COURT OF APPEAL OF ALBERTA

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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 UNDER THE JUDICATURE ACT, RSA 2000, c. J-2, s. 26

DOCUMENT: FACTUM

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 20th day of June, 2019

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PART I – OVERVIEW

1. Reducing the amount of Greenhouse Gas ("GHG") emissions produced by humans is a growing global concern. The Government of Canada passed the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (the *"GGPPA"*) in June of 2018 as an instrument to reduce the amount of greenhouse gases released into the atmosphere by Canadians. The *GGPPA* aims to influence the behaviour of Canadians by incentivizing citizens and businesses to consume less carbon-intensive products. The Province of Alberta questions whether Canada has the jurisdiction to enact such legislation and has proceeded with the within Reference by way of s.26(1) of Alberta's *Judicature Act*, RSA 2000 c.J-2 asking the Court of Appeal of Alberta whether the *GGPPA* is unconstitutional in whole or in part.

2. The Attorney General of Alberta ("Alberta") submits that the *GGPPA* is unconstitutional in its entirety and has taken the position that federal government imposing the *GGPPA* on the provinces by virtue of its Peace, Order, and Good Government ("POGG") power is an unwarranted and unprincipled intrusion into provincial jurisdiction as it undermines the basic structure of the Canadian constitutional system and defeats the purpose and function of section 92(a)(1) of the *Constitution Act, 1867*.[1] Alberta asserts that the *GGPPA* effectively amends the *Constitution Act, 1867* and transfers large swaths of provincial jurisdiction to the federal government.

3. The Attorney General of Canada ("Canada") submits that the Government of Canada passing the *GGPPA* falls within their jurisdiction to enact legislation pursuant to its Constitutional POGG powers as establishing a minimum standard of the regulation of GHG emissions is a matter of national concern. Canada asserts that the *GGPPA* ensures that one province's failure to act on the regulation of GHG emissions will not adversely affect Canada as a whole.

4. It is the Assembly of First Nations ("AFN") position the Government of Canada has the jurisdiction to impose a minimum standard of GHG emission regulation within Canada by way of the *GGPPA* in provinces and territories that do not meet minimum GHG emission standards pursuant to its POGG powers as a matter of national concern. However, the AFN submits that

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

Canada has a legal obligation to recognize Aboriginal and Treaty rights in Canada in its effort to regulate GHG emissions. These rights include the authority of First Nations to participate in the regulation of environmental matters within their respective territories, in this case the regulation of GHG emissions and carbon pricing, and the utilization of any resulting economic benefits derived from the implementation of said regulations based on their inherent right to self-determination.

PART II – FACTS

5. The AFN adopts the Attorney General of Canada's Statement of Facts and adds the additional facts enumerated below.

6. The AFN is a national organization representing more than 634 First Nations throughout Canada and their respective members, a majority of whom are Treaty beneficiaries. The National Chief of the AFN is elected by First Nations Chiefs who provide the AFN with its mandate through resolutions.

7. First Nations across Canada have their own laws, languages, citizens, territories, and governance systems. First Nations hold the right to self-determination as Peoples'. Their relationships with the Crown are founded on inherent rights, as well as historic treaties, the numbered treaties, self-government agreements, and other arrangements.

8. A 2006 paper prepared by the Centre for Indigenous Environmental Resources states that "it is expected that First Nations will experience the impacts of climate change in ways that most non-Aboriginal Canadians will not due to a heavy reliance on the environment, their locations, their economic situations."[2]

9. A 2011 Policy Brief prepared by researchers from the University of Ottawa noted that "Aboriginal people across all metropolitan areas were two to three times more likely that the non-Aboriginal population to live in dwellings needing major repairs."[3] As people living in poor quality housing are more vulnerable to damages from extreme weather events, it is clear that First Nations

[2] Centre for Aboriginal Environmental Resources, "How Climate Change Uniquely Impacts the Physical, Social and Cultural Aspects of First Nations" Prepared for Assembly of First Nations, March 2006
[3] Sustainable Prosperity- Policy Brief 2011- Carbon Pricing and Fairness ["Policy Brief"]

and their infrastructure are far more susceptible to climate change impacts when compared to other Canadians.

10. The *Pan-Canadian Framework on Clean Growth and Climate Change* addressed the susceptibility of Indigenous peoples to climate change when it confirmed that "unlike rebuilding after an extreme event like a flood or a fire, once permafrost has thawed, coastlines have eroded, or socio-cultural sites and assets have disappeared, they are lost forever."[4]

11. A 2016 Research Article entitled *Projected Scenarios for Coastal First Nations' Fisheries Catch Potential under Climate Change: Management Challenges and Opportunities* examined the impact of climate change on First Nations' fisheries along the British Columbia coast. It predicts modest to severe declines in catch potential for all commercial fisheries with known First Nations participation. They estimate regional losses in revenue between 16.4%- 28.9% by 2050.[5]

12. First Nations also tend to be disproportionately impacted from the implementation of regulations over GHG emissions and the resulting charges/taxes. In particular, regressive impacts of a carbon price due to factors such as remoteness, poor quality housing and subsistence lifestyle.[6] For example, the previous institution of the cap and trade system put in place by the Ontario government effective January 1, 2017 had an immediate impact on the costs of diesel, a major fuel source for remote First Nations who rely on continuous diesel-fired electricity generation. These First Nations were disproportionally affected by the cap-and-trade system and suffered far greater economic disadvantages than other Ontarians.

13. In examining the impact of carbon pricing in British Columbia, the researchers noted that "remote communities have a lower ability to substitute less carbon-intensive goods and services, due to limited selection" and therefore "as energy costs rise, the impact upon remotely located

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[4] Pan Canadian Framework on Clean Growth and Climate Change, Canada's Plan to Address Climate Change and Grow the Economy, Gatineau Quebec, Environment and Climate Change Canada, 2016,at pp 2-4 ["Pan Canadian Framework"]

[5] Weatherdon LV, Ota Y, Jones MC, CLse DA, Cheung WWL (2016*)"* Projected Scenarios for Coastal First Nations' Fisheries Catch Potential under Climate Change: Management Challenges and Opportunities*."* PLoS ONE 11(1): e0145285: doi:10.1371/journal.pone.0145285 at pg. 5 & 8.

[6] *Policy Brief, supra*, at pp. 5.

communities will be greater than those facing shorter distances and lower costs to access basic necessities.[7]

14. Remote First Nations rely on traditional means of subsistence, including hunting and fishing, the increased costs of basic necessities such as food could put more pressure on these traditional practices which, in conjunction with climate change impacts, could reduce the availability and reliability of the nature resources upon which these First Nations depend.[8]

15. As affirmed by the Ontario Court of Appeal in the *Reference re Greenhouse Gas Pollution Pricing Act,* climate change has had a particularly serious impact on First Nations communities in Canada, which tend to be exacerbated by the close relationship between First Nations and the land and waters on which they live.[9] It is clear that First Nations are being and will continue to be disproportionately impacted by the effects of climate change unless significant efforts are made on a national level to curb GHG emissions in Canada.

PART III - ARGUMENT

16. The AFN submits that the establishment of a minimum standard for the regulation of GHG emissions within Canada is a matter of national concern and that the passing of the *GGPPA* by the government of Canada is constitutional pursuant to its POGG powers provided under s. 91 of the *Constitution Act, 1867*. Further to this power, the government of Canada has a constitutional onus to address First Nation self-regulation in the area of GHG emission regulation based on First Nations inherent rights and the Crown's obligations flowing from the principle of the honour of the Crown.

A. GGPPA validity as a National Concern

17. In weighing whether the *GGPPA* can be balanced with the provinces' purported exclusive constitutionally acquired jurisdiction, or whether the legislation at question is *ultra vires*, the court must conduct a two-stage analysis. This analysis requires the determination of the true subject matter, being the pith and substance of the proposed law in question, and thereafter the

[7] *Policy Brief*, *supra*, at pp. 10.
[8] *Policy Brief*, *supra*, at pp. 10.
[9] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 12 ["*Ontario Decision*"].

determination of whether the subject matter of the challenged legislation falls within the head of power being relied upon by the party asserting the validity of the legislation at issue.[10]

18. It is the AFN's position that the pith and substance of the *GGPPA* is to effectively address an issue of national import, being the establishment of a price on GHG emissions throughout Canada. The operation of a "backstop" sets a minimum standard that applies across Canada and is intended to create incentives to change the behaviour of consumers. This national perspective is required in order to mitigate the inter-provincial harms which will invariably arise as a result of the failure of individual provinces to address the issue appropriately, including the disproportionate harms suffered by First Nations as a result of climate change.

19. This characterization is supported by the preamble of the *GGPPA*, which notes that the reduction of GHG emissions is necessary to minimize the impacts of climate change on future generations, the deleterious effects to the environment should a province fail to act with sufficient stringency in the area of GHG emission regulation and finally the necessity of creating "a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly across Canada".

20. The second step of the analysis requires that the validity of the legislation be reviewed and involves a determination of whether the identified purpose of the legislation can be characterized as to fall under the head of power said to support it. In this case the question is therefore whether the establishment of a minimum standard of GHG emission regulation falls under the doctrine of national concern pursuant to the federal government's POGG powers.

21. As noted by the majority of the Court of Appeal of Ontario in the *Ontario Decision*, in analyzing legislation pursuant to the doctrine of national concern, the court is concerned with striking a balance between Canada's ability to pass laws that affect the "body politic of the Dominion" and provinces exclusive jurisdiction to enact legislation under their s. 92 heads of power.[11]

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[10] *Reference re Securities Act*, [2011] 3 SCR 837 at para. 63-64 ["*Securities Reference*"]
[11] *Ontario Decision*, *supra* note *9* at para 86.

22. In establishing whether the *GGPPA* falls under the doctrine of national concern, the accepted test is that as developed by the Supreme Court of Canada in *R. v. Crown Zellerbach Canada Ltd.* The Supreme Court established that the doctrine of national concern applies to new matters which did not exist at Confederation or those which have evolved into a matter of national concern.[12]

23. In *Zellerbach*, the Supreme Court further elaborated that for a matter to qualify as a matter of national concern, it must have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[13] In examining the singleness, distinctiveness and indivisibility of a matter, it is relevant to consider the extra-provincial effects resulting from a province's failure to deal with the regulation of the intra-provincial aspects of the matter, commonly referred to as the provincial inability test.

24. The AFN contends that establishing a minimum standard for GHG emission regulation within Canada was not an issue which existed at the time of Confederation but that it has since become a matter of vital interest in light of its contributions to climate change, which has both extra-provincial as well as global impacts. It is a new matter which has in effect attained such dimensions as to affect the body politic of Canada, as evidenced by Canada's national commitments as outlined in the *Pan-Canadian Framework on Clean Growth and Climate Change* and international commitments arising by virtue of the *Paris Agreement*.[14] As noted by the Ontario Court of Appeal in the *Ontario Decision*, Canada's unsuccessful efforts to achieve a national cooperative solution, which at one time was supported by most provinces, is a factor which assist in assessing the national nature of the concern.[15]

25. A minimum national standard for the regulation of GHG emissions also has the singleness, distinctiveness and indivisibility distinguishing it from matters of merely provincial concern. The Supreme Court of Canada in *R. v. Hydro-Québec*[16] was clear that discrete areas of environmental legislative power can fall with the doctrine of national concern provided it meets the criteria as

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[12] *R. v. Crown Zellerbach Canada Ltd.,* [1988] 1 SCR 401["*Zellerbach*"].
[13] *Zellerbach, ibid* at para 33.
[14] Pan-Canadian Framework on Clean Growth and Climate Change ["*Pan-Canadian Framework*"]
[15] *Ontario Decision, supra* note 9 at para 108.
[16] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 ["*Hydro-Québec"*]

established in *Zellerbach*.[17] As per the majority of the Ontario Court of Appeal in the *Ontario Decision*, GHG emissions are a distinct form of pollution, identified with precision by the *GGPPA*.[18] The court further held that the distinctiveness of establishing a minimum national standard is further informed by both the international and interprovincial impacts of GHG emissions[19] Finally, provincial inability also plays a role in informing the singleness, distinctiveness and indivisibility analysis delineating a national minimum standard for GHG regulations from a matter of merely provincial concern.[20]

26. The Government of Alberta has taken the position that the provincial inability test is confined to the constitutional and practical ability to address a particular subject matter and not the efficacy of the federal government's chosen policy or the unwillingness of provinces to exercise their jurisdiction in a manner in line with the federal government's approach.[21] For Alberta, the fact that only a national government can legislate nationally does not give it the power to do so in areas that otherwise fall within provincial jurisdiction.

27. The AFN would submit however that the Government of Alberta has erred in its analysis of the utility of the provincial inability test. The focus of the provincial inability test is not the ability of a province to enact legislation in a particular area nor the efficaciousness of the federal government's proposed legislation, but the need for one national law to mitigate the consequences of inaction on the part of one province on the residents of others. As per Professor Hogg, as cited in *Zellerbach*:

> …… the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it grave consequences for the residents of other provinces. A subject matter of legislation which has this characteristic has the necessary national dimension or concern to justify invocation of the p.o.g.g. power.[22]

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[17] *Hydro-Québec*, *Ibid*, at para 115.
[18] *Ontario Decision*, *supra* note 9 at para 115.
[19] *Ontario Decision*, *supra* note 9 at para 115.
[20] *Ontario Decision*, *supra* note 9 at para 117.
[21] *Factum of the Attorney General of Alberta*, para 205.
[22] *Zellerbach*, *supra* note 12 at para 32.

28. It is clear there would be a very real impact and harm to First Nations and other communities in Alberta should other provinces and/or territories fail to address the issue of GHG emissions with sufficiently stringent GHG emission regulations, most notably the adverse impacts to First Nations and on the exercise of Aboriginal and Treaty Rights as outlined hereinabove. As the majority in the *Ontario Decision* noted, the territories and Atlantic provinces can do nothing, practically or legislatively, to address the approximately 93.2 percent of national GHG emissions that are produced by the rest of Canada.[23] First Nations are similarly limited in the actions they can take to address the issue, even with jurisdiction over the area of GHG emission regulation over their traditional territories.

29. The Government of Alberta has also taken the position that giving the Government of Canada the ability to set national minimum GHG emissions standards would effectively give the federal government the power to regulate all economic activities and jurisdiction within the province, even matters historically within provincial purview.[24]

30. The AFN submits that the provincial inability test in fact defines the scope of federal jurisdiction in the area of GHG emission regulation by distinguishing minimum national standards integral to reducing nationwide GHG emissions from Alberta's ability to regulate in this area. The Government of Canada's efforts are targeted to reducing Canada's nationwide GHG emissions, and as previously noted, has only been implemented to mitigate the effects of one or more provinces inaction on the matter to the detriment of other provinces and arguably, First Nations further to the Crown's obligations derived from the honour of the Crown as discussed below.

31. As in the Supreme Court decision of *Johannesson v. West St. Paul*[25] on aeronautics, the issue of climate change and its disproportionate effects on First Nations transcends the delineation of property and civil rights afforded the Province of Alberta by virtue of s. 92 of the *Constitution Act, 1867*. The national and global impacts of climate change supports the recognition of the establishment of minimum standard of GHG emission regulation as having the requisite singleness, distinctiveness and indivisibleness for recognition as a valid exercise of federal

[23] *Ontario Decision, supra* note 9 at para 117.
[24] *Factum of the Attorney General of Alberta*, para 205.
[25] *Johannesson v. West St. Paul (Rural Mun.),* [1952] 1 S.C.R. 292

jurisdiction. This is further supported by Canada's domestic and international commitments on mitigating the effects of climate change, including the *Paris Agreement* objectives.

32. With respect to remaining aspect of the *Zellerbach* test, being the scale of impact on provincial jurisdiction, the Government of Alberta has taken the position that by negating provincial initiatives designed to deal with GHG emissions in a matter that it views as best suited to the circumstances of Alberta, the *GGPPA* is too large of an intrusion in Alberta's jurisdiction and is therefore unconstitutional.[26]

33. The AFN submits that the *GGPPA* is reconcilable with the distribution of powers as provided for under the Constitution. The Supreme Court of Canada has clearly provided that federal legislation based on the doctrine of national concern can include specific environmental matters in appropriate circumstances, namely for the purpose of this reference being pollution which is transboundary in nature, such as in the case of marine pollution in *Zellerbach*.[27] The backstop nature of the *GGPPA* precludes conflict with provincial GHG emission regulation as it has ascertainable and reasonable limits, particularly as federal jurisdiction is narrowly constrained to address the risk of provincial inaction regarding a problem which all parties' recognize requires cooperative action.

34. Further, the *GGPPA* encourages flexibility and cooperation between the two levels of government in accordance with the principle of cooperative federalism, supporting the concurrent operation of statues enacted by governments at both levels. At the same time, it also ensures minimum national standards and respect for the constitutional boundaries that underlie the division of powers. As the environment is an area of shared constitutional responsibility, the GGPPA is an appropriate response to the environmental crisis of climate change which strikes an appropriate balance within the existing constitutional division of powers.

B. Honour of the Crown: GGPPA validity

35. Beyond the traditional test as outlined in *Zellerbach* for reviewing whether the Government of Canada establishing a minimum standard of GHG emission regulation within Canada is a valid

[26] *Factum of the Attorney General of Alberta*, paras 246-249.
[27] *Zellerbach*, *supra* at para 39

exercise of its constitutional authority pursuant to its POGG powers as a matter of national concern, the AFN submits that a constitutional onus exists, grounded in the federal and provincial Crown's shared obligations to act honourably to First Nations, to proactively make efforts to mitigate the effects of GHG emissions and climate change on First Nations in accordance with globally and nationally accepted standards such as those outlined in the *Pan-Canadian Framework*.

36. Per the Supreme Court in *Mikisew Cree First Nation v. Canada (Governor General in Council*[28]*),* the honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and First Nations. In all dealings with First Nations, from the assertion of sovereignty to the resolution of claims, the Crown must act honourably and that nothing less is required if the reconciliation of the pre-existence of First Nations societies with the sovereignty of the Crown is to be achieved.[29] It is in essence a constitutional duty embedded by virtue of s. 35.

37. Determining what constitutes honourable dealing and what specific obligations are imposed by the honour of the Crown depends heavily on the circumstances as the honour of the Crown is not static, but an evolving principle which at its root is meant for the reconciliation of the divergent interest of First Nations and the Crown. [30]

38. The AFN submits that in implementing the *GGPPA*, the Government of Canada is arguably attempting to ensure that the constitutional obligation owed to First Nations to act honourably in all matters is upheld by attempting to mitigate the inter-provincial harms which will occur and disproportionately impact First Nations and their Aboriginal and Treaty rights should Alberta or another province decide to impose diminished standards in the area of GHG regulation.

39. The AFN further submits that at a minimum, the modern evolution of the honour of the Crown and the role of section 35 in the Canadian legal landscape suggest that *Zellerbach*, a decades old decision, and the associated interpretive test as to whether a matter fits within the doctrine of national concern, should be read as to incorporate the effect of the impugned legislation on First Nations as a factor in the determination of whether a matter has the requisite singleness,

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[28] *Mikisew Cree First Nation v. Canada (Governor General in Council*), [2018] S.C.J. No. 40 at para. 21 ["*Mikisew*"].
[29] *Haida Nation v. British Columbia (Minister of Forests),* [2004] S.C.J. No. 70 *at* para 17.
[30] *Mikisew supra* note 27 at para 24.

distinctiveness and indivisibility. It would appear that the disproportionate effects that First Nations would suffer from provincial inaction on the issue of GHG emissions should arguably be viewed as an indicia during the review of the provincial inability test. This would support a finding that establishing a national minimum standard for GHG emissions within Canada is distinct, single and indivisible as the failure to establish national law and provincial inaction on the matter has such grave consequences for First Nations.

40. The AFN submits that establishing this First Nations component into the *Zellerbach* test on the basis of s. 35 and the obligations imposed by virtue of the principle of the honour of the Crown is an affirmation of how the individual elements of the Constitution are linked, and as per the Supreme Court in the *Secession Reference*, how they should "be interpreted by reference to the structure of the Constitution as a whole."[31] Although the analysis of the constitutionality of the *GGPPA* should incorporate some deference to s. 35 based on the duties of the Crown derived from the honour of the Crown, this does not derogate from First Nations jurisdiction in the area of GHG regulation. As noted by the Supreme Court in *Mitchell v. Peguis Indian Band*[32], "From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not later the basic structure of Sovereign-Indian relations".[33]

C. Section 35 of the *Constitution Act, 1982* & First Nation jurisdiction over GHG regulation

41. The question in this Reference broadly asks if the GGPPA is "unconstitutional in whole or in part". As such, the AFN submits that this Reference is not solely about section 91 and 92 powers. Rather, an analysis of the entirety of the *Constitution Acts of 1867 and 1982* is required and should also consider s. 35 rights. The AFN submits that the Crown's division of powers must be reconciled and understood according to the constitutionally protected rights of Indigenous peoples. First Nations are an order of government within the constitutional framework and the right to self-determination in the area of GHG includes regulation of GHG emissions in their respective territories, including any associated economic benefits derived therefrom.

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[31] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 50.
[32] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85.
[33] *Mitchell, ibid* at p. 109.

42. First Nations have managed ecosystems and natural resources, as well as mitigated environmental degradation prior to European contact. An example of this includes the Mi'kmaq Nation who practiced "Netukulimk", being the Mi'kmaq way of harvesting resources without jeopardizing the integrity, diversity or productivity of the environment, as passed down through the generations by Elders and parents.[34]

43. Factors which support the honour of Crown compelling First Nations jurisdiction in the area GHG regulation includes the disproportionate effects of climate change on First Nations, particularly with respect to the adverse impact on traditional aboriginal rights including, but not limited to, hunting as well as fishing as previously recognized by the Supreme Court for various First Nations across Canada as distinct Aboriginal rights. First Nations across Canada that depend upon nature for traditional and commercial activities as well as cultural well-being are and will continue to be more significantly impacted than other Canadians as a result of climate change.

44. The AFN submits that reconciliation of First Nation interests requires that the construction of s. 35(1) be grounded by the "living tree" doctrine. As the "Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life", to fully pursue the goal of reconciliation and the Crown's fiduciary duty to First Nations, due deference must be given to the modern realities facing all First Nation peoples, including the disproportionate impacts of climate change and GHG emission regulation.[35] These impacts on First Nations are unique and modern circumstances. As such, the honour of the Crown, as a constitutionally embedded principle, must evolve to not only recognize the historical role of individual First Nations in resource management on their respective territories, including the continuity of same, but a modern role for First Nations in the regulation of GHG emissions on their territories and the economic benefits derived therefrom.

45. GHG regulation should not be used as a limiting factor on First Nations economies and development. Instead, an evolving system of cooperative federalism should be strived for by incorporating a nation-to-nation dialogue and a more appropriate system of GHG regulation and

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[34] Suzanne Berneshawi. "Resource Management and the Mi'kmaq Nation". The Canadian Journal of Native Studies XVII, 1 (1997); 115-148 at pp. 118-119.
[35] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.

governance which engages First Nations and promotes the growth of their respective economies and development.

46. Given the above, the AFN submits that the Court should not answer this Reference in a classical ss. 91-92 of *Constitution Act, 1867* sense, as the rights and interests of First Nations under s. 35 of the *Constitution Act, 1982* are clearly at stake. Rather the Court must interpret the *GGPPA* in a manner that harmonizes ss. 91-92 and s. 35.

D. International obligations supporting First Nations jurisdiction

47. The AFN submits the federal and provincial governments respect for and recognition of First Nation inherent rights and exercise of jurisdiction is supported by international discourse. Furthermore, the AFN submits First Nations have jurisdictions in the area of GHG emission regulation, and that it in effect also forms part of First Nations' inherent rights.

48. The *United Nations Declaration on the Rights of Indigenous Peoples*[36] has been made a priority of the Government of Canada which has committed to implementing the *UN Declaration* "without qualification" and undertaken formal plans to implement the *UN Declaration* in accordance with the Canadian Constitution with the aim of imbedding these international standards into Canada's domestic sphere.[37]

49. The Truth and Reconciliation Commission of Canada has called implementation of the *UN Declaration* "the framework for reconciliation at all levels and across all sectors of Canadian society."[38] As reconciliation is the "fundamental objective of the modern law of aboriginal and treaty rights," it is incumbent on Canada to take into consideration these fundamental principles.[39]

50. The *UN Declaration* is clear that First Nations should have jurisdiction in the area of GHG emission regulation and any resultant economic benefits based on its recognition of First Nations

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[36] *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) 15 ["*UN Declaration*"].
[37] Minister of Indigenous and Northern Affairs Carolyn Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016 ; Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples
[38] Final Report of the Truth and Reconciliation Commission of Canada: Summary: Honouring the Truth, Reconciling for the Future. Winnipeg: Truth and Reconciliation Commission of Canada, 2015 at p. 16.
[39] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

inherent right to self-determination and that by virtue of this right "they freely determine their political status and freely pursue their economic, social and cultural development" Further, the *UN Declaration* states that First Nations in exercising this right of self-determination have the right to self-government in matters relating to their local affairs, as well as ways and means of financing these autonomous functions.[40]

51. Other international documents which support First Nation jurisdiction in this area include the *United Nations Framework Convention on Climate Change*, which states that adaptation action should be guided by the best science, traditional knowledge and Indigenous knowledge,[41] as well as initiatives such as the *Reducing Emissions from Deforestation and forest Degradation* [42] which acknowledges Indigenous people's particular relationship with the lands they inhabit and further call for the effective participation of Indigenous peoples in State's climate change mitigation.

52. Not only does that honour of the Crown and recognition of the *UN Declaration* as a pathway towards reconciliation dictate that the court should recognize these international principles in terms of domestic law, but jurisdiction for this court to consider same is supported by the Supreme Court of Canada's decision in *R. v. Hape* where the court noted that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law principle".[43] The Supreme Court, in interpreting the scope of the application of the *Charter of Rights and Freedoms*, affirmed the courts should seek to ensure compliance with Canada's binding obligations under international law.[44]

E. Right to participate in economy

53. Canada and the provinces have established robust economies from centuries of pollution and the emission of GHGs. These economies have largely excluded First Nations. In essence, Canada and the provinces have effectively used up all the carbon space in the atmosphere. First Nations

[40] *UN Declaration,* Articles 3 and 4.
[41] *United Nations Framework Convention on Climate Change, Preamble,* article 7.5
[42] *Reducing emissions from deforestation and forest degradation in developing countries* ("REDD+")
[43] *R. v. Hape,* [2007] 2 S.C.R. at para. 53 ["*Hape*"].
[44] *Hape, ibid* at para. 56.

are just beginning to develop their economies and industries, but there is no more room for any further carbon releases.

54. Through cooperative federalism, Canada, the provinces/territories and First Nations can each adopt specific measures to address climate change impacts, mitigation and green projects. This would be consistent with the special relationship between First Nations and the Government of Canada as it incorporates nation-to-nation dialogue and a more appropriate system of GHG regulation and governance which engages First Nations.

55. Constitutional tools such as interjurisdictional immunity, paramountcy, conflict of laws, double aspect, ancillary power and incidental effects rules are available to address any conflicts in jurisdiction.

PART V – RELIEF SOUGHT

56. With respect to the Reference question, being "Is the Greenhouse Gas Pollution Pricing Act (Canada) unconstitutional in whole or in part", the AFN respectfully requests that this Court answer it in the negative, as the *GGPPA* is within the constitutional gambit of the Government of Canada as part of its peace, order and good government powers as a matter of national concern.

Dated at Ottawa, Ontario, this 1st day of November, 2019.

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2. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
3. *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.