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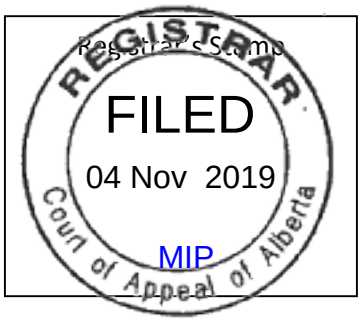

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018 c. 12

AND

IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, c. J-2, S. 26

DOCUMENT **FACTUM OF THE INTERVENOR THE ATHABASCA CHIPEWYAN FIRST NATION**

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

FACTUM OF THE INTERVENOR THE ATHABASCA CHIPEWYAN FIRST NATION

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PART 1. FACTS

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 threatens to push Aboriginal peoples past the edge of survivability into oblivion.

3. The Athabasca Chipewyan First Nation ("ACFN") are *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—including northern Alberta. 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 survival is caused by industrial activity that has emitted more carbon dioxide ("CO_2") and other greenhouse gases ("GHGs") pollution than is normal or 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, whilst even the coolest year of the 21st century [2008] … would have ranked as the second-warmest year of the 20th century.[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 CO_2 concentration of 400 ppm exceeds the natural variability seen over hundreds of thousands of years… Periods of the past with a CO_2 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 CO_2, global mean surface temperature was 2–3 °C warmer than today, the

[1] Affidavit of John Moffet ["**Moffet Affidavit**"], affirmed September 30, 2019, Appeal Record and Evidence of the Attorney General of Canada ["**Canada's AR**"], Vol 1, Tab 1, at Exhibit A.

> 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.[2]

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

A. The Athabasca Chipewyan First Nation and Climate Change

7. The ACFN is a recognized First Nation or "band" under the *Indian Act*. Their traditional territory extends from northeastern Alberta, into the Northwest Territories, and eastward across northern Saskatchewan to Hudson's Bay.[3] In 1899, their ancestors entered into Treaty 8 with Her Majesty, guaranteeing rights to hunt, fish, trap, and "practice [their] usual vocations" throughout a vast territory (larger than France) in Alberta, British Columbia, Saskatchewan, and the Northwest Territories. ACFN communities and people are found throughout the North, including on eight reserves in Alberta and trapping lands in Saskatchewan, and elsewhere in the world.[4]

8. The survival of ACFN people depends on practicing traditional knowledge in a cyclical natural environment: for example, hunting caribou by tracking their migrations, gathering food and medicinal plants in season, and trapping and fishing in times of low or high waters.[5] Destabilize these cycles, as by climate change, and survival becomes doubtful. Examples follow.

9. 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.[6] Formerly abundant, within a single human lifetime all of the woodland caribou

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[2] Moffet Affidavit, Exhibit A, Canada's AR, Vol 1, Tab 1, at p. R78.
[3] Affidavit of Lisa Tssessaze ["**Tssessaze Affidavit**"], affirmed August 29, 2019, Appeal Record and Evidence of the Intervener Athabasca Chipewyan First Nation ["**AR**"], Vol 1, Tab 1, at para 7 and Exhibit A.
[4] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 9-11, and 29.
[5] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 22, 24-26, and 38.
[6] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 8 and 20.

populations in ACFN territory have been scientifically classified as "Threatened" under the *Species at Risk Act*.[7] As a result, all the woodland caribou are now illegal to hunt, leaving only a single, legally-huntable population of barrenland caribou in ACFN traditional territory. But this population too is in 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.[8] Should the scientists' prediction about climate change come to pass, then the caribou hunting which sustained ACFN people for millennia may soon be fully impossible.

10. 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.[9] The PAD is comprised of wetlands that form a water-based transportation network through 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.

11. 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.[10] 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.[11]

12. ACFN are concerned that a hotter, drier PAD, as scientists foresee, will negatively impact navigability and subsistence hunting, fishing, trapping, and gathering, which sustained their people for thousands of years and which constitutionally are ACFN's Rights.[12]

13. 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 along the Alberta-Saskatchewan border.[13]

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[7] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 27.
[8] *Ibid.*
[9] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 5.
[10] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 15.
[11] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 46.
[12] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 20, 44-47.
[13] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 11-13, 29-32.

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.[14]

14. ACFN supports the *GGPPA* because it believes that GHG emissions must be reduced to the point of being net neutral, and very urgently. Alberta must do its part because its GHG emissions of 272.8 megatons annually are by far the highest of any province, and surpass those of Ontario and Quebec *combined*.[15] Alberta's emissions also rose 18% from 2005 and 2017, while those two larger provinces reduced emissions.[16] Per capita, Alberta's emissions are over triple Canada's national average.[17] Indeed, if Alberta seceded and became an independent country, its per capita emissions would be the highest of any country in the world.[18]

PART 2. ARGUMENT

15. For ACFN, climate change is not an ordinary concern, but an existential emergency without comparison in thousands of years. If the scientists at Parks Canada and ECCC are right that ACFN's homeland in the PAD will become drier and hotter by up to 7.1°C by 2080, it is all too likely that 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.[19] If the ACFN cannot navigate the Athabasca River during hunting seasons and cannot use the winter road, they will become isolated in a land unable to sustain their people.[20]

16. Having been stripped of the ability to practice their Rights, ACFN will be forced to leave the territory that has been their homeland and live elsewhere. Thus uprooted, they will no longer be who they are: no longer *Dënesųliné*; no longer the *K'ái Tailé Dené*; and no longer the *Etthen Eldeli Dené.* ACFN will have lost their identity; ACFN will have ceased to survive as an Aboriginal people.[21] Suburban Edmonton is not, and can never be, their culture's home.

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[14] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 32-33.
[15] Affidavit of Dr. Dominique Blain ["**Blain Affidavit**"], affirmed September 27, 2019, Canada's AR, Vol 3, Tab 2, at para. 26 and Exhibit D.
[16] Tssessaze Affidavit, Exhibit I, AR, Vol 2, Tab 1, at p. I244 and Figure 5; Blain Affidavit, Canada's AR, Vol 3, Tab 2, at para. 25.
[17] Blain Affidavit, Canada's AR, Vol 3, Tab 2, at para. 26.
[18] Affidavit of Dr. Nicolas Rivers, affirmed September 30, 2019, Canada's AR, Vol 4, Tab 5, at para. 11.
[19] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 15-16, 46-47.
[20] Tssessaze Affidavit, AR, Vol 1, Tab 1, at paras. 17, 47.
[21] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 53.

A. ACFN's Approach to the Constitutional Question

17. The Supreme Court recently affirmed that laws benefit from a "presumption of constitutionality".[22] In practice, that means the burden is on Alberta to prove that the *GGPPA* is unconstitutional, and not Canada or ACFN to prove the contrary. **Above all, the Court must remain clear-eyed that Alberta bears the burden of proof at each inference in its case.**

18. Both the Attorney Generals of Alberta and Ontario submit that the pith and substance of the *GGPPA* does not matter, because it is unconstitutional no matter what.[23] Respectfully, that is so scornful as to be obtuse; what the law does or says *obviously matters* to its constitutionality.

19. ACFN submits that in pith and substance, the *GGPPA* is about establishing minimum national standards to reduce GHG emissions, by means of pricing that applies with comparable stringency throughout Canada. Minor phrasing differences aside, this pith and substance is no broader than that of the majorities of the Courts of Appeal of Saskatchewan and Ontario.[24]

20. ACFN also agrees with the Courts of Appeal of Saskatchewan and Ontario that the pith and substance of the *GGPPA* falls within a valid "matter" under the peace, order, and good government power ("POGG"), specifically its "National Concern" branch.[25] But ACFN prefers to approach the conclusion differently: while these Court stood solely on the "National Concern" branch, a more accurate, evidence-based, thoughtful, and *complete* picture emerges by considering POGG's "National Emergency" and "New Matter" branches—any or even all three at once—because:

i. Anthropogenic climate change caused by GHGs is presently a "National Emergency";

ii. There is a compelling "National Concern" in establishing minimum standards (of pricing or otherwise) throughout Canada so as to mitigate GHG emissions; and

iii. The phenomenon of anthropogenic GHG emissions changing the climate is a "New Matter" that was unknown to science or law at Confederation in 1867.[26]

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[22] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, Book of Authorities of the Attorney General of Alberta ["**Alberta's BOA**"], Vol 4, Tab 27, at paras. 81-83.

[23] Factum of the Attorney General of Alberta ["**Factum of Alberta**"], at para. 113; Factum of the Attorney General of Ontario, at para. 10.

[24] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ["**Saskatchewan Reference**"], Alberta's BOA, Vol 3, Tab 21, at para. 125; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ["**Ontario Reference**"], Alberta's BOA, Vol 3, Tab 20, at paras. 77 and 166.

[25] *Saskatchewan Reference*, Alberta's BOA, Vol 3, Tab 21, at paras. 139-40; *Ontario Reference*, Alberta's BOA, Vol 3, Tab 20, at para. 124.

[26] The three branches of POGG are distinguished in *Labatt Breweries of Canada Ltd. v. Canada (AG)*, [1980] 1

21. ACFN's factum first discusses s. 35 of the *Constitution Act, 1982*, then discusses all three aspects of POGG and s. 91 of the *Constitution Act, 1867*, through an Aboriginal perspective.

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

22. Alberta's reference question is broad and asks if the *GGPPA* is "unconstitutional in whole or in part". That wording implicates not only the *Constitution Act, 1867*, but also the *Constitution Act, 1982*.

23. 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'".[27] 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".[28]

24. Thus, when Crown action (or inaction) on GHG emissions and climate change imperils the natural environment that underpins a Treaty right—*e.g.*, as climate change imperils the caribou hunt—there is an infringement or perhaps even extinguishment of ACFN Rights, and this makes the *Constitution Act, 1982* directly relevant to this Reference in two ways.

25. **First**: There cannot be Crown action (or inaction) on GHG emissions and climate change without Aboriginal involvement. It is settled law at the Supreme Court that the Crown has a s. 35 duty to consult with Aboriginal peoples when infringing an Aboriginal or Treaty right (*Haida Nation v. British Columbia*),[29] and obtain consent when extinguishing a Treaty right (*R. v. Sioui*).[30] In either formulation, Crown accommodation of Aboriginal interests is a constitutional duty.

26. **Second**: When GHG emissions place Aboriginal and Treaty rights at stake, s. 35 of the *Constitution Act, 1982* adds to the "classical" federalism balance of powers in the *Constitution Act, 1867*. As the Supreme Court wrote in the *Quebec Veto Reference*, "the *Constitution Act, 1982* directly affects federal-provincial relationships".[31] Therefore when federal legislation, such as the

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S.C.R. 914, ["***Labatt Breweries***"], at (per Estey J), Book of Authorities of the Attorney General of Canada ["**Canada's BOA**"], Vol 1, Tab 8, at p. 944; see also *R. v. Crown Zellerbach,* [1988] 1 S.C.R. 401 ["***Crown Zellerbach***"] Alberta's BOA, Vol 2, Tab 15, at para. 34.

[27] *R. v. Badger*, [1996] 1 S.C.R. 771 ["***Badger***"], Book of Authorities ["**BOA**"], Vol. 2, Tab 7, at para. 40.

[28] *R. v. Horseman*, [1990] 1 S.C.R. 901, BOA, Vol. 2, Tab 8, at p. 919 (Wilson J, dissenting, but not on this point).

[29] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, BOA, Vol 1, Tab 4, at paras 32, 37, 43, 47.

[30] *R. v. Sioui*, [1990] 1 S.C.R. 1025 ["***Sioui***"], BOA, Vol. 2, Tab 9, at p. 1063.

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

GGPPA, mitigates a threat to s. 35 Aboriginal or Treaty rights, the Court must strive to conduct its ss. 91-92 federalism analysis in a way that helps uphold those s. 35 Rights.

27. To be clear, ACFN neither submits that s. 35 is a head of power, nor that it replaces ss. 91-92 in federalism analysis. But it imposes a concurrent constitutional duty that leads to this conclusion: **Where, but for the *GGPPA*, emissions of GHGs would be higher and infringe (or possibly extinguish) ACFN's Rights, s. 35 requires that the Court give Parliament the deference to legislate so that the Crown's duty to preserve those Rights is met**. Where there is a duty, there must be the power to carry it out. As the Supreme Court has held, the constitution's assignment of "Indians" means that the federal government is "vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples," so federal legislation that accommodates ACFN's Rights is arguably a constitutional necessity to avoid unconstitutionally infringing or extinguishing those Rights.[32]

28. Or to invert that argument: If the *GGPPA* were constitutionally invalid, then as Canada's evidence establishes, there can be no question of Canada meeting its GHG reduction targets and halting climate change, meaning in turn that the Crown would infringe and not accommodate ACFN's Rights—itself a constitutional violation under s. 35 of the *Constitution Act*, 1982.[33]

29. The Supreme Court held in the *Secession Reference* that "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".[34] Alberta agrees, and writes in its Factum of "the need to reconcile all aspects of the constitution by reading it as an integrated whole."[35] It would therefore be a severe error for the Court to regard ss. 91-92 of the *Constitution Act, 1867* in a "classical" vacuum, for that overlooks and sets at naught ACFN's Rights under s. 35 of the *Constitution Act, 1982*. Rather, the Court must favour an interpretation of ss. 91-92 that both balances federal and provincial jurisdiction, and allows the *GGPPA* to perform its role in preserving ACFN's Rights under s. 35 from the foreseeable infringements of climate change.

30. If that means Alberta must tolerate "necessarily incidental" intrusion on its provincial jurisdiction under the double aspect doctrine, then so be it: how the Crown distributes

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[32] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, BOA, Vol. 1, Tab 3, at para. 176.
[33] Moffet Affidavit, Canada's AR, Vol 1, Tab 1, at para. 87.
[34] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, Alberta's BOA, Vol 3, Tab 24, at para. 50.
[35] Factum of Alberta, at para. 140.

constitutional powers internal to itself (federal or provincial) is of subordinate importance to the duty of the Crown to respect Aboriginal and Treaty rights. As Chief Justice Dickson explained, "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."[36]

31. The *GGPPA* therefore must be upheld as Canada argues, so that the Crown's Treaty 8 promises can be respected. This is easily accomplished by recognizing that the *GGPPA*'s minimum standards of pricing are *intra vires* Parliament, while reaffirming established case law that says the environment is a shared federal and provincial jurisdiction, in which the double aspect doctrine lets Alberta regulate GHG emissions if it wishes.[37] Any other outcome would subject ACFN Rights to what the Supreme Court deplores as the "jurisdictional tug-of-war" or "jurisdictional wasteland" of federal-provincial relations.[38] Seen this way, Alberta's "watertight compartments" view of the constitution is not just misguided, but <u>obsolete</u> since 1982.

The fluid, correct approach to POGG

32. Historically, the general residual power of s. 91 was <u>not</u> viewed as a trinity having (i) "National Concern", (ii) "National Emergency", and (iii) "New Matter" branches, nor is the constitution worded this way.[39] The Supreme Court only coined this nomenclature in 1980 in *Labatt Breweries*, as shorthand to parse and systematize the earlier cases of the general residual power by their factual indicia.[40] The new nomenclature neither requires three new, separate bodies of POGG jurisprudence, nor requires that any single case be chopped and distorted to fit the Procrustean Bed of just one branch. <u>Rather the general residual power is singular—a trunk—but each case manifests strongest as a branch of the trinity, depending on its factual indicia</u>.

33. The facts of this case are so *sui generis* that all three indicia exist, so the Court should apply <u>all three branches</u> of POGG fluidly. There are credible arguments that the *GGPPA* responds to and is *intra vires*: (i) a matter of "National Concern" as Canada argues, (ii) a "National Emergency" as the David Suzuki Foundation argues, and; (iii) as we argue, a scientifically "New Matter" completely unknown at Confederation in 1867. These arguments are cumulative, in that a judicial

[36] *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 109 (per Dickson CJ), BOA, Vol. 2, Tab 6.
[37] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, Alberta's BOA, Vol 1, Tab 4, at pp. 63-65; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, Alberta's BOA, Vol 2, Tab 13, at para. 112.
[38] *Daniels v. Canada (Indian Affairs and Northern Dev't)*, 2016 SCC 12, BOA, Vol. 1, Tab 2, at paras. 14-15.
[39] Professor Hogg prefers to call the "New Matter" branch the "Gap" branch of the constitution—same thing.
[40] *Supra* note 26.

finding that the *GGPPA* comes under the general residual power can rest, synergistically, on evidence and argument respecting each branch, not just one. (For example, *Crown Zellerbach* explains how a "New Matter" can signify a "National Concern".[41])

34. ACFN submits the scientific phenomenon of anthropogenic GHGs changing the climate is certainly a "New Matter". According to Professor James Fleming and Dr. Spencer Weart, both historians of science, anthropogenic climate change was discovered in the 20th century—after Confederation. It was not until 1904 that Svante Arrhenius first theorized that there might be such a thing as anthropogenic GHGs. Arrhenius wrote that *"the slight percentage of carbonic acid [dissolved CO_2] in the atmosphere may by the advances of industry be changed to a noticeable degree in the course of a few centuries,"* and warned that this could come about *"as long as the consumption of coal, petroleum, etc., is maintained at its present figure."*[42]

35. Arrhenius's theory was proved right in the 1950s when atmospheric measurements of CO_2 showed a relentless upward trend, and as Dr. Weart, the science historian, writes, *"[t]his was not quite the discovery of global warming. It was the discovery of the possibility of global warming"*—fully a century after Confederation, making climate-changing anthropogenic GHG emissions scientifically a "New Matter".[43]

36. Another indicium of a "New Matter" is a treaty. The Courts placed aeronautics and radio, also scientifically new in their day, under the general residual power in part because Canada entered into treaties about them.[44] The Courts gave effect to those treaties, despite the *Labour Conventions* case, and notwithstanding that they were new *Canadian* treaties rather than Empire treaties under s. 132 of the *Constitution Act*, 1867. The same treaty indicium exists in this case: the *UN Framework Convention on Climate Change* and the *Paris Agreement* are treaties.

37. As stated already, the Court can consider our "New Matter" argument alongside the "National Concern" and "National Emergency" arguments of others. In *Re: Anti-Inflation Act*, Chief Justice Laskin discussed indicia of both "National Concern" branch and the "National Emergency" branches.[45] The Chief Justice noted much confusion in the historical cases when the

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[41] *Crown Zellerbach, supra* note 26, Alberta's BOA, Vol 2, Tab 15, at paras. 28, 33.
[42] James R Fleming, "Historical Perspectives on Climate Change" (1998) at pp. 81-82, Canada's BOA, Vol 3, Tab 61.
[43] Spencer R Weart, "The Discovery of Global Warming" (2009) at pp. 19-37, Canada's BOA, Vol 3, Tab 65.
[44] *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292, Alberta's BOA, Vol 1, Tab 5; *Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304, BOA, Vol. 1, Tab 5.
[45] *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, Alberta's BOA, Vol 2, Tab 17. The majority ultimately favoured the "National Emergency" outcome.

general residual power was interpreted too restrictively as one or the other, and commented favourably on the *Canada Temperance Federation* case, which followed "a reconciliation of … [the] national dimensions approach with … requiring that there be some crisis or peril".

38. ACFN submits that this Court can similarly reconcile the "National Concern", "National Emergency", and "New Matter" branches. There are two ways to do this.

39. First, the Court should apply the evidence to the three branches in intersecting ways: for example, science's recognition of climate-changing anthropogenic GHG emissions both defines a "New Matter", and identifies a thing having the "singleness, distinctiveness, and indivisibility" of a matter of "National Concern". (This duality explains why the ratio in some decisions, such as the radio and aeronautics cases discussed at paragraph 36, simultaneously fits both branches.)

40. Second, the Court should reject any reading of POGG doctrine that is overly technical: for example, Alberta argues that because the "National Concern" branch in *Crown Zellerbach* is said to create exclusive, plenary federal jurisdiction, that must bar the province regulating GHG emissions.[46] Not only is that argument wrong under the double aspect doctrine, but it contradicts the "reconciled" case law that Chief Justice Laskin commended, such as *Canada Temperance Federation* which reads "there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject."[47] Alberta seems to argue that after splitting the single "trunk" of the general residual power into separate branches, *Crown Zellerbach* created exclusive, plenary power where it did not exist before—and that makes no sense.

41. ACFN submits that by approaching all three branches of POGG fluidly, not only can Alberta and the federal government share jurisdiction, but the internal Crown divisions and "jurisdictional tug-of-war" so harmful to ACFN Rights are avoided—overall a superior outcome.

First Nations are "Nations" under POGG

42. But assuming the Court gives primacy to the "National Concern" or "National Emergency" branches as Canada and David Suzuki Foundation argue, it should consider that the "nation" in both 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 POGG jurisprudence arose before s. 35 became a significant factor in the Canadian legal landscape.

[46] Factum of Alberta, at paras. 199, 227-230.
[47] *AG (Ontario) v The Canada Temperance Federation (Ontario),* [1946] 2 D.L.R. 1 (J.C.P.C.), BOA, Vol. 1, Tab 1.

43. Prior to the arrival of the Europeans, native people in North America coalesced in independent nations who controlled their own territories and had their own laws, practices, traditions and customs. The British and the French, in their early interactions with native people, had relations with them that closely resembled relationships with sovereign nations.[48]

44. In ACFN's case, the Supreme Court has affirmed that Treaty 8 is "an exchange of solemn promises between the Crown and the various Indian nations".[49]

45. Accordingly, when the Court considers the POGG "National Concern" or "National Emergency" doctrines, it should ask this question: Which nation's concern or emergency?

46. The evidence demonstrates that ACFN is experiencing a "National Emergency" categorically—and cataclysmically—unlike Canada at large. While Canada's current target is to limit average warming to 1.5°C globally, that average greatly understates the regional reality of the North, where scientists predict warming of up to 7.1°C in ACFN's territory in the PAD.[50] Warming of that magnitude is simply devastating to the nations of Canada's North.

47. Even Alberta agrees there is an exceptional crisis in the North, 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.[51]

48. ACFN submits these manifestations of climate change, so severe as to threaten hunger by making the gathering of traditional food "difficult and dangerous," are reason for the Court to recognize that ACFN faces a "National Emergency". There is no case law stating, expressly or by implication, that a crisis must threaten *all* the Canadian nation to be a "National Emergency", and the fact that the AFCN nation faces an existential threat in its homeland suffices.

49. Likewise, 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, when it damages ACFN cultural practices and Rights going back several millennia, puts

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[48] *Sioui*, *supra* note 30, BOA, Vol. 2, Tab 9, at pp. 1052-1053.
[49] *Badger*, *supra* note 27, BOA, Vol. 2, Tab 7, at para. 41.
[50] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 15.
[51] Tssessaze Affidavit, AR, Vol 1, Tab 1, Exhibit E, at p. I182.

the survival of their Aboriginal identity and nationhood in doubt. Canada too will face major stresses with climate change—but the survival of Canadian nationhood is not seriously in doubt.

50. The Supreme Court in *Crown Zellerbach* stipulated that a factor in exercising the "National Concern" branch is the existence of "an adverse effect on extra-provincial interests"—*i.e.* on another jurisdiction.[52] An adverse effect on ACFN Rights is inherently extra-provincial, both because ACFN possesses distinct nationhood from Alberta, and because Treaty 8 explicitly confers on ACFN Rights that are exercisable in four provinces and territories—discussed below.

Alberta's failure to consult and accommodate ACFN demonstrates provincial inability

51. To uphold the *GGPPA* under the "National Concern" branch, the Court must consider what *Crown Zellerbach* calls the "provincial inability test". The test inquires whether Alberta's approach to regulating GHG emissions avoids "an adverse effect on extra-provincial interests,"[53] or whether "the failure [of Alberta] to cooperate would carry with it grave consequences for the residents of other provinces".[54] These inquiries pose questions of mixed fact and law, and speak to the indivisibility and national dimensions of the legislative matter.[55]

52. ACFN submits that, <u>in practice and in principle both</u>, Alberta lacks "provincial ability" for GHG emissions regulation because it cannot, and has not, consulted and accommodated First Nations having extra-provincial interests. In ACFN's case, it is headquartered inside Alberta, but its people have s. 35 rights to reside, hunt, fish, or trap extra-provincially in the extended Treaty 8 territory of British Columbia, Saskatchewan, and the Northwest Territories. Likewise, there are other First Nations headquartered outside Alberta, whose people have s. 35 treaty or aboriginal rights to do similarly in the territory near them. From a "National Concern" perspective, all these First Nations clearly possess "extra-provincial interests", which Alberta's GHG emissions are capable of adversely affecting. Moreover, their Aboriginal and Treaty rights to reside, hunt, fish, or trap are *constitutionalized* interests, which this Court must sedulously protect in its assessment of the matter of "National Concern", even more so than ordinary common law interests.

53. Alberta's flagship climate change strategy, the *Technology Innovation and Emissions*

[52] *Crown Zellerbach*, *supra* note 26, Alberta's BOA, Vol 2, Tab 15, at para. 35.
[53] *Ibid*, at para. 35.
[54] *Labatt Breweries*, *supra* note 26, Canada's BOA, Vol 1, Tab 8, at p. 944.
[55] *Crown Zellerbach*, *supra* note 26, Alberta's BOA, Vol 2, Tab 15, at paras. 33 and 34.

Reduction program ("TIER"), demonstrates this provincial inability in practice.[56]

54. In its Factum, Alberta touts *TIER* as a home-grown carbon pricing plan, and a worthy alternative to the *GGPPA*.[57] As of filing its factum in August 2019, Alberta wrote "The TIER program is in the final stages of development and consultation".[58] Subsequently, it became locked-in as Alberta's GHG emissions pricing plan.[59] Were the *GGPPA* struck down as unconstitutional by the Court, that would leave *TIER* alone to govern.

55. Yet Alberta never consulted (much less accommodated) ACFN or any other First Nation on *TIER*.[60] Instead, the Ministry of Environment consulted industry representatives in accordance with a published "Engagement Approach", which conspicuously omitted consulting First Nations and Aboriginal people, who are not so much as mentioned.[61] When ACFN wrote Alberta to complain that it was being excluded and to request that Alberta schedule a meeting so that ACFN could have input on *TIER*, Alberta did not act on the meeting request, and explained that it was interested only in feedback on "the regulation itself and the impact on regulated facilities"—not the impact on First Nations and their Treaty 8 interests.[62]

56. In other words, Alberta took no steps to consult ACFN on *TIER*, even after being politely reminded of its duty to do so.

57. By omitting to consult First Nations, Alberta committed a fatal error. The unanimous Supreme Court held in the *Rio Tinto* case that when a government lays management plans at a high level—precisely the case with *TIER*, which is Alberta's high-level plan for pricing and regulating GHG emissions—that structural step *in itself* implicates Aboriginal rights and requires consultation ahead of any direct, adverse impact on treaty lands and resources:

> 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*

[56] Factum of Alberta, at paras. 35-37.
[57] Factum of Alberta, at para. 84.
[58] Factum of Alberta, at para. 36.
[59] Cross-Examination of Robert Savage, October 21, 2019 ["**Savage Cross-Examination**"], at p. 140, ln. 19-20.
[60] Tssessaze Affidavit, AR, Vol 1, Tab 1, at para. 59.
[61] Tssessaze Affidavit, Exhibit K, AR, Vol 2, Tab 1, at pp. I271.
[62] Affidavit of Emma Billard ["**Billard Affidavit**"], AR, Vol 2, Tab 2, at Exhibit A and B.

adverse impact on land and resources.[63]

58. Alberta's omission to consult ACFN in formulating its GHG emissions regulations is very prejudicial. Without consultation, Alberta has no way of knowing how its GHG emissions and regulatory approach adversely affect the extra-provincial interests of ACFN people in their extended Treaty 8 territory, and cannot possibly accommodate those interests, as it must. Instead, Alberta settled on *TIER* as its regulatory approach, blind to how that might impact constitutionally entrenched Aboriginal hunting, fishing, and trapping outside the province. Further, Alberta did so knowing that ACFN people would be exceptionally harmed when those extra-provincial interests are damaged, for as Alberta has previously conceded, *"Indigenous peoples are at the forefront of the effects of climate change"*, and *"many Indigenous communities will experience more of the impact of climate change due to factors that include their locations, economic situations and relationship with the environment."*[64]

59. Succinctly put, in proffering *TIER* as an alternative GHG pricing regulation to the *GGPPA*, Alberta took no account of Treaty 8 First Nations; their s. 35 Rights; the interests and activities of ACFN people in the extended, extra-provincial treaty territory; or its duty to consult and accommodate to protect those interests and activities from the damage caused by its GHG emissions. Those are serious constitutional *wrongs*, in the face of which Alberta ironically claims its constitutional *right* to exclusive jurisdiction over GHG emissions pricing.

60. ACFN's experience is a practical instance of Alberta failing to account for the extra-provincial impacts and thus the "national dimensions" of its GHG regulatory approach, even though consultation should have been easy to do (ACFN is headquartered in Fort Chipewyan). But even in principle, it is hard to imagine that Alberta, using the utmost of its jurisdiction, has the provincial ability to regulate its GHG emissions in a way that accounts for *all* Aboriginal people impacted by its pollution. Is it possible that Alberta, in some theoretical, future scenario, could successfully consult and accommodate other First Nations who are impacted by its GHG emissions and who are headquartered in other provinces, outside its jurisdiction? Certainly not: that which lies outside the province is self-evidently beyond Alberta's jurisdiction and its "provincial ability".

61. Only Canada has that national jurisdiction, and so come to the effect of GHG emissions on extra-provincial Aboriginal interests, only it is able to manage those "national dimensions".

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[63] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, BOA, Vol. 2, Tab 11, at para. 47.
[64] Tssessaze Affidavit, Exhibit J, AR, Vol 2, Tab 1, at pp. I256 – I257

C. Alberta's industry and economy do not determine the constitutional question

62. Alberta narrates in its Factum that its "economic and social circumstances are unique compared to other jurisdictions," that it is "heavily dependent" on oil and gas, and that "it is unwilling to have the federal government impose carbon pricing measures that fail to account for the unique nature of Alberta industries", lest the province suffer severe damage to its economy.[65]

63. While Alberta's industry is unique in Canada, counsel's attempt to paint a picture of "Alberta exceptionalism" is overwrought and of no legal relevance to this case, for two reasons.

64. First, it is untrue that the *GGPPA* threatens Alberta's industry or economy. In cross-examination, Alberta's affiant conceded that modelling done by Alberta's Climate Change Office shows that a carbon price of $30/ton in the *GGPPA* barely reduces the annual growth rate of Alberta's economy relative to "business as usual" (2.22% vs. 2.27%, or just -0.05%), and even accelerates the oil and gas industry's annual growth (5.07% vs. 5.05%, or +0.02%).[66] Simply put, Alberta's own evidence shows that any intrusion on its economy is, at worst, *de minimis*.

65. Second, jurisprudence shows that neither an industry's weight in the provincial economy, nor plenary provincial jurisdiction over that industry, can exclude federal constitutional power. In *Saskatchewan (AG) v. Canada (AG)*, a provincial law was aimed at interest rates in agricultural mortgages.[67] Saskatchewan claimed jurisdiction on the basis "that agriculture was [its] main industry", and sacrosanct under the plenary power of agriculture in s. 95 of the *Constitution Act*, 1867—exactly as Alberta argues that its main industries are oil and gas, and sacrosanct under s. 92A. Both the Supreme Court and Privy Council rejected Saskatchewan's arguments, citing the federal power over "Interest" in s. 91(19).

PART 3. RELIEF SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED on November 4, 2019.

Professor Amir Attaran
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[65] Factum of Alberta, at paras. 16, 19, 84, and Parts II(A) and II(E) generally.
[66] Savage Cross-Examination, at p. 129, ln 3 to p. 130, ln 12.
[67] *Saskatchewan (Attorney General) v. Canada (Attorney General),* [1949] 2 D.L.R. 145 (J.C.P.C.) BOA, Vol 2, Tab 12

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