Court of Appeal File No.: C65807

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

FACTUM OF THE INTERNER
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PART I - INTRODUCTION

1. The Aboriginal peoples of Canada have lived here for thousands of years, since time immemorial. Particularly in the North, their survival has depended on mastering the challenges of an extremely harsh environment to find reliable food, resources, navigation, and shelter. To be Aboriginal in the North is to exist near the edge of human survivability, and to outwit death by knowledge of practices, customs, and traditions learned from the ancestors and refined through generations.

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

3. The Athabasca Chipewyan First Nation ("ACFN") is a community of the *Dënesųliné* people, who have lived in the North for thousands of years. ACFN have rights under s. 35 of the *Constitution Act, 1982* and Treaty 8 to live, hunt, trap, fish, and practice other traditional land uses in a vast area of northern Canada. Their interest in this case springs from their natural desire to survive as a people in the places that are culturally and historically relevant to them.

4. The threat to their cultural survival is caused by industrial activity that has emitted more climate-warming carbon dioxide ("CO_2") and other greenhouse gases ("GHGs") into the atmosphere than is safe. Climate records are being broken, according to the scientists at the World Meteorological Organization:

> The years 2015, 2016 and 2017 were clearly warmer than any year prior to 2015, with all pre-2015 years being at least 0.15 °C cooler than 2015, 2016 or 2017. The world's nine warmest years have all occurred since 2005, and the five warmest since 2010.

Affidavit of John Moffet ("John Moffet"), Exhibit A, at p. 5, Canada's Record, Volume 1, Tab 1.

5. Further, anthropogenic GHG emissions since the Industrial Revolution three centuries ago are driving the Earth into a climate regime never experienced in human history. The atmosphere now contains about 400 parts per million (ppm) of CO_2—and rising. Taking history as its guide, the World Meteorological Organization warns:

> [T]oday's CO2 concentration of 400 ppm exceeds the natural variability seen over hundreds of thousands of years… Periods of the past with a CO2 concentration similar to the current one can provide estimates for the associated "equilibrium" climate. In the mid-Pliocene, 3–5 million years ago, the last time that the Earth's atmosphere contained 400 ppm of CO2, global mean surface temperature was 2–3 °C warmer than today, the Greenland and West Antarctic ice sheets melted and even some of the East Antarctic ice was lost, leading to sea levels that were 10–20 m higher than they are today.
>
> John Moffet, *supra*, Exhibit A, at p. 8, Canada's Record, Volume 1, Tab 1.

6. The Aboriginal peoples who live in the North are tough—but they are not invincible. It is a genuinely open question whether a people who have lived on the land for thousands of years can survive climatic conditions last seen "3-5 million years ago". Climate change represents an unprecedented threat to the people of ACFN and their constitutionally-protected Aboriginal and Treaty rights (collectively, ACFN's "Rights"). Once the Northern environment is made warmer and more extreme, will it still furnish ACFN people reliable food, resources, and domicile for their subsistence, economic, and cultural needs? Will ACFN's Rights to hunt, fish, and trap still be exercisable if climate change is left unchecked? Or will climate change extinguish those Rights? Those are truly existential questions for ACFN and other Aboriginal peoples.

PART II - FACTS

A) The Athabasca Chipewyan First Nation

7. The ACFN is a recognized First Nation or "band" under the *Indian Act*. Their traditional territory extends from northeastern Alberta, northward into the Northwest Territories, and eastward as far as Hudson's Bay. In 1899, their ancestors entered into Treaty 8 with Her Majesty, guaranteeing rights to hunt, fish, trap, and "practice [their] usual vocations" throughout a large territory (larger than France) of Canada's North.

> Motion Record, Tab 1, *Affidavit of Lisa Tssessaze* ("Lisa Tssessaze"), at paras. 7, 10-11, and 29.

8. The cultural survival of the ACFN depends on practicing their traditional knowledge and land uses, which are intimately calibrated to the natural environment: for example, hunting caribou, gathering food and medicinal plants, and trapping or fishing through the seasons. These practices sustained ACFN's ancestors for thousands of years.

> Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 20, 24-25, and 38.

B) ACFN's Rights are Imperilled by GHG Emissions and Climate Change

9. ACFN fears that climate change is making these traditional, survival-based practices impossible, and extinguishing their Rights. Examples follow.

10. The ACFN are known as "caribou eaters", or *Etthen Eldeli Dené* in their language, because the livelihood and survival of their ancestors was based on hunting woodland and barrenland caribou. Formerly abundant, within a single human lifetime all the woodland caribou populations in ACFN territory have been classified as "Threatened" under the *Species at Risk Act* and made illegal to hunt. Only a single, legally-huntable population of barrenland caribou remains, but it too is in danger of decline due to "[u]npredictable weather events, which are increasing in a changing climate," according to the scientists of the Committee on the Status of Endangered Wildlife in Canada. The scientists accordingly

have recommended classifying the barrenland caribou as “Threatened” also, and should that come to pass, caribou hunting may soon be entirely impossible due to climate change.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 8, 20, 23, and 27.

11. The ACFN also are “people of the land of the willow”, or *K'ái Tailé Dené* in their language, a reference to their longstanding and ongoing dependence on the Peace-Athabasca Delta (“PAD”) as a place to exercise traditional land uses, practices that are now affirmed as ACFN’s Rights. The PAD is comprised of vast wetlands that form an important water-based transportation network through key parts of ACFN territory and contain seasonal fish and game, wild fruits, and medicinal plants—all of which continue to be hunted, trapped, fished, and gathered by ACFN people as is their Treaty 8 right.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at para. 5.

12. Scientists from Environment and Climate Change Canada (“ECCC”) consider climate change in the PAD to be very severe, and recently warned of temperature increases in the PAD of up to 7.1°C by 2080—far more than Canada’s current target to limit average global warming to 1.5°C, and far more than the average increase elsewhere in Canada. An analysis produced for Parks Canada also warns that climate change “will potentially produce thinner snowpack in the headwater and tributary areas of the PAD” and is “likely [to] cause less surface water to be available” to the sensitive ecosystems of the PAD.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 15 and 46.

13. ACFN are concerned that a hotter, drier PAD, as scientists foresee, will negatively impact navigability and subsistence hunting and gathering, which sustained their people for thousands of years and are ACFN’s Rights.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 16 and 44-47.

14. With these traditional food sources and ways of life at risk, the ACFN are dependent on a winter (ice) road that brings heavy freight, including life-sustaining goods such as food and medical oxygen, into their settlements and reserves in northern Alberta. Climate change, associated with shorter winters and increasing freeze-thaw cycles, has already made the winter road more dangerous and less serviceable, which impacts ACFN members for whom the winter road is the only form of transit.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 11 and 29-33.

PART III - ARGUMENT

15. For the ACFN, climate change is not an ordinary concern, but an existential emergency that has not been paralleled in thousands of years. If the scientists at Parks Canada and ECCC are right that the ACFN's homeland in the PAD will become drier and hotter by up to 7.1°C by 2080, then it is all too likely that the AFCN will lose the fish, birds, caribou, muskrat, beaver, moose, medicinal plants and other species that have furnished sustenance and shaped their culture since time immemorial. If the ACFN cannot navigate the Athabasca River during hunting seasons and cannot use the winter road, they will become isolated in a land that no longer sustains their people.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at paras. 15-17, 46-47, and 53.

16. Having been stripped of the ability to practice their Rights, ACFN will be forced to leave their territory and live elsewhere. They will no longer be *Dënesųliné*; no longer be *K'ái Tailé Dené*; and no longer be *Etthen Eldeli Dené.* ACFN will have lost their identity. ACFN will have ceased to survive as an Aboriginal people. Suburban Edmonton or Toronto is not, and cannot, be their culture's home.

Motion Record, Tab 1, Lisa Tssessaze, *supra*, at para. 53.

17. Ontario used to be a climate change leader, but turned a laggard when it abolished its GHG cap-and-trade program on the first day of a new provincial government in 2018—a controversial decision now under judicial review in the Divisional Court. Ontario's turnabout is particularly dangerous because it has the second highest total GHG emissions of the provinces in Canada.

> Motion Record, Tab 1, Lisa Tssessaze, *supra*, Exhibit I, at pp. 11; *Greenpeace Canada v. Minister of the Environment*, 2019 ONSC 670, Book of Authorities ["BOA"], Volume 1, Tab 3.

18. ACFN believes that GHG emissions must be reduced to the point of being net neutral, very urgently, and support the GGPPA as a necessary first step in that direction.

A) ACFN's Approach to the Constitutional Question

19. The Supreme Court recently affirmed that laws benefit from a "presumption of constitutionality". In practice, that means the onus is on Ontario to prove that the GGPPA is unconstitutional, and not Canada to prove the contrary. Above all, the Court must remain clear-eyed that Ontario bears the burden of proof in this case**.**

> *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras. 81-83, Joint Book of Authorities of Ontario and Canada ["JBOA"], Vol IV, Tab 52.

20. ACFN agrees with Canada that the GGPPA is *intra vires* Parliament, particularly the "national concern" branch of Peace, Order, and Good Government (POGG). In pith and substance, the *Act* is about putting a binding, legally-enforceable minimum price on GHG emissions—a price that because of GGPPA's "backstop" architecture applies with equal stringency throughout Canada, as British Columbia rightly argues.

21. ACFN also agrees with others that the GGPPA is *intra vires* the "emergency" branch of POGG (David Suzuki Foundation), or the criminal law power (Canadian Public Health Association, Ecofiscal Commission, Canadian Environmental Law Association).

22. ACFN's factum first discusses s. 35 of the *Constitution Act, 1982*, then discusses s. 91 of the *Constitution Act, 1867*, including its reply to Ontario's argument.

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

23. The Reference question in this matter is broad and asks if the GGPPA is "unconstitutional in whole or in part". That wording is not limited to the *Constitution Act, 1867*, but also implicates the *Constitution Act, 1982*.

24. It is settled law that ACFN's Rights have constitutional gravity. The Supreme Court wrote in *R. v. Badger* that Treaty 8 "guaranteed that the Indians 'shall have the right to pursue their usual vocations of hunting, trapping and fishing'". As Justice Wilson wrote in *R. v. Horseman*, "The whole emphasis of Treaty 8 was on the preservation of the Indians' traditional way of life," including with respect to cultural and subsistence practices such as hunting woodland caribou that are "integral to their very way of life [and] part of who they are as a people".

> *R. v. Badger*, [1996] 1 S.C.R. 771 ("*Badger*"), at para. 40, BOA, Vol. 1, Tab 6; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 919, BOA, Vol. 1, Tab 8 (Wilson J, dissenting, but not on this point).

25. Thus when Crown action (or inaction) on GHG emissions and climate change imperils the environment on which a treaty right depends—for example, as climate change does for the caribou hunt—there is an infringement or perhaps even extinguishment of ACFN Rights. This fact makes the *Constitution Act, 1982* directly relevant in two ways.

26. **First**: There cannot be Crown action (or inaction) on GHG emissions and climate change without Aboriginal involvement. It is settled law that under the *Constitution Act, 1982*, the Crown has a duty to consult with Aboriginal peoples when adversely affecting an

Aboriginal or Treaty right , and obtain consent when extinguishing a Treaty right. In either formulation, accommodation of Aboriginal interests is a constitutional duty.

> *Haida Nation v. British Columbia,* 2004 SCC 73, at paras. 32, 37, 43, 47, BOA, Vol. 1, Tab 4; *R. v. Sioui*, [1990] 1 S.C.R. 1025 ("*Sioui*"), at p. 1063, BOA, Volume 2, Tab 9.

27. **Second**: When GHG emissions place Aboriginal and Treaty rights at stake, s. 35 of the *Constitution Act, 1982* affects the "classical" distribution of powers in the *Constitution Act, 1867*. It is settled law of the Supreme Court that, as stated in the *Quebec Veto Reference*, "the *Constitution Act, 1982* directly affects federal-provincial relationships". Therefore when federal legislation, such as the GGPPA, mitigates the danger to Aboriginal and Treaty rights, that lends support to it being *intra vires* for constitutional reasons transcending the "classical" ss. 91-92 federalism analysis.

> *Reference Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at 801, BOA, Vol. 2, Tab 10.

28. To be clear, ACFN neither submits that s. 35 is a federal head of power, nor that it replaces ss. 91-92 in federalism analysis. But it is a concurrent constitutional duty that leads to this conclusion: Where, but for the GGPPA, GHG emissions would be higher and further infringe (or even extinguish) ACFN's Rights, s. 35 necessitates giving Parliament the deference to legislate so that the Crown's constitutional duty to observe those Rights is met. As the Supreme Court has held, because of the constitution's assignment of "Indians", the federal government is "vested with primary constitutional responsibility for securing the welfare of Canada's Aboriginal peoples," and so remedial federal climate change legislation that accommodates ACFN's Rights appears constitutionally *necessary* to avoid the Crown unconstitutionally infringing or extinguishing those Rights.

> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 176, BOA, Vol 1, Tab 2.

29. Or to invert that argument: If the GGPPA were constitutionally invalid, then as the evidence establishes there can be no question of Canada meeting its GHG reduction targets, with effects that would infringe and fail to accommodate ACFN's Rights—and spawn a further constitutional violation under s. 35 of the *Constitution Act*, 1982.

John Moffet, *supra*, at para. 87, Canada's Record, Volume 1, Tab 1.

30. As the Supreme Court held in the *Secession Reference*, "The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole". It would therefore be a mistake for the Court to regard ss. 91-92 of *Constitution Act, 1867* in a "classical" sense, when classicism wrongly abnegates ACFN Rights under s. 35 of the *Constitution Act, 1982*. Rather the Court must interpret the GGPPA in a manner that achieves simultaneous conformity with and harmony between ss. 91-92 and s. 35—as Canada's constitutional interpretation of the GGPPA does.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 50, JBOA, Vol IV, Tab 49.

31. If that means Ontario must tolerate some intrusion on its provincial jurisdiction, then so be it: How the Crown distributes constitutional powers among itself (federal or provincial) is of <u>subordinate importance</u> to the s. 35 constitutional duty of the honour of the Crown toward Aboriginal people and their treaty rights. This is what Chief Justice Dickson meant when he wrote in the *Mitchell* case that "From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations."

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, at p. 109 (per Dickson CJ), BOA, Vol. 1, Tab 5.

32. The GGPPA therefore must be interpreted in favour of Canada so that ACFN Rights are respected. This is easily done under cooperative federalism by holding that the GGPPA

is *intra vires* Parliament, while affirming that Ontario can also regulate GHG emissions by the double aspect doctrine. Any other outcome risks subjecting ACFN Rights to what the Supreme Court deplores as the "jurisdictional tug-of-war" or "jurisdictional wasteland" of federal-provincial relations. Seen in this light, Ontario's "watertight compartments" view of the constitution is not just misguided, but outright obsolete since 1982.

> *Daniels v. Canada (Indian Affairs and Northern Dev't),* 2016 SCC 12, at paras. 14-15, BOA, Vol. 1, Tab 1.

i) First Nations are "nations" for the purposes of POGG "national concern" and "national emergency" doctrines

33. ACFN submits that in light of the object of reconciliation with First Nations and s. 35 of the *Constitution Act, 1982*, when the Court interprets decades-old case law on the POGG "national concern" and "national emergency" doctrines, it should consider that the "nation" in question is not simply Canada, but also legally-recognized First Nations. Doing so is consistent with the "living tree" character of the constitution, and necessary because the *Anti-Inflation Reference, R. v. Crown Zellerbach*, and their forerunners were decided before s. 35 became a significant factor in the Canadian legal landscape.

34. Prior to the arrival of the Europeans, native people in North America were independent nations who controlled their own territories and had their own practices, traditions and customs. The British and the French, in their early interactions with native people, had relations with them that closely resembled those of sovereign nations. In ACFN's case, the Supreme Court held in *Badger* that Treaty 8 is "an exchange of solemn promises between the Crown and the various Indian nations".

> *Sioui, supra*, at pp. 1052-1053, BOA, Vol. 2, Tab 9; *Badger, supra*, at para. 41, BOA, Vol. 1, Tab 6.

35. Accordingly, when the Court considers the POGG "national concern" doctrine as Canada urges, or the "national emergency" doctrine as the David Suzuki Foundation urges, it should ask this question: Which nation's concern or emergency?

36. The evidence demonstrates that ACFN is experiencing a "national emergency", categorically unlike Canada at large. While Canada's target is to limit average global warming to 1.5°C, that greatly understates warming in the North and the average change of up to 7.1°C that scientists predict in ACFN's territory in the PAD. Warming of that magnitude is simply devastating, and unique to the nations of Canada's North.

37. Even Ontario agrees there is an emergency, when it wrote this in the company of the Canadian Council of Ministers for the Environment:

> For Canadians in the North, however, the impacts of a changing climate have been more pronounced. A shorter, less reliable ice season has made winter hunting and fishing more difficult and dangerous. The traditional knowledge that aboriginal people relied on in the past to live off the land is also becoming harder to apply as a result of more variable weather and changes in the timing of seasonal phenomena. In addition, winter roads that provide supply links to many northern communities are becoming less reliable and cannot be used for as long.
>
> Motion Record, Tab 1, Lisa Tssessaze, *supra*, Exhibit E, at p. 40.

38. ACFN submit that the changes Ontario foresees, which threaten survival as by making the gathering of food and sustenance "difficult and dangerous," furnish a rational basis for the Court to apply the POGG national emergency doctrine. An emergency need not affect all of Canada, when it affects a discrete "nation" as ACFN are. Although others may debate the duration of that emergency—years or decades—from an Aboriginal perspective it is indisputably temporary in comparison to ACFN's 7000 year history.

39. The evidence also demonstrates that ACFN's "national concern" markedly differs from Canada at large. Survival is one obvious difference: as already explained, climate

change puts the survival of ACFN's culture and nation in doubt. Canada too will face major stresses with climate change—but its survival as a nation is hardly in doubt.

40. *R. v. Crown Zellerbach* stipulates that a factor in exercising the POGG "national concern" power is the existence of "an adverse effect on extra-provincial interests"—i.e. on another jurisdiction. An adverse effect on ACFN Rights is inherently extra-provincial, both because ACFN possesses distinct nationhood from any province, and because Treaty 8 allows ACFN people to exercise their Rights in provinces and territories outside Ontario.

> *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401 ("*Crown Zellerbach*"), at para. 35, JBOA, Vol III, Tab 40.

41. ACFN also believes that when the Court considers the "national concern" doctrine in *Crown Zellerbach*, it must recognize that anthropogenic climate change is a "new matter which did not exist at Confederation". Or to take a longer timescale: In the several millennia of ACFN nationhood and traditional knowledge, it is exceedingly recent.

> *Crown Zellerbach*, at para. 33, JBOA, Vol III, Tab 40.

42. According to Professor James Fleming and Dr. Spencer Weart, both historians of science, anthropogenic climate change was discovered in the 20th century. It was not until 1904, after Confederation, that Svante Arrhenius theorized that there might be such a thing as anthropogenic GHGs. He wrote that "the slight percentage of carbonic acid [CO_2 in mist] in the atmosphere may by the advances of industry be changed to a noticeable degree in the course of a few centuries," and that this could come about "as long as the consumption of coal, petroleum, etc, is maintained at is present figure." Arrhenius was proved right in the 1950s when atmospheric measurements of CO_2 by Dr. Charles David Keeling showed a relentless upward trend—the result of anthropogenic influences.

J. Fleming, *Historical Perspectives on Climate Change* (Oxford, 1998), at pp. 81-82, JBOA, Vol V, Tab 80; S. Weart, *The Discovery of Global Warming* (Harvard, 2009), at pp. 19-37, JBOA, Vol V, Tab 89.

43. In *R. v. Hauser*, the Supreme Court upheld the *Narcotics Control Act* under POGG because drug abuse was said to pose "a genuinely new problem which did not exist at the time of Confederation." If that can be said of narcotics, which were not strictly speaking new (opium had been used and abused for millennia), then surely it can be said of anthropogenic GHGs and climate change, entirely unknown to science at Confederation.

R. v. Hauser, [1979] 1 S.C.R. 984 at pp. 997 and 1000, BOA, Vol. 1, Tab 7.

ii) Ontario's failure to consult First Nations demonstrates provincial inability

44. Doctrinally, it is certainly true that Ontario can regulate GHGs and climate change if it wishes; that conclusion flows from the double aspect doctrine and the sharing of federal and provincial jurisdiction over the environment. But under POGG, not just any kind of provincial regulation will do. The Supreme Court in *Crown Zellerbach* considered it relevant, as a question of mixed fact and law, whether a province is able or unable to regulate pollutants in a manner that avoids "an adverse effect on extra-provincial interests." Canada submits, and ACFN agrees, that Ontario lacks this ability.

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 63-65, JBOA, Vol II, Tab 22; *Crown Zellerbach, supra*, at para. 35, JBOA, Vol III, Tab 40.

45. Ontario's approach to GHG emissions affects the climate and hence First Nations both within and beyond its provincial borders. Yet Ontario has no ability to consult all the First Nations in Canada who are and will be affected by its emissions and approach.

46. For Ontario to prove provincial ability (the other side of the "provincial inability" coin) as is its burden, it must not only demonstrate in evidence that it has the capacity to

regulate GHG emissions, but that it can do so in conformity with s. 35 of the *Constitution Act, 1982*. This is because so-called provincial "ability" which violates the constitution is not real ability at all, and on the contrary, is proof of provincial inability.

47. In its Factum, Ontario touts that it has a "made-in-Ontario plan to protect the environment, reduce greenhouse gas emissions, and fight climate change"—but Ontario's plan suffers from exactly this provincial inability. As that made-in-Ontario plan reads:

> [Ontario] consulted extensively with the public, receiving more than 8,000 ideas and recommendations through our online portal. These comments have been considered alongside submissions from stakeholders and information from Indigenous communities who provided feedback on fighting climate change and other areas of environmental focus
>
> Factum of Ontario, at para 6; *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan*, Ontario's Record, Volume 1, Tab 4, p. 15.

48. However, Ontario never approached ACFN to consult on (much less accommodate) their concerns. Further, Ontario's best efforts through an "online portal" and nebulous "feedback" from Indigenous communities fail to meet the legal duty to consult. As the Federal Court of Appeal has held, it is "a matter of well-established law [that] meaningful dialogue is a prerequisite for reasonable [Aboriginal] consultation … and the dialogue should lead to a demonstrably serious consideration of accommodation". None happened.

> *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, at para 564, BOA, Vol. 2, Tab 12.

49. Ontario's exclusion of ACFN—and likely other Northern First Nations—from the consultation process on its GHG strategy is fatal to its contention of provincial ability. The Supreme Court held in *Rio Tinto* that when a government lays plans at a high level—as with the "made-in-Ontario plan" for climate change—that in itself affects Aboriginal rights:

> Adverse impacts extend to any effect that may prejudice [an] Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions

> or structural changes to [a] resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources"… This is because such structural changes […] may set the stage for further decisions that will have a *direct* adverse impact on land and resources.
>
> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 47, BOA, Volume 2, Tab 11.

50. Although this case does not challenge it, the "made-in-Ontario plan" is still relevant, both because it does "set the stage for further decisions" on Ontario's GHG emissions, and more importantly because the manner of its enactment proves in evidence that despite its best efforts Ontario lacks the provincial ability to consult and accommodate First Nations like ACFN whose rights are infringed by its GHG emissions.

51. Thus to answer POGG's provincial inability test and whether Ontario is able to avoid "an adverse effect on extra-provincial interests" of First Nations, the answer is no, Ontario is unable. Worse, Ontario's inability affects not a trivial matter, but a binding Crown duty under s. 35 of the *Constitution Act, 1982* to consult and accommodate First Nations with respect to Ontario's GHG emissions and infringement of their rights. Since inability to uphold a constitutional duty is the severest, most unacceptable type of inability known to law, that is an extremely strong reason to uphold the GGPPA.

PART IV - ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED on February 20, 2019.

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SCHEDULE A – LIST OF AUTHORITIES

1 *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12

2 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

3 *Greenpeace Canada v. Minister of the Environment*, 2019 ONSC 670

4 *Haida Nation v. British Columbia*, 2004 SCC 73

5 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85

6 *R. v. Badger*, [1996] 1 S.C.R. 771

7 *R. v. Hauser*, [1979] 1 S.C.R. 984

8 *R. v. Horseman*, [1990] 1 S.C.R. 901

9 *R. v. Sioui*, [1990] 1 S.C.R. 1025

10 *Reference Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793

11 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43

12 *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

Court of Appeal File No.: C65807

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF THE INTERVENER ATHABASCA CHIPEWYAN FIRST NATION

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