

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**THE ATTORNEY GENERAL OF ONTARIO**

(Appellant)

and

**THE ATTORNEY GENERAL OF CANADA**

(Respondent)

and

**ASSEMBLY OF FIRST NATIONS**

Applicant  
(Proposed Intervener)

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**FACTUM OF THE PROPOSED INTERVENER,  
ASSEMBLY OF FIRST NATIONS**

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**PART I - OVERVIEW**

1. The Assembly of First Nations (“AFN”) is a national organization representing more than 634 First Nations who have Treaties, inherent rights and title in their traditional territories. The AFN submits that it fully meets the criteria to intervene.
2. The AFN advocates and promotes the unique and respective nation-to-nation relationship between the Crown and diverse First Nations. This relationship is manifested in treaties and other legal instruments and the inherent rights of First Nations as Peoples with a right to self-determination as set out in *United Nations Declaration on the Rights of Indigenous Peoples* (“*UN Declaration*”).

***United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) (UN Declaration).***

3. By Order in Council 1014/2018, the Lieutenant General in Council referred to this Honourable Court under section 8 of the *Courts of Justice Act* the following question:

Is the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018 No1*, SC 2018 c.12, unconstitutional in whole or in part?

**Ontario Order in Council 1014/2018; *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018 No1*, SC 2018 c.12, s.186 (GGPPA)**

4. The AFN requests leave to intervene on the grounds that it has a direct interest in the disposition of this appeal, the resolution of which will have broad implications for how Aboriginal peoples exercise their concurrent sovereignty within Canada.

## **PART II – THE FACTS**

5. The AFN has a long history in intervening in Supreme Court of Canada cases. In all of these interventions, the AFN provided the Court with a distinct perspective and valuable insight into the legal questions being considered. The AFN has also been granted leave to intervene in the *Greenhouse Gas Pollution Pricing Act* (hereinafter “GGPPA”) constitutional reference put forth by the Government of Saskatchewan.
6. Climate change impacts all First Nations across Canada and changes to the environment have an adverse impact on the exercise of Aboriginal and Treaty rights. Furthermore, First Nations and their infrastructure are far more susceptible to climate change impacts and intensive storms when compared to other Canadians. The AFN is well-positioned to provide a broad public-interest perspective and unique and relevant submissions that will be of assistance to this Honourable Court in understanding the potentially far-reaching aboriginal law implications of its decision in this matter, including its effects on Indigenous-industry relations.

## **PART III – THE ISSUES**

7. The issue before the Court is whether the proposed Intervenor should be granted leave to intervene as a friend of the court and, if so, the terms on which this motion should be granted.

## **PART IV – THE LAW**

8. Pursuant to Rules 13.02 and 13.03 of the *Rules of Civil Procedure*, leave to intervene as a friend of the court in the Court of Appeal may be granted to any person for the purpose of providing assistance to the Court by way of argument.
9. The test that has been applied under this rule involves three main considerations: (a) the nature of the case, (b) the issues that arise, and (c) the likelihood of moving the party usefully

contributing to the resolution of the appeal without causing prejudice or delay to the parties.

**Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd. (C.A.), 74 O.R. (2d) 164, [1990] O.J. No. 1378 at paras 34-37**

**A) Public Interest Nature of the Case**

10. First Nation communities are deeply impacted by the negative effects related to climate in ways other citizens of Canada are not. Changes to landscape and ecosystems have major effects on how Indigenous societies gather food, arrange our living settlements, manage their societies overall, and the exercise of their section 35 rights.
11. The Constitutional rights of First Nations must inform the broader adaptation and mitigation strategies of Canada and the provinces. First Nations are an order of government within the constitutional framework and are an essential part of Canada's broader efforts to meet international climate change mitigation goals, while meeting the specific needs of individual First Nations across the country.
12. The AFN proposes to focus on First Nations' authority as decision-maker within Canada's current constitutional division of powers as supported by the *UN Declaration*. The Government of Canada has committed to implementing the *UN Declaration* "without qualification." In 2016, Canada dropped its objector status to the declaration and formerly adopted plans to implement it in accordance with the Canadian Constitution. Legislative steps are currently being taken to further embed the international standards set by the *UN Declaration* into Canada's domestic sphere.

**Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.**

**B) The proposed Intervenor's Direct Interest in the Appeal**

13. The AFN will take the position that Canada does have the jurisdiction to impose a charge, or in the alternative a tax, in provinces and territories that do not meet minimum greenhouse gas emission standards. However, it is imperative that this Honourable Court consider how the *GGPPA* fails to accommodate the distinct interests of First Nations throughout Canada.
14. The AFN submits that international standards relating to a state's obligation to obtain FPIC, which is called for in the *UN Declaration*, may inform domestic law on the Crown's duty to consult. The AFN further submits that this obligation is contemplated and can be performed by Canada in accordance with powers granted in section 132 of the Constitution.

***UN Declaration, supra* Free, prior and informed consent appears in articles 10, 19, 29, 30 and 32.**

**C) Utility of the Proposed Intervenor's Submissions**

15. An Intervener may make a useful contribution to the Court through its special knowledge and expertise, by addressing the matters from a fresh perspective, or by providing information about the impact of its judgment beyond the immediate interest of the parties.

***Zoe Childs v. Desormeaux*, 67 O.R. (3d) 385, [2003] O.J. No. 3800 at paras 10-11**

16. If granted leave, the proposed Intervener's submissions will differ in scope and in substance from those of the parties to the reference. Specifically, the AFN will assist this honourable court in rendering its decision with a view to the full legal context of the reference and its public interest implications by making submissions regarding the need to interpret aboriginal rights to self-determination and economic development in light of international human rights.

**D) Granting leave will not Cause Delay or Prejudice to the Parties**

17. The AFN intends to restrict its submissions to a number of issues which have been presented

within this factum and it will not repeat submissions made by other parties. The AFN does not intend to file a voluminous amount of material or and intends to bare its own costs of the reference if leave is granted. Finally, the AFN is prepared to work within the timeframe for the reference hearing as outlined in MacPherson J's Order dated August 31, 2018.

18. For the reasons above, granting leave to intervene will not substantially increase the costs or complexity of the appeal, or cause prejudice or delay to the parties.

**E) Conclusion: The Proposed Intervener Satisfies the Test for Intervention**

19. For the foregoing reasons, the proposed intervener submits that it is well-placed to bring a fresh perspective to this appeal and make useful and relevant submissions which will be of assistance to this Honourable Court in considering the matters at issue in this appeal and their broad aboriginal law and human rights law implications.

**PART V – ORDER REQUESTED**

20. The proposed Intervener requests an order granting leave to intervene as a friend of the court on the following terms:
  - a) The moving party shall serve and file a factum not exceeding 10 pages by February 27, 2019;
  - b) The moving party shall be permitted to make oral submissions at the hearing not exceeding 10 minutes (or such other duration as this Honourable Court may deem appropriate);
  - c) the moving party shall not file any additional evidence;
  - d) the moving party shall not be entitled to, nor subject to, any costs of this motion or the appeal; and;
  - e) such further terms and conditions as this Honourable Court may order.



**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**Dated at Ottawa, Ontario, this 20<sup>th</sup> day of December, 2018.**

SIGNED BY:

  
for Counsel for the Applicant

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**PART IV – TABLE OF AUTHORITIES**

Authorities	Cited at Paras

**PART V - STATUTORY PROVISIONS**

<i>Constitution Act, 1867</i> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.	14
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**PART VI – SECONDARY SOURCES AND OTHER MATERIALS**

Bennett, Carolyn. Minister of Indigenous and Northern Affairs, Speech delivered at the United Nations Permanent Forum on	11
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**PART VII – INTERNATIONAL MATERIAL**

<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.	2, 11, 14
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**THE ATTORNEY GENERAL OF CANADA**  
**Appellant**

**-and-**

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**Respondent**

**Court File No: CA65807**

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