SCC Files No. 38663/38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V
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:

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA *ET AL*.

INTERVENERS

FACTUM OF THE INTERVENER, THE ASSEMBLY OF MANITOBA CHIEFS #38663 and #38781

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

(style of cause continued on the next page **38781**)

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(style of cause continued from p. 1)

SCC No. 38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
SC 2018, c 12, s 186
A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c C.34, s 8

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RESPONDENT

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Table of Contents

PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS

The simple answer is the tapestry requires the golden thread of [First Nations] laws and legal orders. You want to consider the tapestry, what has the tapestry excluded. It's excluded [First Nations] laws. [...] And that's where I think we're going to find the richest source of solutions.[1]

A. Overview of Position

1. Narrowly construed, these appeals address the question of which level of government has *sole* jurisdiction over carbon pricing. But the backdrop to these appeals is an enduring constitutional tension relating to Canada's failure to take meaningful steps to address climate change, to achieve reconciliation between First Nations and settlers and to acknowledge and respect the golden thread of the First Nations laws that underpin the treaty relationship.
2. Reconciliation demands otherwise. Climate change is "one of the great existential issues of our time."[2] It is too important to be addressed without reference to the constitutional order of the original peoples and caretakers of these lands.
3. While First Nations laws tell us it is a sacred responsibility to protect Mother Earth for current and future generations, the submissions of the Provincial and Federal Crowns effectively deny First Nations' responsibilities. They perpetuate the flawed narrative of Canada as a bi-juridical country (civil and common law), contrary to reconciliation and their responsibilities as treaty partners. The lack of judicial clarity on the constitutional relationship between First Nations and settlers has perpetuated uncertainty and conflict between First Nations, settlers, newcomers and in the Euro-Canadian judicial system.
4. Guidance is required from this Court to: (1) *clarify* the need to respect the constitutional order of First Nations as distinct from Euro-Canadian laws as a necessary element of reconciliation; and (2) *direct* governments to engage on a nation-to-nation basis with First Nations as a necessary step to *return* to the original spirt and intent of the treaties.
5. A reconciliation lens must be applied to these appeals. Unlike the other First Nations interveners in this appeal, the AMC asserts that engaging with First Nations on a nation-to-nation basis requires moving beyond the narrow Euro-Canadian lens of constitutional division of powers and section 35. While the *Crown Zellerbach* analysis may clarify which level of Canadian government has jurisdiction over carbon pricing, it is unable to address the role of First Nations laws in contemporary debates. Once the appropriate 'jurisdictional partner' is

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1 Caleb Behn, cited in Canada, Expert Panel: Review of Environmental Assessment Processes, Building Common Ground: A New Vision for Impact Assessment in Canada (Ottawa, 2017) at 29 [Canada, *EA Review*].

2 *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 at para 4 [*SK Reference*].

identified, treaties offer an appropriate framework for constitutional coordination. In this era of reconciliation and nation-to-nation relationships, honouring First Nations laws will affect both how we identify the means of addressing fundamental contemporary concerns and how treaty partners work together to address them.

B. Statement of Facts

6. The treaties intended First Nations and newcomer laws to be respected as equals for the "mutual promise of building a better future together" through nation-to-nation relationships.[3]
7. The issue before this Court is of fundamental importance to Canada. The future of all children and all living beings is at stake. The constitutional validity of the *Greenhouse Gas Pollution Pricing Act*[4] (the "GGPPA") was brought as a Reference to the Saskatchewan and Ontario Courts of Appeal. Both courts held that the *GGPPA* is constitutionally valid.[5] But neither the Federal or Provincial governments acknowledged the existence of First Nations laws or the implications of this constitutional debate on nation-to-nation relationships and reconciliation.
8. The AMC is aware of the impacts of the continued and unilateral imposition of Euro-Canadian laws upon First Nations including effects on their exercise of stewardship over Mother Earth.
9. First Nations people and laws "have always been here". These laws continue to govern First Nations' relationships with the Creator, Mother Earth and all living beings. They are grounded in mutual respect and underpin the treaty relationship.[6] They constitute Canada's first constitutional order alongside the French Civil Law and English Common Law.[7] First Nations know that nature is giving us signs that human beings are behaving out of balance, and First Nations laws provide clear guidance on climate change.[8]

PART II. THE AMC POSITION ON THE QUESTION IN ISSUE

10. The AMC takes no position on the outcome of this appeal. Instead, it addresses**:**

- the need to respect First Nations constitutional orders as distinct but equal to the Euro-

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3 Joe Hyslop cited in James Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang – We Are All Treaty People: Treaty Elders' Teachings Volume 4* (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2016) at 13 **[AMC TAB 1]**.

4 *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 s 186 [*GGPPA*].

5 *SK Reference*, supra note 2 at para 3; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 2 [*ON Reference*].

6 Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, "Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law" (Turtle Lodge, 2016) [*Great Binding Law*].

7 James Cote et al, *supra* note 3 at 14 – 15, 70 – 71.

8 *Great Binding Law*, *supra* note 6.

Canadian laws as a necessary element of reconciliation and nation-to-nation relationships;
- the need to correct the flawed narrative that Canada is a bi-juridical country; and
- the need to direct governments to engage on a nation-to-nation basis with First Nations as a necessary step to *return* to the original intent of treaties.

PART III. STATEMENT OF ARGUMENT

[I]f indigenous traditions are not regarded as useful in tackling contemporary concerns and recognized as applying in current circumstances, then they are nothing but the dead faith of living people.[9]

1 - *Clarify* the Need to Respect First Nations Laws

11. This Court has been asked to determine the constitutional validity of the *GGPPA* which offers one tool to address the climate crisis. While it may be tempting to focus narrowly on the *Crown Zellerbach* analysis, the urgency and necessity of applying a reconciliation lens to the appeal is made evident by fundamental social, legal and environmental tensions in Canada. These include pipeline blockades, violence, police actions,[10] increased frequency and severity of extreme events including floods, droughts, wild fires[11] and the changing of wildlife migration patterns.[12]

12. These appeals contemplate a fundamental constitutional issue. But the blindered perspective of the Provincial and Federal Crowns does not acknowledge that First Nations were "given [...] ways of loving and taking care of Mother Earth" through laws, languages, teachings and stories.[13]

13. Other First Nations interveners in these appeals[14] have argued for the inclusion of First Nations perspectives on climate change as well as the ***integration*** of section 35 and treaty rights ***into*** the analysis of the constitutional division of power, including in the interpretation of the *Crown Zellerbach* test.[15] None proposed an analysis which recognized the existence of First Nations constitutional orders as distinct but equal to Euro-Canadian laws. Unlike these other interventions, the AMC submits that clarity is required from this Court on the need to respect First Nations laws as distinct but equal to Euro-Canadian laws and on the direct link between

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9 John Borrows, "Recovering Canada: The Resurgence of Indigenous Law" (Toronto: University of Toronto Press, 2007) at 147 **[TAB 10]**.

10 *Daniels v Canada (Minister of Indian Affairs and Northern Development),* 2013 FC 6 at para 351; *Coastal GasLink Pipeline Ltd. v Huson,* 2019 BCSC 2264 at paras 1 – 4 [*Huson*].

11 *SK Reference*, supra note 2 at para 16; *ON Reference, supra* note 5 at para 11.

12 Canada, *EA Review, supra* note 1 at 85.

13 *Great Binding Law*, *supra* note 6.

14 The Athabasca Chippewyan First Nations (ACFN), Assembly of First Nations (AFN) and the United Chiefs and Councils of Mnidoo Mnising (UCCMM).

15 See, for example, ACFN Factum filed in the ON Reference at para 33; UCCMM Factum filed in the ON Reference at paras 20 – 22; AFN Factum filed in the SK Reference at para 21.

the respect of First Nations laws and the implementation of reconciliation.

A. Clarification is needed that First Nations and Euro-Canadian laws are distinct but equal

14. Although First Nations laws have been recognized by this Court, recent lower court decisions have sent contradictory signals about the appropriate relationship between Euro-Canadian laws and First Nations laws. The references by Canadian courts to First Nations laws are imprecise at best and cause violence to First Nations at their worst. This lack of clarity has led to a patchwork of inconsistent decisions which:

- rely on principles such as *terra nullius*, the doctrine of discovery and the Papal bulls to justify the assertion of sovereignty *over* First Nations;[16]
- acknowledge pre-existing legal traditions;[17]
- impose Euro-centric values as a means of discounting[18] or diminishing First Nations laws;[19]
- suggest that First Nations laws were absorbed within the Canadian Constitution;[20] and
- provide equal weight to First Nations laws as distinct from Euro-Canadian laws.[21]

15. The doctrine of discovery and the principle of *terra nullius*[22] have caused inter-generational

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16 Karen Drake, "The Impact of St Catherine's Milling" (2018) Osgoode Hall Articles and Book Chapters at 2, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3684&context=scholarly_works>. See especially *Guerin v The Queen,* [1984] 2 SCR 335 at 378; *R v Van der Peet*, [1996] 2 SCR 507 at paras 35-36 [*Van der Peet*]; *Mitchell v MNR*, 2001 SCC 33 at paras 112-113, [2001] SCR 911 (Binnie J minority opinion) [*Mitchell v MNR*]. See also *R v Sparrow,* [1990] 1 SCR 1075 at 1103; *St Catherines Milling and Lumber Co. v R*, (1887) 13 SCR 577 at 580 [*St. Catherines Milling*]; *R v Bloom*, 2016 ONCJ 8 at paras 12, 13, [2016] OJ No 24.

17 *Connolly v Woolrich,* [1867] QJ No 1 at para 23, (1867) 11 LCJ 197 [*Connolly*]**[TAB 3]**; The 'Marshall Trilogy': *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823) **[TAB 4]**, *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) **[TAB 5]**, and *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) **[TAB 6]**; *Delgamuukw v The Queen*, [1997] 3 SCR 1010 at para 148, 153 DLR (4th) [*Delgamuukw*]; *Pation v Dene Tha' First Nation*, 2018 FC 648 at para 8, [2018] 4 FCR 467. See *Wewayakum Indian Band v Canada,* [1991] 3 FC 420 at 430 **[TAB 7]** regarding a Band's authority to sue in members' names. In the context of Band elections, see *McLeod Lake Indian Band v Chingee,* (1998) 165 DLR (4th) 358. In the context of adoption, see *Casimel v Insurance Corp of British Columbia,* (1993) 82 BCLR (2d) 387. See also *Campbell v British Columbia,* 2000 BCSC 1123 at paras 35, 45 [*Campbell*].

18 *Van der Peet, supra* note 16 at paras 40, 44; *Alderville First Nation v Canada,* 2014 FC 747 at para 40.

19 According to former United States Chief Justice Marshall, the right of First Nations peoples to govern themselves had been "*diminished* but not extinguished."(emphasis added): *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [**TAB 4**]cited in *Campbell*, *supra* note 17 at para 90; *Delgamuukw, supra* note 17 at para 148.

20 *Van der Peet, supra* note 16 at paras 44, 49; *Mitchell v MNR*,*supra* note 16 at para 9.

21 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 12, 13 [*Restoule*].

22 Drake, *supra* note 16 at 1.

trauma for First Nations.[23] Both are rooted in a deep sense of superiority over First Nations people, governments and laws. Scholars have noted a significant disconnect between the doctrine of discovery and the actions of the British government which entered into nation-to-nation relationships with First Nations.[24]

16. These tensions are reflected in two recent cases – the *Restoule* decision of the Ontario Superior Court and the *Wet'suwet'en* decision of the British Columbia Supreme Court (the "BCSC"). In Wet'suwet'en, the BCSC concluded that Wet'suwet'en customary laws were not authoritative because they had not been integrated into domestic law.[25] Failing to grasp the direct connection between First Nations laws (i.e., customary law) and the responsibility of First Nations to sustain relationships with Mother Earth,[26] the BCSC concluded that "[t]here is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation."[27] Rather than accepting teachings of Wet'suwet'en customary law, the BCSC relied on the fact that "reconciliation of the common law with Indigenous legal perspectives is still in its infancy."[28]

17. By contrast, the *Restoule* decision applied a reconciliation lens by honouring the significant procedural and substantive differences between First Nations and Euro-Canadian laws, respecting them as equal.[29] The decision explicitly recognized that evidence from Anishinaabe and Euro-Canadian perspectives must be treated on equal footing.[30] In doing so, the Court was gifted with teachings about Anishinaabe law and worldview by Knowledge Keepers which it was asked to respect as part of the Anishinaabe perspective, without "applying" the law.[31] The Court followed protocols to receive this knowledge and concluded by thanking all involved for working together to "make this trial a proceeding of respect and an exercise in reconciliation."

18. These decisions embody two distinct approaches to the treatment of First Nations laws. One

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23 It has been described by some authors as the "national shame" see: Drake, *supra* note 16 at 2.

24 Drake, *supra* note 16 at 3. Also see generally: John Borrows "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Ascha, ed, Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference (Vancouver: UBC Press, 1997) **[TAB 8].**

25 *Huson*, supra note 10 at para 127.

26 Great Binding Law, *supra* note 7.

27 *Huson*, supra note 10 at para 155.

28 *Huson*, supra note 10 at para 139. See also *Beaver v Hill*, 2018 ONCA 816 at para 29 citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras 32, 35, [2013] 2 S.C.R. 227.

29 *Restoule, supra* note 21 at paras 12, 21.

30 *Ibid* at para 9.

31 *Ibid* at para 13.

honours them as equal and distinct. The other, contrary to reconciliation, discounts their value and relevance further damaging the relationship between First Nations and settlers.

B. This Court ought not to apply First Nations laws

19. In arguing for the equal respect of First Nations law as separate and distinct from Euro-Canadian laws, the AMC does not advocate for this Court to apply or define First Nations laws. As the Nunavut Court of Appeal cautions:

> there is a danger that "in retaining and imposing our ideas of what constitutes 'law' [...] we may inadvertently give weight only to those elements of a [First Nations] legal system which are recognized in Canadian law [...]. At the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions; at most, we must unlearn them.[32]

20. One example of the risks can be found in this Court's definition of 'First Nations laws' as "those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples".[33] In contrast, the *Restoule* decision observes that "Anishinaabe law and systems of governance were *pimaatiziwin* (life), where everything is alive and everything is sacred [...]".[34] It recognizes First Nations laws as a way of living and being rather than a historic artifact frozen in time and passed down through generations.

2 - *Correct* the Narrative of Canada as a Bi-juridical Country

21. Without respecting First Nations laws, "we are just rearranging deck chairs on the Titanic."[35] These appeals offer an opportunity for a paradigm shift in the relationship between First Nations and non-First Nations. By questioning our assumptions, we can usher in a more meaningful implementation of reconciliation –grounded in the spirit and intentions of treaties.

22. This Court has the necessary foundations within existing case law[36] to clarify that First Nations laws existed prior to the arrival of Europeans; are central to the First Nations - settler relationship; and, are one of the three constitutional orders underpinning the treaties.

23. It is incumbent upon this Court to correct misconceptions which do not align with the goals of

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32 *R v Ippak*, 2018 NUCA 3 at para 85.Also see Aaron Mills, "Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) McGill LJ 847 at 856-857 [**TAB 9**].

33 *Van der Peet, supra* note 16 at para 40.

34 *Restoule, supra* note 21 at paras 21, 56, 57.

35 John Borrows, "Fourword: Issues, Individuals, Institutions and Ideas" (2002) 1 Indigenous LJ vii at xvi [**TAB 10**]. See also Harry Laforme, "Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation" (Paper delivered at the Ontario Bar Association's Institute Conference, 7 February 2013) at 11 (unpublished), cited in Drake, *supra* note 16 at 21.

36 *Connolly, supra* note 17 at para 23 [**TAB 3**]; *Campbell, supra* note 17 at para 86; *R v Marshall; R v Bernard*, 2005 SCC 43 at paras 127, 131 [2005] 2 SCR. 220; *R v Sparrow, supra* note 16 at 1103.

reconciliation. The narrative of Canada as a bi-juridical country has created significant barriers for meaningful and consistent consideration of First Nations laws. Clear guidance is required on the meaning of 'reconciliation' to offer a framework for the required paradigm shift.

24. Reconciliation has been framed variously as a project[37], goal[38], objective[39], principle,[40] promise[41] and something to be "achieved."[42] It has been described as synonymous for "merging" and "bringing together".[43] This has led to confusion by Canadian courts regarding its meaning and intent, perpetuating the narrative of Canada as a bi-juridical country. For example, this Court has described reconciliation as a "process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982* [arising from] the Crown's *sovereignty over* an Aboriginal people and *de facto* control of land and resources that were formerly in the *control of* that people."[44]

25. Any suggestion that reconciliation arises from sovereignty *over* and *control of* First Nations must be corrected. This notion causes profound harm and perpetuates erroneous premises about First Nations' history, culture and laws.[45] It reinforces the doctrine of discovery and the principle of *terra nullius* which have been rejected by this Court.[46] It promotes the notion that Canada was inhabited by "uncivilized" First Nations in need of legal structures.[47] It is contrary to the spirit and intent of the treaty relationship to conclude that First Nations would have

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37 *Manitoba Metis Federation v Canada (AG),* 2013 SCC 14 at para 99, [2013] 1 SCR 623 [*MMF*]; *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para 23, [2014] 2 SCR 256 [*Tsilhqot'in*].

38 *Van der Peet, supra* note 20 at para 40; *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 35, [2004] 3 SCR 511 [*Haida*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 33, [2005] 3 SCR 388 [*Mikisew*]; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34, [2010] 2 SCR 650; *MMF*, *ibid* at paras 137, 140; *Tsilhqot'in*, *ibid* at para 82; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 89, [2017] 2 SCR 386 [*Ktunaxa*].

39 *Mikisew, ibid* at para 50; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 91, 103, 107, 203, [2010] 3 SCR 103 [*Beckman*].

40 *MMF*, *supra* note 42 at para 143.

41 *R v Kapp*, 2008 SCC 41 at para 121, [2008] 2 SCR 483.

42 *Ktunaxa supra* note 38 at para 86.

43 *Mitchell v MNR, supra* note 16 at para 129; *Van der Peet, supra* note 16 at para 31 [emphasis added].

44 *Haida, supra* note 38 at para 32 [emphasis added].

45 James Cote et al, *supra* note 3 at 70 – 71, 72 – 73 [**TAB 1**].

46 *Tsilhqot'in, supra* note 37 at para 69.

47 Canada, Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 1.

"surrendered" their sacred stewardship responsibilities towards Mother Earth. This conclusion contradicts guidance from the Truth and Reconciliation Commission (TRC) which defines 'reconciliation' as "an ongoing process of establishing and maintaining respectful relationships."[48]

26. The impacts of these erroneous understandings of reconciliation are readily seen in these appeals. The arguments at the lower courts were cemented in the mistaken notion that Canada is a bi-juridical country, providing evidence that colonialism is contemporary.[49]

27. The *Campbell v British Columbia* decision offers a useful precedent to correct this misconception.[50] It clarified that First Nations self-government was not extinguished by the *British North America Act*[51] and that a constitutional amendment was not required for the respectful treatment of First Nations laws.[52]

28. Moving beyond *Campbell*, the AMC submits that the continued existence of First Nations laws is far more than an "unwritten underlying value of the Constitution."[53] Relying on the definition of 'reconciliation' from the TRC, the AMC observes that establishing and maintaining relationships between First Nations and non-First Nations requires respect for First Nations laws as equal and distinct from Euro-Canadian laws.[54] It calls for recognition of First Nations as protectors of Mother Earth.[55] It requires acknowledging that from a First Nations perspective "Mother Earth is alive" and "has a living spirit [that] is sacred".[56] It requires a return to the spirit and intent of the treaty relationships on which Canada was built.[57]

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48 Canada, Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queens University Press, 2015) vol 6 at 11–12.

49 Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (Ph.D. Thesis, University of Victoria Faculty of Law, 2019) at 244 [unpublished] at 2 [*Mills, Miinigowiziwin*].

50 *Campbell*, *supra* note 17.

51 *Ibid* at paras 68, 64 65. See also *AG Ontario v AG Canada* [1912] AC 571 at 5 [**TAB 11**].

52 *Campbell*, *supra* note 21 at paras 71 – 77 and in particular para 76. Also see para 78 which says "the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or aboriginal rights)".

53 *Campbell*, *supra* note 21 at para 81.

54 Mills, *Miinigowiziwin*, *supra* note 49 at 212.

55 Great Binding Law, *supra* note 6; D'Arcy Linklater et al, *Ka'Esi Wahkotumahk Aski – Our Relations with the Land: Treaty Elders' Teachings Volume 2* (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2014) at 27 [**TAB 12**].

56 Great Binding Law, *supra* note 6.

57 According to *Kakfwi*, reconciliation has a connotation of "a pact arrived at by the giving and taking of both parties, of a mutual understanding worked out through concessions and

3- *Direct* Governments to engage with First Nations on a Nation-to-Nation Basis

29. Treaties offer a "means of constitutional coordination"[58] and "constitutional dialogue."[59] The Federal Government has recognized the need for a "renewed, nation-to-nation relationship with Indigenous people" based on "respect, co-operation, and partnership."[60] Canada is a full supporter [61] of the *United Nations Declaration on the Rights of Indigenous Peoples*, which protects the right of First Nations to distinct legal institutions.[62] These appeals, whether acknowledged or not, are happening within this context. They highlight the need to direct governments to engage with First Nations on a nation-to-nation basis, returning to the original spirit and intent of treaties.

30. There are two competing approaches to understanding the significance of treaties.[63] The first is rooted in colonial doctrines and argues that treaties can be used to justify the First Nations' 'surrender' of sovereignty and land.[64] Alternatively, and consistent with a reconciliation lens, "treaties can be understood as agreements to share the land on a nation-to-nation basis."[65] According to First Nations Knowledge Keepers, the:

> original intent of the Treaty relationship between [First Nations] and [newcomers] at the time of Treaty making . . . was based on a mutual understanding of respect and responsibility. [...] There was an understanding by [First Nations] that we would share the benefits.[66]

31. The existence and strength of First Nations' own governance and legal systems was acknowledged by settlers from the beginning.[67] Within this understanding of treaties, each nation had their own unique gifts (language, custom and culture) as well as responsibilities

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compromise, and is therefore a word closely related to treaty." : *Canada v Kakfwi*, [2000] 2 FC 241 at para 10, [1999] FCJ No 1407; affirmed in *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2005 MBCA 22 at paras 97, 110 [2005] 2 CNLR 155.

58 Mills, *Miinigowiziwin*, *supra* note 49 at 231.

59 *Ibid* at 193.

60 Rt Hon. Justin Trudeau, P.C., M.P, Prime Minister of Canada, "Minister of Crown-Indigeneous Relations and Northern Affairs Mandate Letter" (2017).

61 Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017-08-03).

62 *United Nations Declaration on the Rights of Indigenous Peoples,* 13 September 2007, A/61/295 at Article 5. Also see: Canada, Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (Ottawa: Library and Archives Canada, 2015) at 27, 28, 45, 50, 86, 92.

63 Drake, *supra* note 16 at 4.

64 Haida, *supra* note 38 at paras 20, 25; also see *Beckman*, *supra* note 39 at para 8.

65 Drake, *supra* note 16 at 4.

66 James Cote et al, *supra* note 3 at 13 [**TAB 1**].

67 *Ibid* at 23.

towards each other.[68] The very existence of treaties with First Nations are based on the assumption that both nations were equal and legitimate.[69] In order to fulfill the original intent of treaty, it is necessary to acknowledge that the story told about treaty has been manipulated by one nation.[70] A proper consideration of treaties must consider both the Crown and First Nations perspectives flowing from their written or oral traditions.[71]

32. Looking at the climate crisis through a reconciliation lens requires acknowledging that both settler and First Nations worldviews and laws can meaningfully inform contemporary policy. It means working together to identify appropriate processes and recommended approaches, including relying on First Nations protocols.

33. Parallel to this process, there may be federal and provincial debates, including through the application of the *Crown Zellerbach* test, to identify which level of government will engage with First Nations as their constitutional partner. Consistency in applying the reconciliation lens requires direct and ongoing engagement between First Nations and settler nations to identify the appropriate approach(es) to address contemporary issues.

34. The golden thread of First Nations laws can no longer be excluded when the future of all our children and all living beings is at stake. The existential crisis of climate change, like all contemporary challenges, is too complex for one treaty partner and one legal tradition. First Nations laws can assist in restoring environmental and constitutional balance.

PART IV. SUBMISSIONS ON COSTS

The AMC does not seek costs and should not be liable to pay costs to any party.

PART V. ORDER SOUGHT

The AMC takes no position regarding the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2020.

Joëlle Pastora Sala, Byron Williams & Katrine Dilay

68 James Cote et al, *supra* note 3 at 51 – 52, 69 [**TAB 1**].
69 *Ibid* at 23.
70 *Ibid* at 62.
71 In *Restoule*, *supra* note 25 at para 411, the Court identified that a proper analysis of the Treaties must take into account both the Crown and Anishinaabe perspectives.

Caleb Behn, cited in Canada, Expert Panel: Review of Environmental Assessment Processes, Building Common Ground: A New Vision for Impact Assessment in Canada (Ottawa, 2017) at 29	1
Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017-08-03)	29
Karen Drake, "The Impact of St Catherine's Milling" (2018) Osgoode Hall Articles and Book Chapters at 2, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3684&context=scholarly_works>	*passim*
Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, "Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law" (Turtle Lodge, 2016)	*passim*
Rt Hon. Justin Trudeau, P.C., M.P, Prime Minister of Canada, "Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter" (2017)	29
United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/61/295	29