

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 PROPOSED INTERVENER
THE UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING**

Cynthia Westaway
LSO No. 37698V
WESTAWAY LAW GROUP
55 Murray Street, Suite 230
Ottawa ON K1N 5M3
Tel: 613.722.9091
Fax: 613.722.9097
Email : cynthia@westawaylaw.ca

Professor Nathalie Chalifour
LSO No. 37766O
Barrister & Solicitor
FACULTY OF LAW, UNIVERSITY OF OTTAWA
57 Louis Pasteur St.
Ottawa, ON K1N 6N5
Tel: 613.562.5800 ext. 3331
Fax: 613.564.5124
Email: natchali@uottawa.ca

**Counsel for the Proposed Intervener
United Chiefs and Councils of Mnidoo Mnising**

TO: THE ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

**Josh Hunter / Padraic Ryan /
Thomas Lipton**
Tel: 416.326.3840 / 416.326.0131 / 416.326.0296
Fax: 416.326.4015
Email: joshua.hunter@ontario.ca / padraic.ryan@ontario.ca /
thomas.lipton@ontario.ca

Counsel for the Attorney General of Ontario

AND TO: DEPARTMENT OF JUSTICE CANADA
Prairie Regional Office (Winnipeg)
301-310 Broadway
Winnipeg, MB R3C 0S6

Sharlene Telles-Langdon
Tel: 204.983.0862
Fax: 204.984.8495
Email: sharlene.telles-langdon@justice.gc.ca

Counsel for the Attorney General of Canada

Contents

PART I – OVERVIEW	1
PART II - FACTS	2
PART III – UNIQUE AND USEFUL PERSPECTIVE.....	3
PART IV - ARGUMENTS.....	3
PART V – ORDERS SOUGHT	5
SCHEDULE A – AUTHORITIES CITED.....	6
SCHEDULE B – LEGISLATION CITED	7

PART I – OVERVIEW

1. The United Chiefs and Councils of Mnidoo Mnising (UCCMM) is a Tribal Council representing six First Nations, namely: the Aundeck Omni Kaning, Sheguiandah, M’Chigeeng, Sheshegwaning, Whitefish River and Zhibaaahaasing First Nations. It applies for leave to intervene on behalf of its members to assist in this matter of great public importance.
2. The UCCMM Nations are sovereign rights bearing Anishinabek (1) holding important traditional knowledge derived from serving as stewards of the world’s largest freshwater island, home to some of the most unique biodiversity in Canada, which can assist the Court; and (2) with a direct interest in the outcome of the proceeding because of the continued effects of anthropogenic climate change on their inherent constitutionally protected Aboriginal rights, including their right to self-determine and self-govern.
3. The intervention of UCCMM offers this Court the perspective of First Nations located in Ontario and the first order of government in this jurisdictional dispute between the Crown’s two orders of government. The effects of greenhouse gas (GHG) emissions and climate change in Ontario cannot be properly understood without the input of Indigenous people and the traditional knowledge of the Anishinabek. The Court will better appreciate the full scope of the issues and how the failure to reduce GHG emissions will significantly impact the exercise of customs, practices, and traditions and rights to self-determine and self-govern their traditional territory recognized under s. 35 of the *Constitution Act, 1982*¹ and in the *United Nations Declaration on the Rights of Indigenous Peoples*.²
4. UCCMM submits that the interpretation of the division of powers amongst the Crown’s orders of government must align with Canada’s international obligations, its treaty promises and consider how to best uphold the Crown’s constitutional obligations towards Indigenous peoples. In applying the constitutional principles of the Honour of the Crown and the protection of minorities, UCCMM will argue that the *Greenhouse Gas Pollution Pricing Act (GGPPA)* is *intra*

¹ [Constitution Act, 1982, s 35, being Schedule B to the Canada Act 1982 \(UK\), 1982, c 11.](#)

² [United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49.](#)

vires of Parliament's authority over matters of national concern under the Peace, Order, and Good Governance (POGG) power.

PART II - FACTS

5. Since time immemorial, the Anishinabek have been successful in coexisting sustainably with other elements of their environments. The Anishinabek's close link to lands and waters mean they are often the first to experience environmental dangers. Threats to the environment, including anthropogenic climate change, pose direct threats to the Anishinabek.

6. UCCMM is a key voice and leader in the broader Anishinabek Nation. The traditional territories of the UCCMM Nations are primarily situated on the island of Mnidoo Mnising (Manitoulin Island, Ontario), the islands surrounding it, and the North shore of Georgian Bay, part of the Great Lakes Basin.

7. The UCCMM Nations are stewards of one of the world's most unique environments. They interact with this distinct ecosystem based on thousands of years of traditional knowledge and continue exercising their customs, practices, traditions, and governance rights throughout their traditional lands and waters in accordance with this knowledge.

8. The close relationship to the lands and waters has enabled the UCCMM Nations to witness firsthand the impacts of climate change. Over decades, the UCCMM Nations have noticed a decrease in native species in favour of invasive species, more instances of drought in the summer months due to higher temperatures and less precipitation, increased instances of forest fires, shorter and thinner ice cover in the winter months, increased frequency and intensity of microburst storms, and diminishing water quality due to increased green algae blooms resulting from higher water temperatures.³

9. The impact of climate change on traditional food sources, medicinal plants, sacred sites, and the traditional territory at the core of their ethos and central to their wellness, is increasingly becoming one of the most critical threats to their mental and physical health. These effects of climate change are impairing the core of their subsistence, are a growing obstacle to the

³ Affidavit of Chief Patsy Corbiere sworn December 18, 2018.

intergenerational transfer of their culture, and they pose a threat to the ability of future generations to exercise their rights as a self-determining people.

PART III – UNIQUE AND USEFUL PERSPECTIVE

10. UCCMM offers a perspective that will not be addressed by either Party and that will be helpful to the Court.

11. The UCCMM Nations have a unique, real, substantial, and identifiable interest in the constitutionality of the *GGPPA*, a central part of Canada's strategy to reduce GHG emissions. GHG emissions are a matter of national and global importance and they impact inherent and constitutionally protected rights. A ruling that the *GGPPA* is *ultra vires* would negatively impact the UCCMM Nations. The failure of even one province to mitigate its GHG emissions could unjustifiably infringe their constitutional rights, would create a legal vacuum in Canada for dealing with emissions of national and international significance, and would prevent the Crown from fulfilling its constitutional and fiduciary obligations towards Indigenous peoples across Canada, in particular towards UCCMM.

12. UCCMM has an important and unique perspective to offer that is distinct from the immediate Parties. It also offers this Court a unique perspective even among Indigenous communities, because UCCMM represents primarily island Nations that are stewards of one of the world's most unique and diverse environments. Given that Mnidoo Mnising is the world's largest freshwater island in the world's fourth largest lake (Lake Huron), UCCMM is unique in its capacity in Canada and in the world to speak to the effects of climate change on freshwater and island nations. UCCMM's arguments will make a useful contribution to the case without causing injustice to the Parties.

PART IV - ARGUMENTS

13. The UCCMM Nations will argue that the Crown's obligations to Indigenous peoples must be taken into account when interpreting division of powers disputes between the Crown's orders of government. These include the (1) constitutional rights and related principles like the Honour of the Crown; and, (2) the constitutional principle of protection for minorities.

14. The **Honour of the Crown** is the fundamental constitutional principle that governs the Crown's relationship with Indigenous peoples. It arises from the "Crown's assertion of sovereignty over an Aboriginal people and *de facto* control [over their] land and resources."⁴ It obliges the Crown to act honorably in its historical and future relationship with Indigenous peoples, notably when s. 35 rights risk being infringed. We submit that this solemn obligation belonging to the Crown must be at the heart of any interpretation of the division of powers in s. 91 and 92 of the *Constitution Act, 1867*. As stated by the Supreme Court of Canada (SCC), the Honour of the Crown "binds the Crown *qua* sovereign."⁵

15. The SCC has recognized the importance of using the rights "recognized and affirmed" in s. 35 to interpret the division of powers, explicitly recognizing that s. 35 and s. 91 "should be read together."⁶ In this case, the interpretation of the division of powers must align with safeguarding s. 35 rights and the Honour of the Crown.

16. A failure by one or more provinces to reduce their GHG emissions would jeopardize Canada's ability to meet its national GHG emissions target thus jeopardizing international efforts to mitigate the effects of climate change. As such, a national GHG mitigation mechanism, anchored in the federal order's authority in s. 91, is needed urgently to limit the already significant effects of climate change on the UCCMM Nations' s. 35 rights.

17. The Court must avoid creating a legal vacuum on climate change mitigation that could lead to the destruction and deterioration of the UCCMM Nations' lands and waters. If the Court were to find that the GGPPA is *ultra vires*, the Crown would be unable to meet its constitutional, fiduciary, and Honour of the Crown obligations to the UCCMM Nations. As the SCC made clear, "jurisdictional tug-of-war[s]" should not leave Indigenous peoples in a "jurisdictional wasteland."⁷

⁴ [Haida Nation v British Columbia \(Minister of Forests\), 2004 SCC 73 at para 32.](#)

⁵ [Mikisew Cree First Nation v Canada \(Governor General in Council\), 2018 SCC 40 at para 44.](#)

⁶ [Daniels v Canada \(Indian Affairs and Northern Development\), 2016 SCC 12 at para 34.](#)

⁷ [Ibid.](#), at paras 14-15.

18. The SCC has also confirmed that the **protection of minorities** is an underlying constitutional principle which “inform[s] and sustain[s] the constitutional text” and is a “major [element] of the architecture of the Constitution itself and [is] as such its lifeblood.”⁸ The SCC notes explicitly that s. 35 rights are at the heart of this principle and that the protection of s. 35 rights “whether looked at in their own right or as a part of the larger concern with minorities, reflects an important underlying constitutional value.”⁹

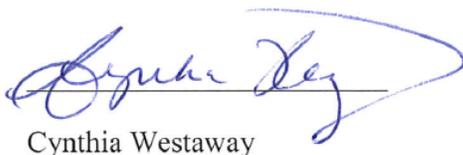
19. The UCCMM Nations submit that in the context of climate change, s. 91 and s. 92 should be interpreted in accordance with the underlying constitutional principle of the “protection for minorities.” Such an interpretation should consider the effects the failure of even one province to mitigate its GHG emissions will have on s. 35 rights throughout the country and particularly on Mnidoo Mnising, one of the world’s most unique island environments. This has been home to the UCCMM Nations for millennia. Both the constitutional duties and the protection of this minority should inform the Court’s determination of whether the *GGPPA* is *intra vires* of Parliament’s jurisdiction as a matter of National Concern.

PART V – ORDERS SOUGHT

20. UCCMM seeks:

- (i) An order granting leave to intervene upon the merits of the reference question, to file a factum of 10 pages, and to make *viva voce* arguments not to exceed 30 minutes;
- (ii) An order that the Affidavit of Chief Patsy Corbiere sworn December 18, 2018 filed upon the motion for leave to intervene be included in the record for the merits hearing;
- (iii) An order that UCCMM shall neither be liable for, nor obtain, costs in this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this ^{18th} 21st day of December, 2018


Cynthia Westaway


Nathalie Chalifour

⁸ [Reference re Secession of Quebec, \[1998\] 2 SCR 217 at paras 49 & 51.](#)

⁹ *Ibid*, at para 82.

SCHEDULE A – AUTHORITIES CITED**CASES**

1. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
2. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.
3. *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.
4. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49 & 51.

SCHEDULE B – LEGISLATION CITED

1. *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
2. *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49.
3. *Constitution Act, 1867* (UK). 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

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 FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE PROPOSED INTERVENER
THE UNITED CHIEFS AND COUNCILS OF MNIDOO
MNISING**

Cynthia Westaway

LSO No. 37698V

WESTAWAY LAW GROUP

55 Murray Street, Suite 230

Ottawa ON K1N 5M3

Tel: 613.722.9091

Fax: 613.722.9097

cynthia@westawaylaw.ca

Professor Nathalie Chalifour

LSO No. 37766O

Barrister & Solicitor

FACULTY OF LAW, UNIVERSITY OF OTTAWA

57 Louis Pasteur St.

Ottawa, ON K1N 6N5

T. 613.562.5800 ext. 3331

F. 613.564.5124

natchali@uottawa.ca

Counsel for the Proposed Intervener

United Chiefs and Councils of Mnidoo Mnising