 6, Affidavit of John Moffet, affirmed October 25, 2018, ["**Moffet Affidavit**"], Exhibit A at p. 71.

A. The Athabasca Chipewyan First Nation and Climate Change

6. The ACFN is a First Nation or "band" under the *Indian Act*. Their traditional territory extends from northeastern Alberta, into the Northwest Territories, and eastward to Hudson's Bay.[2] In 1899, their ancestors entered into Treaty 8 with Her Majesty, guaranteeing rights to hunt, fish, trap, and "practice [their] usual vocations" throughout a different but still vast territory (larger than France) in Alberta, British Columbia, Saskatchewan, and the Northwest Territories.[3]

7. The survival of ACFN people depends crucially on practices tuned to a cyclical natural environment: for instance, hunting caribou by tracking their migrations, gathering food and medicinal plants in season, and trapping and fishing in times of low or high waters.[4] Destabilize these cycles, as by climate change, and their survival becomes doubtful. Some examples follow.

8. The ACFN are traditionally known as "caribou eaters", or *Etthen Eldeli Dené* in their language, because the livelihood and survival of their ancestors was based on hunting woodland and barrenland caribou.[5] Formerly abundant, within a single human lifetime all of the woodland caribou populations in ACFN territory have been scientifically classified as "Threatened" under the *Species at Risk Act*.[6] As a result, all the woodland caribou are now illegal to hunt, leaving only a single, legally-huntable population of barrenland caribou in ACFN traditional territory. But scientists report the barrenland population too is declining due to "[u]npredictable weather events, which are increasing in a changing climate".[7] Should climate change progress, the caribou hunting which sustained ACFN people for millennia probably will be fully impossible.

9. The ACFN also are "people of the land of the willow", or *K'ái Tailé Dené* in their language, a reference to their longstanding, ongoing dependence on the Peace-Athabasca Delta ("PAD").[8] The PAD is comprised of rivers, lakes, and wetlands that form a navigable network through ACFN territory containing seasonal fish and game, wild fruits, and medicinal plants—all of which continue to be hunted, trapped, fished, and gathered by ACFN people.

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[2] CR, Vol VIII-XI, Tab 11, Affidavit of Lisa Tssessaze, affirmed November 23, 2018, originally filed in the SKCA, ["**Tssessaze SK Affidavit**"] at para. 7.
[3] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 9-11, and 31.
[4] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 26, 28-30, and 42.
[5] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 8 and 24.
[6] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at para. 31.
[7] *Ibid.*
[8] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at para. 5.

10. Scientists from Environment and Climate Change Canada (ECCC) consider climate change in the PAD to be very severe, and forecast it becoming hotter and drier with temperatures rising up to 7.1°C by 2080.[9] That is vastly more than Canada's current target to limit average global warming to 1.5°C. It is all too foreseeable that the adverse effects of climate change are much worse for ACFN than for Canadians elsewhere. The Appellants have never disputed this.

11. ACFN are concerned that the hotter, drier PAD that scientists foresee will damage the hunting, fishing, trapping, and gathering which sustained them for thousands of years—not just infringing their Treaty rights, but casting doubt on their ability to continue existing as a people.[10]

PART II. ACFN's POSITION ON THE QUESTIONS ON APPEAL

12. ACFN submits that the *GGPPA* is not only *intra vires* on federalism grounds, but also constitutionally imperative to avoid violations of s. 35 Aboriginal and Treaty rights.

PART III. CONCISE STATEMENT OF ARGUMENT

13. For ACFN, climate change is not an ordinary concern, but an existential emergency without historical comparison. If the scientists at Parks Canada and ECCC are right that ACFN's homeland in the PAD will become drier and hotter by up to 7.1°C by 2080, it is all too likely that AFCN will lose the fish, birds, caribou, muskrat, beaver, moose, medicinal plants and other species that have furnished sustenance and shaped their culture since time immemorial.[11] If ACFN cannot navigate the Athabasca River during hunting seasons and cannot use the winter road, they will become isolated in a land unable to sustain their people.[12]

14. Having been stripped of the ability to practice their Rights, ACFN will be forced to leave the territory that has been their homeland and live elsewhere. Thus uprooted, they will no longer be who they are: no longer *Dënesųłiné*; no longer the *K'ái Tailé Dené*; and no longer the *Etthen Eldeli Dené.* ACFN will have lost their identity; frankly ACFN will have ceased to exist as an Aboriginal people.[13] Suburban Saskatoon is not, and can never be, their culture's home.

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[9] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at para. 19.
[10] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 24, 48-51.
[11] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 19-20, 50-51.
[12] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at paras. 21, 51.
[13] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at para. 57.

A. ACFN's Approach to the Constitutional Question

15. This Court recently affirmed that laws benefit from a "presumption of constitutionality".[14] In practice, that means the burden is on the Appellants to prove that the *GGPPA* is unconstitutional, and not on Canada or ACFN to prove the contrary.

16. ACFN submits that in pith and substance the *GGPPA* is about establishing minimum national standards to reduce GHG emissions, by means of pricing that applies with comparable stringency throughout Canada. Minor phrasing differences aside, this pith and substance is no broader than that of the majorities in the Courts of Appeal of Saskatchewan and Ontario.[15]

17. ACFN also agrees with the Courts of Appeal of Saskatchewan and Ontario that the pith and substance of the *GGPPA* falls within a valid "matter" under the peace, order, and good government power ("POGG").[16] But ACFN prefers to approach that conclusion slightly differently: while the Courts below reasoned using only the "National Concern" branch, this Court would present a more accurate, evidence-based, *comprehensive* picture by also considering POGG's "National Emergency" and "New Matter" branches—all three concurrently—because:

i. The phenomenon of anthropogenic GHG emissions changing the climate is a "New Matter" that was unknown to both science and law at Confederation in 1867.[17]

ii. Anthropogenic GHG emissions persist and travel long distances in the atmosphere, transcending provincial ability to regulate and establishing a "National Concern"; and

iii. The dangers of anthropogenic climate change pose a grave "National Emergency".

18. ACFN's factum first discusses s. 35 of the *Constitution Act*, *1982*, then discusses all three branches of POGG and s. 91 of the *Constitution Act*, *1867*, through an Aboriginal perspective.

B. How Section 35 of the *Constitution Act, 1982* Enters into this Reference

19. The reference question asks if the *GGPPA* is "unconstitutional in whole or in part", which is broad wording that implicates both the *Constitution Act, 1867*, and the *Constitution Act, 1982*.

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[14] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, at paras. 81-83.

[15] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ["***Saskatchewan Reference***"], at para. 125; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ["***Ontario Reference***"], at paras. 77 and 166.

[16] *Saskatchewan Reference*, at paras. 139-40; *Ontario Reference*, at para. 124.

[17] The three branches of POGG are distinguished in *Labatt Breweries of Canada Ltd. v. Canada (AG)*, [1980] 1 S.C.R. 914 ["***Labatt Breweries***"], at p. 944; see also *R. v. Crown Zellerbach,* [1988] 1 S.C.R. 401 ["***Crown Zellerbach***"], at para. 34.

20. Not even the Appellants dispute that ACFN's Rights are constitutionally entrenched, as are the provincial heads of power. As this Court wrote in *R. v. Badger*, Treaty 8 "guaranteed that the Indians 'shall have the right to pursue their usual vocations of hunting, trapping and fishing'".[18]

21. Thus, when Crown action (or inaction) on GHG emissions and climate change imperils the natural environment underpinning a Treaty right—*e.g.*, as climate change imperils the caribou hunt—there is a foreseeable infringement or perhaps even extinguishment of ACFN Rights, which makes the *Constitution Act, 1982* relevant to the reference question in two ways.

22. First, is not permitted for Crown action (or inaction) on GHG emissions and climate change to occur without Aboriginal involvement. It is settled law that the Crown has a s. 35 duty to consult with Aboriginal peoples when infringing an Aboriginal or Treaty right,[19] and obtain consent when extinguishing a Treaty right.[20] Accommodation of Aboriginal interests is also a constitutional duty. These steps are necessary because Crown inaction in protecting Aboriginal or Treaty rights from foreseeable environmental threats fails to meet the Crown's s. 35 duty.[21]

23. Second, when GHG emissions place Aboriginal and Treaty rights at stake, s. 35 of the *Constitution Act, 1982* supplements (but does not replace) the classical federalism analysis. This Court wrote in the *Quebec Veto Reference* that "the *Constitution Act, 1982* directly affects federal-provincial relationships".[22] Therefore when federal legislation, such as the *GGPPA*, mitigates climate threats to s. 35 Aboriginal or Treaty rights, the Court must strive for an interpretation of federalism and the POGG test that upholds (or least conflicts with) those Rights.

24. To be clear, ACFN neither submits that s. 35 is a head of power, nor that it replaces ss. 91-92 in federalism analysis. But it imposes a constitutional duty on the Crown that leads to this conclusion: **Where, but for the *GGPPA*'s carbon price—which the evidence shows is *sine qua non* and "essential … to reduce Canada's GHG emissions"—GHG emissions would rise, heat the climate, and infringe or extinguish ACFN's Rights, there must be a margin of appreciation under s. 35 in which the law is let subsist to preserve those Rights.**[23] For when

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[18] *R. v. Badger*, [1996] 1 S.C.R. 771 ["***Badger***"], at para. 40.
[19] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, at paras. 32, 37, 43, 47.
[20] *R. v. Sioui,* [1990] 1 S.C.R. 1025 ["***Sioui***"], at p. 1063.
[21] *Adam v Canada (Environment)* 2011 FC 962.
[22] *Quebec Veto Reference*, [1982] 2 S.C.R. 793, at p. 801.
[23] CR, Vol I, Tab 6, Moffet Affidavit, at para. 87. Also see the findings of fact in the *Sakatchewan Reference*, supra note 16, at para. 147.

the Crown owes Aboriginal peoples s. 35 duties, whose fulfillment turns on a federal law, then it stands to reason Parliament must possess the constitutional jurisdiction for that law.

25. Or to invert that argument: If the *GGPPA* were *ultra vires* Parliament, then the evidence establishes it is factually impossible to meet global climate targets, which in turn means the Crown would infringe or extinguish ACFN's s. 35 Rights—which constitutionally cannot be.

26. This Court held in the *Secession Reference* that "The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole".[24] We agree: it would be a severe error to regard ss. 91-92 of the *Constitution Act, 1867* in a vacuum that overlooks ACFN's Rights under s. 35 of the *Constitution Act, 1982*. Rather, the Court must favour an interpretation of ss. 91-92 that balances federal and provincial jurisdiction, <u>and</u> allows the *GGPPA* to perform its essential role protecting ACFN's Rights from foreseeable loss through climate change. As Chief Justice Dickson explained, "From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations"—in this case Treaty 8 relations dating from 1899, now made factually dependent on the *GGPPA*.[25]

27. Any other outcome would consign ACFN's s. 35 Rights to what this Court deplores as the "jurisdictional tug-of-war" or "jurisdictional wasteland" of federal-provincial relations.[26] It would unwisely "solve" the federalism problem, but at the expense of spawning collateral constitutional violations of s. 35. Seen this way, the "watertight compartments" view of ss. 91 and 92 that the Appellants urge is not just misguided, but <u>obsolete</u> since the *Constitution Act, 1982* and s. 35.

The fluid, correct approach to POGG

28. Historically, the general residual power of s. 91 was <u>not</u> viewed as a trinity having (i) "National Concern", (ii) "National Emergency", and (iii) "New Matter" (or "Gap") branches, nor is the constitution worded this way. This Court only coined this nomenclature in 1980 in *Labatt Breweries*, the better to systematize earlier cases of the general residual power by their factual indicia.[27] Coining the three branches neither requires three new, separate bodies of POGG jurisprudence, nor requires that any single case be chopped and distorted to fit the Procrustean Bed

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[24] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 50.
[25] *Mitchell v. Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 S.C.R. 85, at p. 109.
[26] *Daniels v. Canada (Indian Affairs and Northern Dev't),* 2016 SCC 12, at paras. 14-15.
[27] *Labatt Breweries, supra* note 1717.

of just one branch. Rather the general residual power is singular—a trunk—but manifests in most cases as just one branch of the trinity, depending on the facts that the case presents.

29. But this case is so *sui generis* that its facts contain indicia of all three POGG branches, so the Court can apply them concurrently. There are credible arguments that the *GGPPA* is *intra vires* as: (i) a matter of "National Concern" as Canada argues, (ii) a "National Emergency" as the David Suzuki Foundation argues, and; (iii) a "New Matter" unknown to both science and law at Confederation in 1867, as we argue. These three arguments are nonexclusive, in that the Court can place the *GGPPA* under the general residual power by viewing the evidence and argument tendered for each branch synergistically. By doing so, the Court reaches an answer that is truer to the facts of the case, and therefore preferable.

30. With respect to the "New Matter": The scientific phenomenon of anthropogenic GHGs heating Earth's climate indisputably postdates Confederation and the design of ss. 91-92.

31. According to Professor James Fleming and Dr. Spencer Weart, both historians of science, anthropogenic climate heating was discovered in the 20th century. It was not until 1904 that Svante Arrhenius first theorized that there might be such a thing as anthropogenic GHGs. Arrhenius wrote that *"the slight percentage of carbonic acid [dissolved CO_2] in the atmosphere may by the advances of industry be changed to a noticeable degree in the course of a few centuries"*, and warned that this could come about *"as long as the consumption of coal, petroleum, etc., is maintained at its present figure."*[28] Arrhenius's theory was proved right in the 1950s when atmospheric measurements of CO_2 showed a relentless upward trend, and as Dr. Weart writes, *"[t]his was not quite the discovery of global warming. It was the discovery of the possibility of global warming"*—fully a century after Confederation, making climate-changing anthropogenic GHG emissions scientifically and legally a "New Matter".[29]

32. Another indicium of a "New Matter" is a treaty. The Courts placed aeronautics and radio, also scientifically new in their day, under the general residual power in part because Canada entered into treaties about them.[30] The Courts gave effect to those treaties despite the *Labour Conventions*

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[28] James R Fleming, "Historical Perspectives on Climate Change" (Oxford University Press, 1998) at pp. 81-82, Canada's BOA, Tab 13.

[29] Spencer R Weart, "The Discovery of Global Warming" (Cambridge, MA: Harvard University Press, 2008) at pp. 19-37, Canada's BOA, Tab 19.

[30] *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Re Regulation and Control of Radio Communication in Canada,* 1932 CanLII 354 (UK JCPC).

case, and notwithstanding that they arose in new *Canadian* treaties rather than old Empire treaties under s. 132 of the *Constitution Act*, *1867*. The treaty indicium exists in this case too: the *UN Framework Convention on Climate Change* and the *Paris Agreement* are treaties.

33. The Court ought to view our "New Matter" argument synergistically with the "National Concern" and "National Emergency" arguments of others; each is a nonexclusive factor weighing in favour of recognizing federal jurisdiction. A synergistic approach has precedent in our law: in *Re: Anti-Inflation Act*, Chief Justice Laskin lamented the doctrinal confusion of the early POGG cases, but approved of the "synthesis" or "reconciliation of … [the] national dimensions approach with … requiring that there be some crisis or peril", pointing to examples in *Canada Temperance Federation* and the *Reference re Natural Products Marketing Act*.[31]

34. ACFN submits that this Court similarly ought to synthesize and reconcile the "National Concern", "National Emergency", and "New Matter" branches, and suggests two ways.

35. First, the Court should apply the evidence to the three branches in intersecting ways: for example, science's discovery that anthropogenic GHG emissions accumulate and travel long distances in the atmosphere and heat the climate both defines a "New Matter" since Confederation, and identifies physical properties of GHGs that differ from ordinary air pollution, furnishing the "singleness, distinctiveness, and indivisibility" of a matter of "National Concern". (Dualities like these explain why the ratio in some cases, such as the radio and aeronautics cases discussed at paragraph 32, fit two POGG branches at once.)

36. Second, the Court should not approach the test in *Crown Zellerbach* slavishly, particularly the mistaken interpretation that assigning a matter of National Concern cements exclusive, plenary federal jurisdiction that entirely bars provinces regulating GHG emissions. Not only is that interpretation wrong under the modern double aspect doctrine but it <u>contradicts</u> "reconciled" POGG cases such as *Canada Temperance Federation,* which reads that "there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject."[32]

37. ACFN submits that by approaching all three branches of POGG in synergy, not only can the provincial and federal governments share jurisdiction, but the internal Crown divisions and "jurisdictional tug-of-war" so harmful to ACFN Rights are avoided—overall a superior outcome.

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[31] *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at pp. 413-415.

[32] *AG (Ontario) v The Canada Temperance Federation (Ontario),* 1946 CanLII 351 (UK JCPC). See also *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at 339-40.

First Nations are "Nations" under POGG

38. One way that the *Constitution Act*, *1982* bears upon the decades-old POGG jurisprudence, established before s. 35 became prominent in the Canadian legal landscape, is best illustrated by a question: In the "National Concern" and "National Emergency" doctrines, which nation's concern or emergency counts? ACFN submits that the "Nation" in question is not just Canada, but also First Nations, and that it is timely for this Court to adjust POGG doctrine accordingly.

39. Before Europeans arrived, native people in North America lived in independent nations with their own territories, laws, practices, traditions and customs. The British and the French, in their early interactions with native people, had relations with them that closely resembled relationships with sovereign nations.[33] Recognizing that historical fact, this Court affirmed that Treaty 8 is "an exchange of solemn promises between the Crown and the various Indian nations".[34]

40. The evidence demonstrates that ACFN is experiencing a "National Emergency" cataclysmically unlike Canada at large. While Canada's current target is to limit average heating to 1.5°C globally, the heating that Environment Canada scientists predict of up to 7.1°C in the North on ACFN's territory is a league apart—and undeniably devastating.[35]

41. Even Ontario and Saskatchewan agree northern First Nations face a singular emergency, for both wrote under the imprimatur of the Canadian Council of Ministers for the Environment:

> For Canadians in the North, however, the impacts of a changing climate have been more pronounced. A shorter, less reliable ice season has made winter hunting and fishing more difficult and dangerous. The traditional knowledge that aboriginal people relied on in the past to live off the land is also becoming harder to apply as a result of more variable weather and changes in the timing of seasonal phenomena. In addition, winter roads that provide supply links to many northern communities are becoming less reliable and cannot be used for as long.[36]

42. ACFN submits the Appellants' recitation of the changing climate, one which threatens hunger by making the gathering of traditional food "difficult and dangerous", gives the Court reason to find that northern First Nations face a "National Emergency"—truly an existential one.

43. Likewise, the "National Concern" doctrine needs updating, so that the "provincial inability"

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[33] *Sioui*, *supra* note 2020, at pp. 1052-1053.
[34] *Badger*, *supra* note 18, at para. 41.
[35] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit Tssessaze SK Affidavit, at para. 19.
[36] CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, Exhibit G, at p. 187.

test considers the ability to meet provinces' s. 35 duties to extra-provincial First Nations. Consider ACFN, whose Treaty 8 rights to hunt, fish, and so forth cover four provinces and territories. Should any single province fail to mitigate GHG emissions and climate heating, that injures the whole Treaty 8 territory and perforce creates "an adverse effect on [ACFN's] extra-provincial interests", quoting *Crown Zellerbach.*[37] Any province causing that adverse, extra-provincial effect has a constitutional duty under s. 35 to consult and accommodate ACFN, but runs squarely into its "provincial inability" to reach beyond its territorial jurisdiction and deliver accommodation extra-provincially. The unconstitutional outcome is that the province's extra-provincial injury to ACFN's Rights fails to be accommodated at provincial hands.

44. The Appellant provinces are actually *resigned* to the fact that they cannot accommodate the adverse effects they cause extra-provincial First Nations, for as the affidavit evidence in the Courts below shows, neither Ontario nor Saskatchewan even began to consult ACFN when forming their "high-level management decisions" on GHG emissions and climate, which s. 35 says they must when affecting Aboriginal resources.[38] That affidavit evidence is unchallenged, as the provinces neither filed contrary evidence, nor cross-examined the affiant.

45. When this Court reformulates the *Crown Zellerbach* test, we ask it please remember that counterweighting the scale of impact of a POGG matter on s. 92 provincial jurisdiction is not the only balancing that need take place; also important is balancing the scale of impact on s. 35 and First Nations' rights. The First Nations balance can favour POGG, even as the provincial balance opposes it. Both are constitutional, but there is no hierarchy inside the constitution, so both must count equally. Reconciliation is well served by this Court's reformulation acknowledging so.

PART IV. ORDER SOUGHT

46. That the Constitutional Question be answered: The whole *GGPPA* is *intra vires*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 27, 2020.

Professor Amir Attaran
Matt Hulse
Counsel for the Intervener, Athabasca Chipewyan First Nation

[37] *Crown Zellerbach, supra* note 17, at para. 35.

[38] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, at para. 47; CR, Vol VIII, Tab 11, Tssessaze SK Affidavit, at para 62; Ontario's Record, Part III, Tab 19, Affidavit of Lisa Tssessaze, affirmed December 17, 2018, originally filed in the ONCA, at para. 59.

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