

**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**

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**FACTUM OF ATHABASCA CHIPEWYAN FIRST NATION  
(Motion for Leave to Intervene)**

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**TABLE OF CONTENTS**

**PART I: OVERVIEW ..... 1**

**PART II: FACTS ..... 1**

**PART III: ISSUE ..... 2**

**PART IV: ANALYSIS ..... 2**

**A. The nature of the case ..... 2**

**B. ACFN makes useful, different contribution to this Reference ..... 3**

**C. ACFN's intervention does not cause injustice or prejudice ..... 5**

**PART V – RELIEF SOUGHT ..... 5**

**SCHEDULE A – List of Authorities ..... 6**

**SCHEDULE B – Legislation ..... 7**

## **PART I: OVERVIEW**

1. The Aboriginal people of Canada have lived here for thousands of years, since time immemorial. Particularly in the North, their survival has depended in no small part on mastering the challenges of an extremely harsh environment to find reliable food, resources, navigation, and shelter. To be Aboriginal in the North is naturally 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. The proposed intervener, the Athabasca Chipewyan First Nation (ACFN), is a community of the *Dënesyliné* people, who have lived in the North for about 7,000 years. Their survival is intimately tied up with the climate and ecology of the North.
3. The ACFN have rights under s. 35 of the *Constitution Act*, 1982, and Treaty 8 to live, hunt, trap, fish, and practice other Aboriginal rights in a vast area of the North. But climate change now threatens their rights, for even Ontario agrees that on current trends Northern Ontario will become 6.5–7.0° C hotter by 2050.<sup>1</sup> Such profound warming threatens to destroy the ecosystems in which ACFN have constitutional rights to hunt, fish, trap, gather, *et cetera*, and calls their existence as a people into question. They intervene in this case to protect their rights, and to survive as a culture.

## **PART II: FACTS**

4. The ACFN is a recognized First Nation or “band” under the *Indian Act*. 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) ranging from British Columbia to Hudson’s Bay. Today the cultural and

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<sup>1</sup> Motion Record, Tab 2 – Affidavit of Lisa Tsessaze, sworn December 14, 2018, Exhibit “J”, at p. 16

administrative hub of ACFN is located in Fort Chipewyan, Alberta, but their communities and people are found throughout the North.<sup>2</sup>

5. The ACFN fear that anthropogenic climate change is making the exercise of these traditional, survival-based practices untenable. The ACFN consider current levels of greenhouse gas emissions “an existential threat”, which imperils constitutionally-protected Aboriginal and Treaty rights and practices central to their cultural identity.<sup>3</sup>

6. The Affidavit of Lisa Tssessaze summarizes how ACFN’s Treaty rights are profoundly injured by climate change, in three examples: (i) hunting caribou, (ii) accessing their territory, particularly in the Peace Athabasca Delta, to exercise their Treaty rights, and (iii) dwelling in settlements dependent on a winter ice road.<sup>4</sup>

### **PART III: ISSUE**

7. May ACFN intervene in this Reference, and if so, on what terms?

### **PART IV: ANALYSIS**

8. ACFN submits the test on Rule 13.02 motions to intervene is summarized in *Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada*.<sup>5</sup> The *Peel* factors are: “the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.”

#### **A. The nature of the case**

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<sup>2</sup> Motion Record, Tab 2, Tssessaze Affidavit at paras 10-12, and 33.

<sup>3</sup> Motion Record, Tab 2, Tssessaze Affidavit at para 53.

<sup>4</sup> Motion Record, Tab 2, Tssessaze Affidavit at paras 12-48.

<sup>5</sup> *Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada*, (1990) 74 OR (2d) 164 (CA), Book of Authorities [“BOA”], Tab 1 at paras 6, 8, and 10.

9. This case is a Reference on whether the *Greenhouse Gas Pollution Pricing Act* (“Act”) is, to quote the Executive Council, “unconstitutional in whole or in part”. It is the widest possible constitutional question that could be posed in a Reference.

10. ACFN takes the position that the *Act* is *intra vires* s. 91 of the *Constitution Act*, 1867, whether under the “national concern” or “national emergency” branch of Peace, Order and Good Government (POGG), or the criminal law power, and that any impact on s. 92 provincial powers is incidental and permitted by the double aspect doctrine.

11. ACFN also believes that the Reference question of “unconstitutional in whole or in part” implicates the *Constitution Act*, 1982, and whether the *Act* furthers and respects Aboriginal and Treaty rights. This is ACFN’s focus, explained below.

**B. ACFN makes useful, different contributions to this Reference**

12. The Attorney General of Ontario utterly fails to consider the perspective of Aboriginal people and their constitutional rights. Ontario’s *Factum* neither mentions the word “Aboriginal”, nor cites the *Constitution Act*, 1982. Yet Aboriginal and Treaty rights under s. 35 thereof are obviously germane constitutional considerations, when posing the question of whether the *Act* is “unconstitutional in whole or in part”.

13. ACFN will argue that the *Act* is necessary legislation to uphold the “honour of the Crown”—a constitutional law principle that coexists with the federal/provincial balance of powers.<sup>6</sup> The honour of the Crown imposes a duty on both levels of government not to diminish ACFN’s Aboriginal and Treaty rights, including in high-level decisions about climate change that otherwise severely imperils the exercise of those rights.<sup>7</sup>

ACFN will argue that the entrenchment of such rights in s. 35 of the *Constitution Act*,

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<sup>6</sup> *Mikisew Cree First Nation v Canada (Gov General in Council)*, 2018 SCC 40, BOA, Tab 2 at para 42.

<sup>7</sup> *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, BOA, Tab 3 at para 47.

1982, illuminates and guides the interpretation of the federalism question under the *Constitution Act*, 1867, because these two constitutional enactments must be viewed holistically, harmoniously, and equally.<sup>8</sup> Likewise federalism and respect for minorities, as unwritten but “fundamental and organizing principles of the Constitution”, must be interpreted harmoniously and “in symbiosis” with one another.<sup>9</sup>

14. ACFN will argue that on the facts of the instant case the *Act* should be upheld as *intra vires*, both because the federal government has the constitutional remit for “Indians” and would be unable to meet its duty of the honour of the Crown were the *Act* struck down leaving it dispossessed of jurisdiction over climate change, and because Ontario violated the honour of the Crown when it omitted to consult ACFN and (it appears) other northern Aboriginal peoples on its recent climate change plan.<sup>10</sup>

15. ACFN will argue that in light of the object of reconciliation with First Nations and s. 35 of the *Constitution Act*, 1982, when the Court interprets 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. This interpretation is consistent with the “living tree” character of the constitution and befits modern Crown-Indigenous intergovernmental relations. Accordingly legislation that responds to an extraordinary concern or emergency of Northern First Nations, as the *Act* does for climate change, may be upheld under POGG even if the same degree of concern or emergency is not manifested throughout Canada at large.

16. At the risk of oversimplifying and encapsulating these arguments in a single

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<sup>8</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217, BOA, Tab 4 at para 50.

<sup>9</sup> *Ibid*, paras 32, 49, 81-82.

<sup>10</sup> Motion Record, Tab 2, Tsessaze Affidavit at paras 58-59.

paragraph: The distribution of legislative powers as between federal and provincial governments must in the instant Reference be interpreted *vis-à-vis* the third constitutional level of government—First Nations under s. 35 of the *Constitution Act*, 1982—so as to further reconciliation in Canada, to preserve harmony between two *Constitution Acts* a century apart, and to give effect to the Supreme Court’s constitutional principles of respect for minorities and the honour of the Crown.

**C. ACFN’s intervention does not cause injustice or prejudice**

17. ACFN accepts the hearing schedule in this matter. Since the Parties have notice of ACFN’s arguments in the concurrent Saskatchewan Reference, where ACFN already has intervenor status, the parties will not be ambushed or put to extra effort.

**PART V – RELIEF SOUGHT**

18. ACFN requests an order granting leave to intervene on the following terms:

- (i) ACFN shall file a factum in this matter in accordance with the Order of the Honourable Justice J.C. MacPherson dated August 30, 2018, and shall make up to 1 hour of oral argument at the hearing of the Reference;
- (ii) ACFN may rely on the Affidavit of Lisa Tssessaze filed in this motion for the merits hearing, and that it be included in the Court’s record; and
- (iii) ACFN shall not be entitled to, nor subject to, any costs of this Motion or the Reference.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** on 19 December, 2018.

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**Professor Amir Attaran**

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**Matt Hulse**

**Counsel for the Athabasca Chipewyan First Nation**



## **SCHEDULE A**

### **LIST OF AUTHORITIES**

1. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*, (1990) 74 OR (2d) 164 (CA)
2. *Mikisew Cree First Nation v. Canada (Gov Gen in Council)*, 2018 SCC 40
3. *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650
4. *Reference re Secession of Quebec*, [1998] 2 SCR 217

## **SCHEDULE B**

### **LEGISLATION**

*The Constitution Act, 1867, 30 & 31 Vict, c 3, section 91.*

#### **POWERS OF THE PARLIAMENT**

**91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
  - 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
  - 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

*The Constitution Act, 1982 (Schedule B to the Canada Act 1982 (UK), 1982), section 35.*

## RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

**35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

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**Court of Appeal File No.:**  
**C65807**

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDINGS COMMENCED AT TORONTO

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