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

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- and –

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RESPONDENT

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

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SCC Court File No. 38781

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, C 12, S 186

AND IN THE MATTER OF 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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PART I –OVERVIEW AND FACTS

1. Although the focus of Saskatchewan's and Ontario's appeals is the question of whether the Greenhouse Gas Pollution Protect Act (GGPPA) is "unconstitutional in whole or in part" pursuant to ss. 91 and 92 of the *Constitution Act, 1867*, the effects of anthropogenic climate change and its disproportionate impacts on First Nations across Canada and the exercise of their Constitutionally protected s. 35 and inherent rights demands that consideration given to the entirety of the *Constitution Act, 1982*. The AFN will demonstrate how this approach ultimately supports the conclusion that the GGPPA is wholly *intra vires*.

2. The AFN is a national organization representing over 634 First Nations throughout Canada and their respective members, a majority of whom are Treaty beneficiaries. The National Chief is elected by First Nations Chiefs who provide the AFN with its mandate through resolutions. The AFN adopts the Attorney General of Canada's Statement of Facts and adds the following.

3. First Nations across Canada have their own laws, languages, citizens, territories, and governance systems. First Nations hold the right to self-determination as Peoples'. Their relationships with the Crown are founded on inherent rights, as well as historic treaties, the numbered treaties, self-government agreements, and other arrangements.

4. There is no dispute that First Nations will experience the impacts of climate change in ways that most non-Aboriginal Canadians will not due to a heavy reliance on the environment, their locations and their economic situations.[1] As noted by the Ontario Court of Appeal in the *Reference re Greenhouse Gas Pollution Pricing Act*, climate change has had a particularly serious impact on First Nations communities in Canada, which tend to be exacerbated by the close relationship between First Nations and the land and waters on which they live.[2]

5. The *Pan-Canadian Framework on Clean Growth and Climate Change* addressed this susceptibility of First Nations, noting that "unlike rebuilding after an extreme event like a flood or a fire, once permafrost has thawed, coastlines have eroded, or socio-cultural sites and assets have disappeared, they are lost forever."[3]

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[1] Centre for Aboriginal Environmental Resources, "How Climate Change Uniquely Impacts the Physical, Social and Cultural Aspects of First Nations" Prepared for Assembly of First Nations, March 2006

[2] *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544 at para 12 ["*Ontario Decision*"].

[3] Pan Canadian Framework on Clean Growth and Climate Change, Canada's Plan to Address Climate Change and Grow the Economy, Gatineau Quebec, Environment and Climate Change Canada, 2016,at pp 2-4 ["Pan Canadian Framework"]

6. Researchers have further noted that "Aboriginal people across all metropolitan areas were two to three times more likely that the non-Aboriginal population to live in dwellings needing major repairs."[4] People living in poor quality housing are more vulnerable to damages from extreme weather events. It is clear that First Nations and their infrastructure are far more susceptible to climate change impacts as compared to other Canadians.

7. British Columbia researchers are also predicting modest to severe declines in catch potential for First Nation commercial fisheries as a result of climate change, with estimated regional losses in revenue between 16.4%- 28.9% by 2050.[5]

8. First Nations also tend to be disproportionately impacted from the implementation of regulations over GHG emissions and their accompanying charges. They are particularly susceptible to the impacts of a carbon price due to factors such as remoteness, poor quality housing and subsistence lifestyle.[6] Remote First Nations communities have a lower ability to substitute less carbon-intensive goods and services due to limited selection and therefore as energy costs rise, the impact upon remotely located communities will be greater than those facing shorter distances and lower costs to access basic necessities.[7] The increased costs of these basic necessities such as food will put more pressure on traditional practices like hunting and fishing which will likely reduce the availability and reliability of the natural resources upon which remote First Nations depend.[8]

PART II – THE AFN'S POSITION ON THE QUESTION ON APPEAL

9. The AFN submits that the *GGPPA* is a valid exercise of federal jurisdiction as establishing a minimum national standard of GHG regulation to reduce GHG emissions is a matter of national concern further to its POGG powers and also a constitutionally required exercise by virtue of the Crown's obligations derived from the honour of the Crown and s.35.

10. Further, in exercising this jurisdiction, Canada has a legal onus to recognize Aboriginal and Treaty rights in Canada in its effort to regulate GHG emissions, including the authority of First Nations to participate in the regulation of environmental matters within their respective territories and the utilization of any resulting economic benefits derived from the implementation of said

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[4] Sustainable Prosperity- Policy Brief 2011- Carbon Pricing and Fairness ["Policy Brief"]

[5] Weatherdon LV, Ota Y, Jones MC, CLse DA, Cheung WWL (2016*)" Projected Scenarios for Coastal First Nations' Fisheries Catch Potential under Climate Change: Management Challenges and Opportunities." PLoS ONE 11(1): e0145285: doi:10.1371/journal.pone.0145285 at pg. 5 & 8.

[6] *Policy Brief, supra*, at pp. 5.

[7] *Policy Brief, supra*, at pp. 10.

[8] *Policy Brief, supra*, at pp. 10.

regulations.

PART III –STATEMENT OF ARGUMENT

A. GGPPA validity as a National Concern - traditional test

11. In weighing the constitutionality of the *GGPPA*, the court must conduct a two-stage analysis. This first step is the determination of the true subject matter of the impugned legislation, being the pith and substance of the proposed law in question, and thereafter the determination of whether the subject matter falls within the head of power being relied upon by the party asserting the validity of the legislation at issue.[9]

12. It is the AFN's position that the pith and substance of the *GGPPA* is the establishment of a minimum national standard of GHG emission regulation to reduce GHG emissions. This national perspective is required in order to mitigate the inter-provincial harms which will invariably arise as a result of the failure of individual provinces to address the issue appropriately, including the disproportionate harms suffered by First Nations as a result of climate change.

13. This characterization is supported by the preamble of the *GGPPA*, which notes that the reduction of GHG emissions is necessary to minimize the impacts of climate change on future generations, the deleterious effects to the environment should a province fail to act with sufficient stringency in the area of GHG emission regulation and finally the necessity of creating a federal scheme to ensure that greenhouse gas emissions pricing applies broadly across Canada to effect behavioural changes.

14. The second step of the analysis involves a determination of whether the identified purpose of the legislation falls under the head of power said to support it. In this case the question is therefore whether the establishment of a minimum standard of GHG emission regulation to reduce GHG emissions can be classified as falling under the doctrine of national concern pursuant to the federal government's POGG powers.

15. In establishing whether the *GGPPA* falls under the doctrine of national concern, the accepted test is that as developed in *R. v. Crown Zellerbach Canada Ltd* which provides that the doctrine is applicable to new matters which did not exist at Confederation or those which have evolved into a matter of national concern.[10] For a matter to qualify, it must also have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern

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[9] *Reference re Securities Act*, [2011] 3 SCR 837 at para. 63-64 ["*Securities Reference*"]
[10] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401["*Zellerbach*"].

and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[11] In examining the singleness, distinctiveness and indivisibility of a matter, it is relevant to consider the extra-provincial effects resulting from a province's failure to deal with the regulation of the intra-provincial aspects of the matter, commonly referred to as the provincial inability test.

16. The AFN contends that establishing a minimum standard for GHG emission regulation to reduce GHG emissions within Canada was not an issue which existed at the time of Confederation but that it has since become a matter of vital interest in light of their contributions to climate change, which has both extra-provincial as well as global impacts. It is a new matter which has attained such dimensions as to affect the body politic of Canada. As noted by the Ontario Court of Appeal in the *Ontario Decision*, Canada's unsuccessful efforts to achieve a national cooperative solution is a factor which assist in assessing the national nature of the concern.[12]

17. A minimum national standard for the regulation of GHG emissions to reduce GHG emissions also has the singleness, distinctiveness and indivisibility distinguishing it from matters of merely provincial concern. The Supreme Court of Canada in *R. v. Hydro-Québec*[13] was clear that discrete areas of environmental legislative power can fall with the doctrine of national concern provided it meets the criteria as established in *Zellerbach*.[14] In terms of distinctiveness, GHG emissions are a distinct form of pollution, identified with precision by the *GGPPA and the UN Framework Convention on Climate Change*. This is further informed by both the international and interprovincial impacts of GHG emissions.[15] Finally, provincial inability also plays a role in informing the singleness, distinctiveness and indivisibility analysis delineating a national minimum standard for GHG regulations from a matter of merely provincial concern.[16]

18. With respect to provincial inability, the focus is the need for one national law to mitigate the consequences of inaction on the part of one province on the residents of others. As per Professor Hogg, as cited in *Zellerbach*:

> …… the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences

[11] *Zellerbach*, *ibid* at para 33.
[12] *Ontario Decision, supra* note 2 at para 108.
[13] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 ["*Hydro-Québec*"]
[14] *Hydro-Québec*, *Ibid*, at para 115.
[15] *Ontario Decision, supra* note 2 at para 115.
[16] *Ontario Decision, supra* note 2 at para 117.

> for the residents of other provinces. A subject matter of legislation which has this characteristic has the necessary national dimension or concern to justify invocation of the p.o.g.g. power.[17]

19. There would be a very real impact and harm to First Nations should the provinces fail to address the issue of GHG emissions with sufficiently stringent GHG emission regulations. As noted in the *Ontario Decision*, the territories and Atlantic provinces can do nothing, practically or legislatively, to address the approximately 93.2 percent of national GHG emissions that are produced by the rest of Canada.[18] First Nations are similarly limited in the actions they can take to address the issue, and provincial inaction on lands reserved for Indians will intensify vulnerabilities.

20. The AFN submits that the provincial inability test helps define and limit the scope of federal jurisdiction in the area of GHG emission regulation by distinguishing minimum national standards integral to reducing nationwide GHG emissions from the provinces' ability to regulate in this area. Canada's efforts are targeted to reducing nationwide GHG emissions, and has only been implemented to mitigate the effects of one or more provinces inaction on the matter to the detriment of other provinces and First Nations.

21. As in this Court's decision of *Johannesson v. West St. Paul*[19] on aeronautics, the issue of climate change and its disproportionate effects on First Nations transcends the delineation of property and civil rights afforded the provinces by virtue of s. 92 of the *Constitution Act, 1867*. The national and global impacts of climate change support and Canada's domestic and international commitments support a minimum standard of GHG emission regulation to reduce GHG emissions as having the requisite singleness, distinctiveness and indivisibleness for recognition as a matter of national concern.

22. With respect to the remaining aspect of the *Zellerbach* test, being the scale of impact on provincial jurisdiction, the AFN submits that the *GGPPA* is reconcilable with the distribution of powers as provided for under the Constitution. Federal legislation based on the doctrine of national concern can include specific environmental matters in appropriate circumstances, including pollution which is transboundary in nature as in the case of marine pollution in *Zellerbach*.[20] The

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[17] *Zellerbach, supra* note 10 at para 32.
[18] *Ontario Decision supra* note 2 at para 117.
[19] *Johannesson v. West St. Paul (Rural Mun.),* [1952] 1 S.C.R. 292
[20] *Zellerbach, supra* note 10 at para 39

backstop nature of the *GGPPA* precludes conflict with provincial GHG emission regulation as it has ascertainable and reasonable limits, particularly as federal jurisdiction is narrowly constrained to address the risk of provincial inaction regarding a problem which all parties' recognize requires cooperative action.

23. The AFN submits that as the environment is an area of shared constitutional responsibility, the *GGPPA* is an appropriate response to the environmental crisis of climate change as it strikes an appropriate balance within the existing constitutional division of powers by encouraging flexibility and cooperation between the two levels of government in accordance with the principle of cooperative federalism.

B. Honour of the Crown: GGPPA validity

24. The AFN submits that a constitutional onus exists, grounded in the Crown's obligation to act honourably to First Nations, to proactively make efforts to mitigate the effects of GHG emissions and climate change on First Nations in accordance with globally and nationally accepted standards such as those outlined in the *Pan-Canadian Framework.*

25. Per this Court's decision in *Mikisew Cree First Nation v. Canada (Governor General in Council),*[21] the honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and First Nations. In all dealings with First Nations, the Crown must act honourably and that nothing less is required if the reconciliation of the pre-existence of First Nations societies with the sovereignty of the Crown is to be achieved.[22] It is in essence a constitutional duty embedded by virtue of s. 35.

26. Determining what constitutes honourable dealing and what specific obligations are imposed by the honour of the Crown depends heavily on the circumstances and the divergent interest of First Nations and the Crown. [23]

27. The AFN submits that in implementing the *GGPPA*, the Government of Canada is attempting to ensure that the constitutional obligation owed to First Nations to act honourably in all matters is upheld by attempting to mitigate the harms of substandard provincial action in the area of GHG emissions and the disproportionate impacts of climate change on First Nations.

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[21] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40 at para. 21 ["*Mikisew*"].
[22] *Haida Nation v. British Columbia (Minister of Forests),* [2004] S.C.J. No. 70 *at* para 17.
[23] *Mikisew supra* note 21 at para 24.

28. The AFN further submits that the modern evolution of the honour of the Crown and the role of s. 35 in the Canadian legal landscape suggest that *Zellerbach*, a decades old decision, and the associated interpretive test as to whether a matter fits within the doctrine of national concern, should be read as to incorporate the effect of the impugned legislation on First Nations as a factor. The disproportionate harms that First Nations would suffer by virtue of substandard provincial action on the issue of GHG emissions should be viewed as an indicia of provincial inability. The grave consequences for First Nations associated with substandard provincial action should therefore support a finding that a national minimum standard for GHG emissions to reduce GHG emissions has the requisite singleness, distinctiveness and indivisibility.

29. The AFN submits that establishing this First Nations component into the *Zellerbach* test on the basis of s. 35 and the obligations imposed by virtue of the principle of the honour of the Crown is an affirmation of how the individual elements of the Constitution are linked, and as per this Court's decision in the *Secession Reference*, how they should "be interpreted by reference to the structure of the Constitution as a whole."[24] However, these considerations do not detract from First Nations jurisdiction in the area of GHG regulation. As noted by this Court in *Mitchell v. Peguis Indian Band*[25], "from the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not later the basic structure of Sovereign-Indian relations".[26]

C. Section 35 of the *Constitution Act, 1982* & First Nation jurisdiction over GHG regulation

30. The question in this Reference broadly asks if the GGPPA is "unconstitutional in whole or in part." As such, the AFN submits that this Reference is not solely about section 91 and 92 powers. Rather, an analysis of the entirety of the *Constitution Acts of 1867* and *1982* is required and should also consider s. 35 rights. The Crown's division of powers must be reconciled and understood according to the constitutionally protected rights of Indigenous peoples. First Nations are an order of government within the constitutional framework and the right to self-determination in the area of GHG includes regulation of GHG emissions in their respective territories, including any associated economic benefits derived therefrom.

31. First Nations have managed ecosystems and natural resources, as well as mitigated

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[24] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 50.
[25] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.
[26] *Mitchell, ibid* at p. 109.

environmental degradation prior to European contact. An example of this includes the Mi'kmaq Nation who practiced "Netukulimk", being the Mi'kmaq way of harvesting resources without jeopardizing the integrity, diversity or productivity of the environment, as passed down through the generations by Elders and parents.[27]

32. Factors which support First Nations jurisdiction in the area GHG regulation includes the disproportionate effects of climate change on First Nations, particularly with respect to impacts on traditional aboriginal rights, such as hunting and fishing. First Nations who depend upon nature for traditional and commercial activities as well as cultural well-being are and will continue to be more significantly impacted than other Canadians as a result of climate change.

33. The AFN submits that reconciliation of First Nation interests requires that the construction of s. 35(1) be grounded by the "living tree" doctrine. As the "Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life", to fully pursue the goal of reconciliation and the Crown's fiduciary duty to First Nations, due deference must be given to the modern realities facing all First Nation peoples, including the disproportionate impacts of climate change and GHG emission regulation.[28] These impacts on First Nations are unique and modern circumstances. As such, the honour of the Crown, as a constitutionally embedded principle, must evolve to not only recognize the historical role of individual First Nations in resource management in their respective territories, including the continuity of same, but a modern role for First Nations in the regulation of GHG emissions on their territories and the economic benefits derived therefrom.

34. GHG regulation should not be used as a limiting factor on First Nations economies and development. Canada and the provinces have established robust economies from centuries of pollution and the emission of GHGs which have largely excluded First Nations. Instead of the continuing exclusion of First Nations, an evolving system of cooperative federalism should be strived for by incorporating a nation-to-nation dialogue and a more appropriate system of GHG emission regulation and governance which engages First Nations and promotes the growth of their respective economies and development.

35. Given the above, the AFN submits that the Court should not answer this Reference in a

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[27] Suzanne Berneshawi. "Resource Management and the Mi'kmaq Nation". The Canadian Journal of Native Studies XVII, 1 (1997); 115-148 at pp. 118-119.

[28] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.

classical ss. 91-92 of *Constitution Act, 1867* sense, as the rights and interests of First Nations under s. 35 of the *Constitution Act, 1982* are clearly at stake. Rather the Court must interpret the *GGPPA* in a manner that harmonizes ss. 91-92 and s. 35.

D. International obligations supporting First Nations jurisdiction

36. The AFN submits the federal and provincial governments respect for and recognition of First Nation inherent rights and exercise of jurisdiction, including in the area of GHG emission regulation, is supported by international discourse.

37. The *United Nations Declaration on the Rights of Indigenous Peoples*[29] has been made a priority of the Government of Canada which has committed to implementing the *UN Declaration* "without qualification" and undertaken various efforts to implement the *UN Declaration* in accordance with the Canadian Constitution with the aim of imbedding these international standards into Canada's domestic sphere.[30]

38. The *UN Declaration* has been described as the framework for reconciliation at all levels and across all sectors of Canadian society.[31] As reconciliation is the "fundamental objective of the modern law of aboriginal and treaty rights," it is incumbent on Canada to take into consideration the fundamental human rights principles associated therewith.[32]

39. The *UN Declaration* supports First Nations jurisdiction in the area of GHG emission regulation and any resultant economic benefits based on its recognition of First Nations inherent right to self-determination and that by virtue of this right "they freely determine their political status and freely pursue their economic, social and cultural development" Further, the *UN Declaration* states that First Nations in exercising this right of self-determination have the right to self-government in matters relating to their local affairs, as well as ways and means of financing these autonomous functions.[33]

40. Other international documents which support First Nation jurisdiction in this area include

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[29] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 ["*UN Declaration*"].

[30] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016 ; Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples

[31] Final Report of the Truth and Reconciliation Commission of Canada: Summary: Honouring the Truth, Reconciling for the Future. Winnipeg: Truth and Reconciliation Commission of Canada, 2015 at p. 16.

[32] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

[33] *UN Declaration*, Articles 3 and 4.

the *Paris Agreement,* which states that as climate change is a common concern of humankind, parties should, when taking action to address climate change "respect, promote and consider their respective obligations on human rights and the rights of indigenous people.[34] Other initiatives, such as *Reducing Emissions from Deforestation and forest Degradation,*[35] acknowledge Indigenous people's particular relationship with the lands they inhabit and further call for the effective participation of Indigenous peoples in State's climate change mitigation efforts.

41. Not only does the honour of the Crown and recognition of the *UN Declaration* as a pathway towards reconciliation dictate that the court should recognize these international principles in terms of domestic law, but jurisdiction for this Court to consider same is supported by this Court's decision in *R. v. Hape* where this Court noted that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principle".[36] This Court, in interpreting the scope of the application of the *Charter of Rights and Freedoms*, affirmed the courts should seek to ensure compliance with Canada's binding obligations under international law.[37]

PART IV – ORDER SOUGHT AND COSTS

42. The AFN respectfully requests that the constitutionality of the GGPPA be affirmed. The AFN does not seek costs and asks that no costs be awarded against it.

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

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[34] *Paris Agreement* (Dec. 13, 2015), *in* UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1 (Jan. 29, 2016) ["*Paris Agreement*"].
[35] *Reducing emissions from deforestation and forest degradation in developing countries* ("REDD+")
[36] *R. v. Hape*, [2007] 2 S.C.R. at para. 53 ["*Hape*"].
[37] *Hape, ibid* at para. 56.

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