Court File No: **38781**

IN THE SUPREME COURT OF CANADA
(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 COURT OF APPEAL FOR ONTARIO UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C. 43, s. 8

BETWEEN:

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Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

1. The First Nations which make up the Anishinabek Nation (AN) and the United Chiefs and Councils of Mnidoo Mnising (UCCMM) have lived on the lands and waters of their territories, and exercised their traditional way of life within those territories since time immemorial. The member Nations of the AN and the UCCMM have also exercised inherent jurisdiction over those lands and waters for just as long. With the inclusion of section 35 in the *Constitution Act, 1982*, all of these inherent rights have now also been given constitutional recognition and affirmation.[1]

2. Many of the First Nation communities that together make up the AN (including the member Nations of UCCMM) entered into Treaties and other solemn agreements with the Crown, some of which go back almost 200 years. In addition, many of the AN member Nations are presently engaged in exploratory discussions with Canada regarding the exercise of jurisdiction and to support and implement a renewed Nation-to-Nation relationship. As representatives of Canada's First peoples, and as Treaty partners with the Crown, the AN and UCCMM member Nations bring a critical and unique perspective to the issues raised in this appeal.

3. The majority of the Ontario Court of Appeal (ONCA) recognized the disproportionate impact that climate change has had (and will continue to have) on Indigenous communities in Canada. Chief Justice Strathy, speaking on behalf of the majority, found, generally that "climate change is causing or exacerbating: increased frequency and severity of extreme weather events (including droughts, floods, wildfires, and heat waves); degradation of soil and water resources; thawing of permafrost; rising sea levels; ocean acidification; decreased agricultural productivity and famine; species loss and extinction; and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus."[2] He then went on to note the specific impacts that climate change has had on Indigenous communities:

> [12] Climate change has had a particularly serious impact on some Indigenous communities in Canada. The impact is greater in these communities because of the

[1] *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 11 (*per* Strathy CJO) [***Ontario Reasons***].

> traditionally close relationship between Indigenous peoples and the land and waters on which they live.
>
> [13] For example, members of the intervener Athabasca Chipewyan First Nation ("ACFN") … depend for their survival on hunting caribou, gathering food and medicinal plants, and trapping and fishing. The ACFN has adduced evidence that these traditional, survival-based practices are threatened by climate change. A declining barrenland caribou population, the reduction of surface water in lakes and rivers, and an increased risk of wildfires, each of which is caused or exacerbated by climate change, threaten the ACFN's ability to maintain its traditional way of life.
>
> [14] … The traditional territories of the UCCMM Nations are primarily situated on and around Manitoulin Island and the north shore of Georgian Bay. … the UCCMM Nations' intimate relationship with their lands and waters has allowed them to observe the impacts of climate change firsthand. Over recent decades, they have noted a decrease in moose populations and native whitefish stocks, less frequent but more intense bouts of precipitation, shorter and thinner ice cover in the winter, and diminishing water quality due to increased green algae blooms spurred by warmer temperatures.[3]

4. As recognized by the majority of the ONCA, these changes to the environment impair the UCCMM Nations' ability to sustain themselves by observing traditional practices, and threaten their continued existence as a self-determining people. The same is true for all of the AN member Nations.

5. The adverse impacts on the rights of Indigenous peoples which were acknowledged by the majority of the ONCA also contravene the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which expressly recognizes, among other rights, the rights of Indigenous peoples to the "conservation and protection of the environment and the productive capacity of their lands or territories and resources" (Article 29).

6. In answering the fundamental question of constitutional interpretation presented in this appeal, related to the allocation of legislative jurisdiction in Canada, this Court must consider not only sections 91 and 92 of the *Constitution Act, 1867*,[4] but must also take into account other written constitutional provisions, including section 35 of the *Constitution Act, 1982*, as well as its international obligations towards Indigenous peoples and their inherent rights.

[3] *Ontario Reasons* at paras 12-14 (*per* Strathy CJO).
[4] *Constitution Act, 1867* (UK), at ss. 91, 92, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

7. Understood from the perspective of Canadian constitutional law, this case is about whether the federal level of government has the requisite constitutional authority to enact legislation designed to establish and enforce minimum national standards in relation to reducing greenhouse gas emissions (GHGs). From the perspective of the AN and the UCCMM, this case raises even more fundamentally important questions about who has the *responsibility* to protect our planet and to preserve the exercise of those rights which have been recognized and affirmed in section 35 of the *Constitution Act, 1982*. The answer to that question must be: "All of us!!"

8. It is the view of the AN and the UCCMM that the analysis to be undertaken by the Court on this appeal must reconcile the distribution of legislative authority under sections 91 and 92 of the *Constitution Act, 1867,* with the recognition and affirmation of Aboriginal and Treaty rights in section 35 of the *Constitution Act, 1982*. In order to achieve this reconciliation, the answer to the question before this Court must recognize a role for all levels of government – including the federal and provincial levels of government, as well as Indigenous governments – in protecting and preserving the environment.

9. If the decision of the majority of the ONCA is not upheld, then the result will be to deny the federal government the constitutional authority to adopt legislation *establishing minimum national standards to reduce greenhouse gas emissions*. That outcome would create an impermissible constitutional gap. It would present a very real risk that the rights of the AN and the UCCMM member Nations to carry out those customs and practices that are integral to their traditional way of life and their ability to exercise their inherent jurisdiction will be impacted to the point of extinguishment, thereby rendering those rights meaningless.

PART II – ISSUES

10. The issue before this honourable Court on this appeal is properly framed by the question referred to the ONCA by the Governor-in-Council, namely: "whether the *Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12, is unconstitutional in whole or in part." Any effort on the part of Ontario to narrow the scope of the issues to be considered, based on the more restrictive wording of the Constitutional Question it has put forward, must be rejected.

PART III – ARGUMENT

11. The AN and the UCCMM advance the following arguments in support of their position that the *Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12[5] (*GGPPA*) is *intra vires* the federal Parliament.

I. All Parts of the Constitution Must Be Read Together

12. The requirement to read the Constitution as a whole has been recognized on many occasions by this Court. The clearest and most concise statement of this principle can be found in *Gosselin (Tutor of) v. Quebec (Attorney General)*:

> As the Court has stated on numerous occasions, there is no hierarchy amongst constitutional provisions. … ***All parts of the Constitution must be read together***.[6]

13. The interpretation of the written constitutional provisions, is also informed by unwritten principles. In *Rogers Communication Inc. v. Chateauguay (City)*, this Court expressly recognized that:

> … when courts apply the various constitutional doctrines, they must take into account the principles of co-operative federalism, ***which favours, where possible, the concurrent operation of statutes enacted by governments at both levels***.[7]

14. This approach to constitutional interpretation, which takes into account principles of co-operative federalism, is reflected in the reasons of the majority of the Saskatchewan Court of Appeal (SKCA) in the Saskatchewan reference:

> If it is necessary to apply established doctrine in a slightly different way to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem to be entirely appropriate. ***It is also in keeping with what the Supreme Court has said about the utility of, where possible, allowing both Parliament and the provincial legislatures jurisdictional room to act in relation to the environment***.[8]

[5] *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, s 186.
[6] *Gosselin (Tutor of) v Quebec (Attorney General)*, 2005 SCC 15 at para 2 [***Gosselin***].
[7] *Rogers Communication Inc v Chateauguay (City)*, 2016 SCC 23 at para 38 [***Rogers Communication Inc***].
[8] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 144 [***Saskatchewan Reasons***].

15. Given the disproportionate impacts that climate change has on First Nation communities and their traditional way of life, and recognizing the potential for Indigenous communities to assert and exercise jurisdiction in relation to environmental issues that directly impact their lands and their people, the AN and UCCMM ask this Court to take the SKCA's reasoning a step further. The AN and UCCMM urge this Court to adopt an approach to the issues in this case which allows jurisdictional space for all levels of government – federal, provincial and Indigenous – in regulating critical environmental matters.

II. Division of Powers Analysis Must be Consistent with Section 35 of the *Constitution Act, 1982*

16. Where courts are faced with a division of powers question, the analysis to be undertaken involves the following two steps:

> **Step 1 – Characterization**
>
> The Court must examine the purpose and effect of the legislation at issue in order to identify its dominant or most important characteristic (i.e., its "pith and substance").
>
> **Step 2 – Classification**
>
> Having identified the pith and substance of the legislation, the Court must determine where it falls within the constitutional division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*.[9]

17. At each step of the analysis, courts considering questions related to the constitutional division of legislative authority in Canada are required to take Indigenous rights and interests, including environmental stewardship and governance rights, "recognized and affirmed" under section 35 of the *Constitution Act, 1982*, into consideration.

18. In 1990, this Court affirmed in *R. v. Sparrow*[10] that the powers set out in section 91 must "now be read together with s. 35(1)" as "federal power must be reconciled with federal duty."[11] Furthermore, as was recognized by Chief Justice Dickson in *Mitchell v. Peguis*, "any federal-

[9] *Ontario Reasons* at para 67 (*per* Strathy CJO), citing *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 86.
[10] *R v Sparrow*, [1990] 1 SCR 1075 [***Sparrow***].
[11] *Sparrow* at 1109.

provincial divisions that the Crown has imposed on itself are internal to itself ***and do not alter the basic structure of Sovereign-Indian relations***."[12]

Step 1 – A Narrow and Specific Characterization of the "Pith and Substance" of the *GGPPA* is to be Preferred

19. The majority of the ONCA properly characterized the pith and substance of the *GGPPA* with reference to the Act's purpose and its effects.[13] The majority of the ONCA described the Act's pith and substance as: "***establishing minimum national standards to reduce greenhouse gas emissions***."[14]

20. The AN and the UCCMM accept this characterization of the pith and substance of the *GGPPA* as correct. It is submitted that there are two equally important aspects to this characterization, both of which are critical to an assessment of whether the matter falls within the national concern branch of the "Peace, Order and good Government" (POGG) authority under section 91 of the *Constitution Act, 1867*:

(i) the establishment of minimum national standards; and

(ii) to reduce GHG emissions.

21. After 1982, following the constitutional recognition and affirmation of Aboriginal and Treaty rights in section 35, a narrow and specific characterization of the "matter" of national concern is generally to be preferred (as opposed to the Appellant's broad characterizations). This approach to characterization leaves the maximum possible space for other levels of government, including both provinces and Indigenous governments, to exercise jurisdiction and legislate with respect to any related but local aspects of the broader matter in issue. To the extent that there are cases decided before 1982 which suggest a different approach to characterization, it is submitted that they should be given little or no weight in light of section 35 of the *Constitution Act, 1982*.

22. In the alternative to the characterization of pith and substance adopted by the majority of the ONCA, the AN and UCCMM would also be prepared to accept the modified characterization

[12] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 109. See also: *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 44. [emphasis added]
[13] *Ontario Reasons* at para 76 (*per* Strathy CJO).
[14] *Ontario Reasons* at para 77 (*per* Strathy CJO). [emphasis added]

of the pith and substance of the *GGPPA* now put forward by Canada – i.e., "*establishing minimum national standards integral to reducing nationwide GHG emissions*". In the remainder of these submissions, the AN and UCCMM will cite the characterization of pith and substance adopted by the majority of the ONCA, which they consider sufficiently specific to be consistent with section 35. However, nothing in these submissions would change if Canada's characterization were to be adopted by this Court.

Step 2 – Classification

23. Section 91 of the *Constitution Act, 1867*, includes the residual POGG authority. The federal POGG authority includes a "national concern", a "national emergency" and a "gap" branch. The accepted test for deciding whether a given piece of legislation falls within the national concern branch of POGG was set down by this Court in *Crown Zellerbach*.[15]

24. Applying the *Crown Zellerbach* test, the majority of the ONCA concluded that the *GGPPA* "is constitutionally valid under the national concern branch of the POGG." The majority reasoned that establishing minimum national standards to reduce GHG emissions was either a matter that did not exist in 1867[16] or was a matter that, while originally of a local and private nature, had become a matter of national concern.[17]

25. The test set down by this Court in *Crown Zellerbach*, requires a determination as to whether the matter in issue has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In applying these *Crown Zellerbach* criteria, the AN and UCCMM agree with the summary put forward by the Attorney General of British Columbia and endorsed by the majority of the ONCA as "a helpful guide":

> (1) singleness requires that the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute;
>
> (2) distinctiveness requires that the matter be one beyond the practical or legal capacity of the provinces because of the constitutional limitation on their jurisdiction to matters "in the Province"; and

[15] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [***Crown Zellerbach***].
[16] *Ontario Reasons* at para 104 (*per* Strathy CJO).
[17] *Ontario Reasons* at para 105 (*per* Strathy CJO).

> (3) indivisibility means that the matter must not be an aggregate of matters within provincial competence, but must have its own integrity – this normally occurs ***where the failure of one province to take action primarily affects extra-provincial interests, including the interests of other provinces, other countries and Indigenous and treaty rights***.[18] [emphasis added]

26. The majority of the ONCA concluded that "establishing minimum national standards to reduce GHG emissions" meets these requirements, based, in part, on the following rationale:

> [114] … [GHGs] have known and chemically distinct scientific characteristics. They combine in the atmosphere to become persistent and indivisible in their contribution to anthropogenic climate change. ***They have no concern for provincial or national boundaries. Emitted anywhere, they cause climate change everywhere, with potentially catastrophic effects on the natural environment and on all forms of life. They are exactly the type of pollutant that both the majority and the minority in Crown Zellerbach contemplated would fall within the national concern branch of the POGG power***.[19] [emphasis added]

27. The constitutional recognition and affirmation of Aboriginal and Treaty right in section 35 of the *Constitution Act, 1982* mandates that, in applying the *Crown Zellerbach* criteria, the rights and interests of First Nations must be taken into account. A consideration of Indigenous rights and interests in this case supports a finding that the *GGPPA* is *intra vires* the federal Parliament.

28. It is well-established that when determining if a matter is one of national concern, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[20] As accepted by the majority of the ONCA, the "extra-provincial" interests to be considered must be recognized as including Indigenous interests. Courts must, at this stage of the analysis, consider what impact the failure of even one province to effectively reduce GHG emissions would have on the Aboriginal and Treaty rights of the AN member Nations recognized and affirmed under section 35.[21]

[18] *Ontario Reasons* at para 113 (*per* Strathy CJO).
[19] *Ontario Reasons* at para 114 (*per* Strathy CJO).
[20] *Crown Zellerbach* at 431-32.
[21] *Crown Zellerbach* at 431-32.

29. The majority of the ONCA found the application of the "provincial inability" test "leaves no doubt that establishing minimum national standards to reduce GHG emissions is a single, distinct and indivisible matter":

> [117] … While a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces – emissions that cause climate change across all provinces and territories. However stringent a provinces GHG emissions reduction measures, they cannot, on their own, reduce Canada's net emissions. …
>
> [118] The matter is itself indivisible. ***No one province acting alone or group of provinces acting together can establish minimum standards to reduce GHG emissions. Their efforts can be undermined by the action or by the inaction of other provinces***. Thus, the reduction of GHG emissions cannot be dealt with in a piecemeal manner. It must be addressed as a single matter to ensure its efficacy. The establishment of minimum national standards does precisely that.[22] [emphasis added]

30. First Nations' lands and waters, and the exercise of their inherent rights, do not align with and are not confined within provincial boundaries. The AN and UCCMM Nations urge this Court to acknowledge that the recognition and affirmation of Aboriginal and Treaty rights in section 35 of the *Constitution Act, 1982*, necessarily require that there be some level of government that is accountable to First Nations for the protection and preservation of those rights. It would be a hollow promise indeed for the Constitution to "recognize and affirm" rights without providing any effective recourse if and when those rights are imperiled. Where there are rights, there must be an effective remedy.[23]

31. Provinces are incapable of addressing concerns raised by Indigenous groups about the potential impacts of actions that occur within provincial boundaries on section 35-protected rights that exist and are being exercised beyond those provincial boundaries. Only the federal level of government is capable of adopting the minimum national standards necessary for the protection of the Aboriginal and Treaty rights that lie at the core of the Anishinabek way of life, which are constitutionally protected in section 35, and expressly recognized in the *UNDRIP*.

[22] *Ontario Reasons* at paras 117-118 (*per* Strathy CJO).
[23] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25.

32. This Court should prefer an approach to the issue raised in this appeal which provides Indigenous groups, including the member Nations of the AN and UCCMM, with an effective remedy for the impacts that GHG emissions and climate change have had, and will continue to have, on their constitutionally-protected rights, which lie at the heart of their very existence as distinctive Anishinabek peoples.

33. This Court has previously held that Indigenous peoples should not be left without effective redress as a result of federal-provincial jurisdictional disputes.[24] To deny the federal government jurisdiction to enact legislation "*establishing minimum national standards to reduce greenhouse gas emissions*" (ONCA majority characterization) or "*establishing minimum national standards integral to reducing nationwide GHG emissions*" (Canada's characterization) would leave the AN and UCCMM member Nations "in a jurisdictional wasteland with significant and disadvantaging consequences".[25] Such an outcome has already been rejected by this Court.[26] Only an outcome which gives the AN and UCCMM Nations the ability to hold some level of government accountable for the protection and preservation of their rights is consistent with the "recognition and affirmation" of Aboriginal and Treaty rights in section 35.

PART IV – COSTS

34. The AN and UCCMM do not seek costs, and ask that no costs be awarded against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of January, 2020.

Cynthia Westaway/Patricia Lawrence
Counsel for the Interveners
Anishinabek Nation and
United Chiefs and Councils of Mnidoo Mnising

[24] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [***Daniels***].
[25] *Daniels* at para 14.
[26] *Daniels* at para 14.

PART V – TABLE OF AUTHORITIES

Case Law	**Cited at paragraphs**
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PART VI – STATUTORY PROVISIONS

Legislation		**Cited at paragraphs**
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Constitution Act, 1982, s 35, Schedule B to the *Canada Act 1982* (UK), 1982, c 11	*Loi constitutionnelle de 1862*, art 35, annexe B de la *Loi de 1982 sur le Canada*, 1982 (R-U), c 11	1, 6, 7, 8, 17, 21, 27, 30
Greenhouse Gas Pollution Pricing Act, being Part 5 of the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, s 186.	*Loi sur la tarification de la pollution causée par les gaz à effet de serre*, constituant la partie 5 de la *Loi no 1 d'exécution du budget de 2018*, LC 2018, c 12, art 186.	11