**SCC Court File No. 39116**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

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

**AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S. 26**

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

APPELLANT

- and –

**ATTORNEY GENERAL OF ALBERTA**

RESPONDENT

- and –

*(Continued on next page)*

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# FACTUM OF THE INTERVENER, ATHABASCA CHIPEWYAN FIRST NATION

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

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## PART I. OVERVIEW

1. The Athabasca Chipewyan First Nation ("ACFN") is an intervener in the companion appeals of Saskatchewan and Ontario. This factum does not repeat those submissions but is limited to British Columbia's appeal from the decision of the Alberta Court of Appeal.

2. The majority reasons of the court below are not merely wrong in law—as Canada and British Columbia argue—but more fundamentally they are wrong in fact. Instead of an evidence-based inquiry into the social and legislative facts underlying the constitutional question, the majority reasons contain findings of fact that are expressly contradicted by the record of evidence.

3. The majority's decision turns on a palpably wrong factual finding: that there is no evidence in the record to show that Alberta's GHG emissions cause extraprovincial harm outside Alberta. From this premise of "no evidence", the court infers its legal conclusion that there is no Peace, Order, and Good Government ("POGG") matter of national concern.

4. But this premise is untrue. Far from being silent about how Alberta's GHG emissions injure neighbouring and distant jurisdictions, actually the record—even Alberta's own evidence—is verbose on that very subject. The majority committed a palpable error of fact asserting otherwise, which led it to a legally incorrect inference on the POGG national concern test that is in itself fatal under *Housen v. Nikolaisen*, regardless of any "pure" errors of law that may also exist.

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

5. Similarly to British Columbia, Canada, and the Assembly of First Nations, ACFN submits that the *Greenhouse Gas Pollution Pricing Act* is constitutional in full.

## PART III. CONCISE STATEMENT OF ARGUMENT

### *A. The Palpable and Overriding Error of Fact in the Judgment Below*

6. At ¶324 of the judgment below, the majority makes this finding of fact:

> [F]actually, in any event, there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. The scale and proportionality of GHG emissions differ from the immediacy of harm from a toxic chemical. The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries.

7. Finding there is "no evidence on [the] record" of extraprovincial harm is pivotal, for in the next paragraph (¶325) the majority takes the absence of evidence to infer that "the provincial

inability test is not met here." Alberta also block-quotes this passage and relies on the absence of evidence at ¶27-28 of its factum to argue "that the purported analogy between provincial actions with an immediate and tangible impact on other provinces—such as toxic waste flowing directly from one province to the other—and the interprovincial impacts of one province's GHG emissions, is simply inaccurate."

8. In other words: the factual finding that there is "no evidence" of extraprovincial harm underlies both the majority's legal inference on POGG, and Alberta's argument in this Court, so if it is palpably wrong neither can stand. The appellate standard of "palpable and overriding error" under *Housen v. Nikolaisen* for findings of fact applies to review the Alberta decision in this Court.[1]

### *B. Alberta Concedes on the Record That There Is Evidence of Extraprovincial Harm*

9. The record establishes the following common-sensical, scientific facts:

i. GHGs mix in the Earth's atmosphere.[2] What is emitted in one province does not stay in that province, any more than clouds drifting over Alberta collide with an invisible wall at the border with British Columbia, and;

ii. Globally there is an upper limit or "budget" of how much GHG the Earth can assimilate before disaster sets in, so when Alberta emits *X* tonnes of excess GHG, there is measurable harm to other provinces or countries who consequently must sacrifice to emit *X* tonnes less.[3] There is just no way around that zero-sum math.

10. These facts mean that the majority is mistaken that excess GHG emissions from Alberta cannot cause "harm to any other province now or in the foreseeable future." The majority's finding that that the record is silent and contains "no evidence" of such harm is certainly an error of fact because the record is explicit that such harm exists.

11. Alberta's *own* evidence speaks of the need to "break the link between hydrocarbon energy development and greenhouse gas emissions, thereby sustaining Alberta's ability to develop its resources in a carbon-constrained world."[4] Alberta's admission that the world is carbon-

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[1] *Housen v. Nikolaisen*, 2002 SCC 33.
[2] Robert Savage Cross-Examination, p. 51:ln 16-19, in **Supplementary Record of the Intervener Attorney General of Alberta in SCC Files 38663 and 38781 ["Supp. Record"]**, Vol. 10; also John Moffet Affidavit, at ¶7, **Supp. Record**, Vol. 11.
[3] John Moffet Affidavit, p. R80 and p. R268 (at heading C1.3), **Supp. Record**, Vol. 11.
[4] Robert Savage Affidavit, Ex. A (at p. A76), **Supp. Record**, Vol. 2.

constrained means that if Alberta emits too much of the global budget for emissions, it harms others who consequently must emit less. Alberta's affiant conceded so in cross-examination, and said it is "true" that "the more [GHG] that's emitted in one part of the country, the less that can be emitted in other parts of the country."[5] Likewise at the global level, Alberta's affiant also conceded it is true that "the more that's emitted by one country, the less that can be emitted from other countries."[6]

12. Succinctly put, if Alberta gorges on GHG emissions, other provinces and countries must tighten their belts. When Alberta itself admits so on the record, the majority's finding of fact that there is "no evidence on [the] record" of harm to others is patently wrong. That the majority based its POGG analysis on this wrong factual finding makes its decision wrong under *Housen v. Nikolaisen*.

### *C. Alberta Is A Special Problem in the Federation and Globally for Emissions*

13. A related error is the majority's finding at ¶113 that Alberta has "acted and continues to act to reduce GHG emissions," which is palpably, shockingly wrong. Somehow the majority overlooked an admission exactly to the contrary by Alberta's *own* affiant that its GHG emissions have burgeoned in recent years—from 231 Mt $CO_2e$ in 2005, to 273 Mt $CO_2e$ in 2017.[7]

14. Alberta is not a "clean" province; on the contrary it is singularly filthy. Among the provinces, Alberta emits the most GHG, and its *per capita* emissions are grossly disproportionate: about 500% of Ontario's or BC's, and 600% of Quebec's.[8] If hypothetically "Wexit" made Alberta a sovereign state, its *per capita* emissions would be the highest of any country in the world.[9]

15. Nor does Alberta have a plan to curb its overconsumption of Canada's emissions budget and cease usurping these cleaner provinces. When asked if Alberta has a plan to reverse course and achieve a target of 162 Mt $CO_2e$ by 2030 (representing Alberta's share of emissions in the national target of cutting emissions by 30% from 2005 to 2030), Alberta's affiant conceded that "we have not come up with policies that would get us there".[10]

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[5] Robert Savage Cross-Examination, p. 67:ln11-17, **Supp. Record,** Vol. 10.
[6] Robert Savage Cross-Examination, p. 64:ln8-13, **Supp. Record,** Vol. 10.
[7] Robert Savage Cross-Examination, p. 68:ln22 to p.69:ln18, **Supp. Record**, Vol. 10.
[8] Dr. Dominique Blain Expert Report, at ¶26, **Supp. Record**, Vol. 13; Dr. Nicolas Rivers Expert Report, Ex. D (at p. R1212), **Supp. Record**, Vol. 14.
[9] Dr. Nicolas Rivers Expert Report, Ex. D (at p. R1211), **Supp. Record**, Vol. 14.
[10] Robert Savage Cross-Examination, p. 70:ln21-25, and p. 71:ln16-22, **Supp. Record**, Vol. 10.

16. When Alberta refuses to come up with such a policy, the cleaner provinces are impotent to force it. In the language of POGG, there is "provincial inability" on the part of cleaner provinces to stop Alberta being greedy and foisting the hardship of GHG reductions on others. For this reason, the majority is wrong at ¶316 when it writes dismissively of the provincial inability test that "The bottom line is … [h]ow the provinces exercise their jurisdiction to regulate GHG emissions is a policy question not a legal one"—because, in a federation of provinces, it is both.

17. ACFN wishes to emphasize that it is harmed by Alberta's selfish conduct. For First Nations in the North, climate change is extreme and dangerous. As submitted in ACFN's main factum (in the Ontario and Saskatchewan appeals) on current trajectory Canadian scientists estimate that climate warming will raise temperatures on ACFN's Treaty territory by up to 7.1°C by 2080—a change well above Canada's current target to limit average global warming to 1.5°C.[11] (Just to illustrate, 7.1°C is about the difference in annual average temperature between cool Vancouver and rather warmer Mexico City.)

18. Warming the climate of ACFN's traditional homeland to such an extreme degree has catastrophic implications for the local ecology, and ultimately, ACFN's survival. Since time immemorial ACFN people have survived by carrying on their Treaty 8 rights of hunting, fishing, trapping, and other traditional vocations in the Peace-Athabasca Delta (PAD). There is no permanent road to their community, and their lifeline to the rest of the world is the Winter Road (an ice road) that can operate for only a few weeks a year. Climate change threatens all of this, and in the words of ACFN's affiant, whose evidence was never cross-examined or contradicted:

> ACFN believes that greenhouse gas emissions must be reduced to the point of being net neutral, and urgently. For ACFN, impacts from climate change to the wildlife, the PAD, and the Winter Road intersect with and exacerbate each other. If we cannot hunt caribou or hunt, trap, fish, and gather in the PAD, cannot travel in the PAD along the Athabasca River, and cannot use the Winter Road, we will become more isolated in a land that no longer sustains us. Having been stripped of the ability to practice our Rights, we will be forced to leave our territory and live elsewhere. We will no longer be *Dënesųliné*; no longer the *K'ái Tailé Dené*; and no longer the *Etthen Eldeli Dené.* ACFN will have lost our identity. We will have ceased to survive as an Aboriginal people. That this may come about from climate change is, from our perspective, an existential threat.[12]

19. Alberta may have its reasons to possess no policy to reduce its emissions and meet the national benchmark by 2030. But before this Court decides that Alberta's policy choice is entitled

[11] Lisa Tssessaze Affidavit, at ¶15, **Supp. Record**, Vol. 20.
[12] Lisa Tssessaze Affidavit, at ¶53, **Supp. Record**, Vol. 20 (underlining added).

to deference, it must remember this: the protection and survival of First Nations is not just an ordinary policy choice, but a Crown obligation in s. 35 of the *Constitution Act*, 1982. It would be a grave error for the Court to show Alberta's policy choice obeisance, at the expense of negating a Crown obligation in law. Doing so flips the hierarchy in which law trumps policy on its head, and risks infringing or even extinguishing ACFN's Treaty rights.

20. Climate change has *already* inflicted serious harm on ACFN's Treaty rights, and the uncontradicted evidence before the Court is that much worse is foreseeable.[13] Alberta has contributed to it, proportionately more than any other province; the emissions data leave no doubt. Its emissions are a material cause of harm to AFCN and other Indigenous communities.

### *D. A Closing Observation on Alberta's Record – and the Trivial Cost of Action*

21. Alberta has not always been so intransigent as in this Court. Indeed Alberta once conceded that it seeks "an effective national approach to climate change … [that] allows Alberta to do its fair share in dealing with an international problem".[14] How strikingly unlike Alberta's submissions today, where it feigns it has no fair share, and (at ¶27-28 of its factum) relies on the majority's erroneous finding that its GHG emissions are unable to harm others!

22. In less duplicitous times, Alberta admitted that according to forecasts by the Alberta Climate Change Office, pricing GHGs causes it virtually no harm. Alberta's affiant conceded that the forecast shows introducing a carbon price of $30/tonne barely reduces the annual growth of Alberta's overall economy relative to "business as usual" (from 2.27% to 2.22%, or -0.05%), and even *improves* the growth of its oil and gas industry (from 5.05% to 5.07%, or +0.02%).[15]

23. That Alberta now comes before this Court to avoid its fair share of GHG reductions, with disregard for the cleaner provinces, ACFN's Treaty rights, and life on Earth, when the stakes to its economy's growth are so incredibly picayune, does not appear to be the wisest of judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on August 12, 2020.

**Professor Amir Attaran**
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[13] Lisa Tssessaze Affidavit, at ¶17-53, **Supp. Record**, Vol. 20
[14] Robert Savage Affidavit, Ex. A (at p. A62), **Supp. Record**, Vol. 2.
[15] Robert Savage Cross-Examination, p. 129:ln3 to p. 130:ln12, **Supp. Record** Vol. 10.

## PART IV. TABLE OF AUTHORITIES