Docket: CACV3239

COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part 5

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c C-29.01

FACTUM OF THE ATHABASCA CHIPEWYAN FIRST NATION

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This Factum is dedicated to Dr. Charles David Keeling, for his scientific discovery of global warming and the knowledge to secure our children's future

PART I – INTRODUCTION

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 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. Anthropogenic climate change now threatens those Aboriginal practices, customs, and traditions, and in the North it threatens to push Aboriginal peoples past the edge of survivability into oblivion.

3. The Athabasca Chipewyan First Nation ("ACFN") is a community of the *Dënesųłiné* 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 Saskatchewan. 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 cultural survival is caused by industrial activity that has emitted more climate-warming carbon dioxide ("CO_2") and other greenhouse gases ("GHGs") into the atmosphere than is 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.[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

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1 Affidavit of John Moffat, Exhibit A at pp. 4-5 (in Volume 1 of Canada's Record).

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 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 a people who have lived on the land for thousands of years can survive climatic conditions last seen "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, "ACFN's Rights"). Once the Northern environment is made warmer and more extreme, will it still furnish ACFN people reliable food, resources, and domicile for their subsistence, economic, and cultural needs? Will ACFN's Rights to hunt, fish, and trap still be exercisable if climate change is left unchecked? Or will climate change extinguish those Rights? Those are truly existential questions for ACFN and other Aboriginal peoples.

PART II – FACTS

A. The Athabasca Chipewyan First Nation

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 large territory (larger than France) that includes northern Saskatchewan. ACFN communities and people are found throughout the North, including on eight reserves in Alberta and trapping lands in Saskatchewan.[4]

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2 *Ibid*, at p. 8.
3 Affidavit of Lisa Tssessaze, at para. 7.
4 Affidavit of Lisa Tssessaze, at paras. 10-12, and 33.

8. The cultural survival of the ACFN depends on practicing their traditional knowledge and land uses, which are intimately calibrated to the natural environment: for example, hunting caribou by tracking their migrations, gathering food and medicinal plants, and trapping or fishing through the seasons.[5] These practices sustained ACFN's ancestors for thousands of years.

B. ACFN's Rights are Imperilled by GHG Emissions and Climate Change

9. ACFN fears that climate change is making these traditional, survival-based practices impossible, and extinguishing their Rights. Examples follow.

10. 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 populations in ACFN territory have been scientifically classified as "Threatened" under the *Species at Risk Act*.[7] As a result, the woodland caribou are now illegal to hunt, and only a single, legally-huntable population of barrenland caribou in ACFN traditional territory remains. But this population too is in danger of 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 caribou hunting which sustained the ACFN for millennia may soon be impossible.

11. 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 vast wetlands that form an important water-based transportation network through key parts of 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.

5 Affidavit of Lisa Tssessaze, at paras. 24, 28-30, and 42.
6 Affidavit of Lisa Tssessaze, at paras. 8 and 24.
7 Affidavit of Lisa Tssessaze, at para. 27.
8 Affidavit of Lisa Tssessaze, at para. 31.
9 Affidavit of Lisa Tssessaze, at para. 5.

12. 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]

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

14. 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] 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]

15. ACFN argues this intervention on its own behalf and also on behalf of another Northern Saskatchewan First Nation: the Fond Du Lac Denesuline First Nation.[15]

PART III – ARGUMENT

16. For the ACFN, climate change is not an ordinary concern, but an existential emergency that has not been paralleled in thousands of years. If the scientists at Parks Canada and ECCC are right that the 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 the AFCN can lose the fish, birds, caribou, muskrat, beaver, moose, medicinal plants and other species that have furnished

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10 Affidavit of Lisa Tssessaze, at para. 19.
11 Affidavit of Lisa Tssessaze, at para. 50.
12 Affidavit of Lisa Tssessaze, at paras. 20, 48-51.
13 Affidavit of Lisa Tssessaze, at paras. 11-13, 33-36.
14 Affidavit of Lisa Tssessaze, at paras. 36-37.
15 Affidavit of Lisa Tssessaze, at para. 63.

sustenance and shaped their culture since time immemorial.[16] If the ACFN cannot navigate the Athabasca River during hunting seasons and cannot use the winter road, they will become isolated in a land that no longer sustains their people.[17]

17. Having been stripped of the ability to practice their Rights, ACFN will be forced to leave their territory and live elsewhere. They will no longer be *Dënesųłiné*; 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.[18] Suburban Edmonton or Saskatoon is not, and cannot, be their culture's home.

18. Although Saskatchewan portrays itself as "green", scholarly evidence shows that it is responsible for "some of the largest per capita emissions in the world", and when last measured (in 2012) no province emitted more GHG per capita than Saskatchewan.[19]

19. ACFN believes that GHG emissions must be reduced to the point of being net neutral, very urgently, and support the GGPPA as a necessary first step in that direction.

A. ACFN's Approach to the Constitutional Question

20. The Supreme Court recently affirmed that laws benefit from a "presumption of constitutionality".[20] In practice, that means the onus is on Saskatchewan to prove that the GGPPA is unconstitutional, and not Canada to prove the contrary. <u>Above all, the Court must remain clear-eyed that Saskatchewan bears the burden of proof in this case</u>**.**

21. ACFN agrees with Canada that the GGPPA is *intra vires* Parliament, particularly the "national concern" branch of Peace, Order, and Good Government (POGG). In pith and substance, the *Act* is about putting a binding, legally-enforceable minimum price on GHG emissions—a price that because of GGPPA's "backstop" architecture applies with equal stringency throughout Canada, as British Columbia rightly argues.

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16 Affidavit of Lisa Tssessaze, at paras. 19-20, 50-51.
17 Affidavit of Lisa Tssessaze, at paras. 21, 51.
18 Affidavit of Lisa Tssessaze, at para. 57.
19 "By the Numbers: Canadian GHG Emissions", by Paul Boothe and Felix A. Boudreault, published by the Ivey Business School of Western University (2016) (in Affidavit of Lisa Tssessaze, at Exhibit K, at page 12 and Figure 5).
20 *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras. 81-83, Canada's Book of Authorities [Canada's BOA], Vol 2, Tab 34.

22. ACFN also agrees with others that the GGPPA is *intra vires* the "emergency" branch of POGG (David Suzuki Foundation), or the criminal law power (Canadian Public Health Association, Ecofiscal Commission, Canadian Environmental Law Association).

23. ACFN's factum first discusses s. 35 of the *Constitution Act*, 1982, then discusses s. 91 of the *Constitution Act*, 1867, including its retort to Saskatchewan's argument.

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

24. The Reference question in this matter is broad and asks if the GGPPA is "unconstitutional in whole or in part". That wording is not limited to the *Constitution Act, 1867*, but also implicates the *Constitution Act, 1982*.

25. 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'".[21] 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".[22]

26. Thus when Crown action (or inaction) on GHG emissions and climate change imperils the environment on which a treaty right depends—for example, as climate change does for the caribou hunt—there is an infringement or perhaps even extinguishment of ACFN Rights. The *Constitution Act, 1982* becomes directly relevant in two ways.

27. **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 under the *Constitution Act, 1982*, the Crown has a duty to consult with Aboriginal peoples when adversely affecting an Aboriginal or Treaty right (*Haida Nation v. British Columbia*),[23] and obtain consent when extinguishing a Treaty right (*R. v. Sioui*).[24] In either formulation, accommodation of Aboriginal interests is a constitutional duty.

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21 *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*], at para. 40, BOA, Tab 6.
22 *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 919, BOA, Tab 9 (Wilson J, dissenting, but not on this point).
23 2004 SCC 73 [*Haida*], at paras. 32, 37, 43, 47, BOA, Tab 3.
24 [1990] 1 S.C.R. 1025 [*Sioui*], at p. 1063, BOA, Tab 10.

28. **Second**: When GHG emissions place Aboriginal and Treaty rights at stake, s. 35 of the *Constitution Act, 1982* affects the "classical" federalism balance of powers in the *Constitution Act, 1867*. It is settled law of the Supreme Court that, as stated in the *Quebec Veto Reference*, "the *Constitution Act, 1982* directly affects federal-provincial relationships".[25] Therefore when federal legislation, such as the GGPPA, mitigates the danger to Aboriginal and Treaty rights, that lends support to it being *intra vires* for constitutional reasons transcending the "classical" ss. 91-92 federalism analysis.

29. To be clear, ACFN neither submits that s. 35 is a federal head of power, nor that it replaces ss. 91-92 in federalism analysis. But it is a concurrent constitutional duty that leads to this conclusion: Where, but for the GGPPA, emissions of GHGs would be higher and further infringe (or perhaps extinguish) ACFN's Rights, s. 35 necessitates giving Parliament the deference to legislate so that the Crown's constitutional duty to observe those Rights is met. As the Supreme Court has held, because of the constitution's assignment of "Indians", the federal government is "vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples," and so remedial federal climate change legislation that *accommodates* ACFN's Rights appears constitutionally *necessary* to avoid the Crown unconstitutionally infringing or extinguishing those Rights.[26]

30. Or to invert that argument: If the GGPPA were constitutionally invalid, then as the evidence establishes there can be no question of Canada meeting its GHG reduction targets, with effects that would infringe and fail to accommodate ACFN's Rights—and spawn a further constitutional violation under s. 35 of the *Constitution Act*, 1982. [27]

31. As the Supreme Court held in the *Secession Reference*, "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".[28] It would therefore be a mistake for the Court to regard ss. 91-92 of *Constitution Act, 1867* in a "classical" vacuum, for on the facts of this

25 *Reference Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at 801, BOA, Tab 11.
26 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 176, BOA, Tab 2.
27 Affidavit of John Moffat, at para. 87 (in Volume 1 of Canada's Record)
28 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 50, Canada's BOA, Vol 2, Tab 32.

unique case classicism wrongly abnegates ACFN Rights under s. 35 of the *Constitution Act, 1982*. Rather the Court must favour an interpretation of the GGPPA and ss. 91-92 that best harmonizes with s. 35—i.e. Canada's interpretation.

32. If that means Saskatchewan must tolerate some intrusion on its provincial jurisdiction, then so be it: How the Crown distributes constitutional powers internal to itself (federal or provincial) is of subordinate importance to the duty of the honour of the Crown (itself a constitutional principle) toward those having constitutional Rights such as ACFN. This is what Chief Justice Dickson meant when he wrote that "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."[29]

33. The GGPPA therefore must be interpreted in favour of Canada so that Treaty 8 promises and ACFN Rights can be respected. This is easily accomplished by recognizing that the GGPPA is *intra vires* Parliament, while affirming that Saskatchewan too may regulate GHG emissions if it wishes. Any other outcome risks subjecting ACFN Rights to what the Supreme Court deplores as the "jurisdictional tug-of-war" or "jurisdictional wasteland" of federal-provincial relations.[30] Seen in this light, Saskatchewan's "watertight compartments" view of the constitution is not just misguided, but obsolete since 1982.

i. First Nations are "nations" for the purposes of POGG "national concern" and "national emergency" doctrines

34. ACFN submits that in light of the object of reconciliation with First Nations and s. 35 of the *Constitution Act, 1982*, when the Court interprets decades-old case law on 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. Doing so is consistent with the "living tree" character of the constitution, and necessary because *R. v. Crown Zellerbach*, the *Anti-Inflation Reference*, and their forerunners were decided before s. 35 became a significant factor in the Canadian legal landscape.

35. Prior to the arrival of the Europeans, native people in North America were independent nations who controlled their own territories and had their own practice,

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29 *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 109 (per Dickson CJ), BOA, Tab 5.
30 *Daniels v. Canada (Indian Affairs and Northern Dev't),* 2016 SCC 12, at paras. 14-15, BOA, Tab 1.

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.[31] In ACFN's case, the Supreme Court refers to Treaty 8 as "an exchange of solemn promises between the Crown and the various Indian nations".[32]

36. Accordingly, when the Court considers the POGG "national concern" doctrine as Canada urges, or the "national emergency" doctrine as the David Suzuki Foundation urges, it should ask this question: Which nation's concern or emergency?

37. The evidence demonstrates that ACFN is experiencing a "national emergency", categorically unlike Canada at large. While Canada's current target is to limit average global warming to 1.5°C, that average greatly understates warming in the North, and the change of up to 7.1°C predicted in ACFN's territory in the PAD. Warming of that magnitude is simply devastating, and unique to nations in Canada's North.

38. Even Saskatchewan agrees there is an emergency, 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.[33]

39. ACFN submit that these manifestations of climate change, which threaten survival as by making the gathering of food and sustenance "difficult and dangerous," are severe enough for the Court to recognize under the POGG national emergency doctrine. An emergency need not affect all of Canada, when it affects a discrete "nation" as ACFN are.

40. When the Court considers whether a national emergency exists, or how long it will last, it needs to remember that for the ACFN and other nations of Canada's North, the emergency is clear, and likely to last longer than for the nations of the South.

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31 *Sioui*, *supra* note 24, at pp. 1052-1053, BOA, Tab 10.
32 *Badger*, *supra* note 21, at para. 41, BOA, Tab 6.
33 Affidavit of Lisa Tssessaze, Exhibit G, at p. 40.

41. 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 cultural practices and Rights going back several millennia that are integral to ACFN identity, puts the survival of their culture and nation in doubt. Canada too will face major stresses with climate change—but its survival as a nation is hardly in doubt.

42. *R. v. Crown Zellerbach* stipulates that a factor in exercising the POGG "national concern" power is the existence of "an adverse effect on extra-provincial interests"—i.e. on another jurisdiction.[34] An adverse effect on ACFN Rights is inherently extra-provincial, both because ACFN possesses distinct nationhood from any province, and because Treaty 8 allows ACFN people to exercise their Rights throughout several provinces and territories.

43. ACFN also believes that when the Court considers the "national concern" doctrine in *Crown Zellerbach*, it must recognize that anthropogenic climate change is a "new matter which did not exist at Confederation".[35] Or to take a longer timescale: In the several millennia of ACFN nationhood and traditional knowledge, it is exceedingly recent.

44. According to Professor James Fleming and Dr. Spencer Weart, both historians of science, anthropogenic climate change was discovered in the 20th century. It was not until 1904, after Confederation, that Svante Arrhenius theorized that there might be such a thing as anthropogenic GHGs. He wrote that "the slight percentage of carbonic acid [CO_2 in mist] in the atmosphere may by the advances of industry be changed to a noticeable degree in the course of a few centuries," and that this could come about "as long as the consumption of coal, petroleum, etc, is maintained at is present figure."[36] Arrhenius was proved right in the 1950s when atmospheric measurements of CO_2 by Dr. Charles David Keeling showed a relentless upward trend. As Weart writes, "[t]his was not quite the discovery of global warming. It was the discovery of the *possibility* of global warming."[37]

45. In *R. v. Hauser*, the Supreme Court upheld the *Narcotics Control Act* under POGG because drug abuse was said to pose "a genuinely new problem which did not exist at the

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34 [1988] 1 S.C.R. 401 [*Crown Zellerbach*], at para. 35, Canada's BOA, Vol 1, Tab 24.
35 *Ibid*, at para. 33, Canada's BOA, Vol 1, Tab 24.
36 J. Fleming, *Historical Perspectives on Climate Change* (Oxford, 1998), at pp. 81-82, Canada's BOA, Tab 68.
37 S. Weart, *The Discovery of Global Warming* (Harvard, 2009), at pp. 19-37, Canada's BOA, Tab 71.

time of Confederation."[38] If that can be said of narcotics, which were not completely new (opium had existed for millennia), then surely it can be said of anthropogenic GHGs and climate change, entirely unknown to science at Confederation. POGG befits this threat, which is very new both in ACFN's thousands of years of traditional knowledge, and Canada's shorter history.

ii. Saskatchewan's failure to consult and accommodate First Nations demonstrates provincial inability

46. Doctrinally, it is certainly true that Saskatchewan can regulate GHGs and climate change if it wishes; that conclusion flows from the double aspect doctrine and the sharing of federal and provincial jurisdiction over the environment.[39] But under POGG, not just any kind of provincial regulation will do. The Supreme Court in *Crown Zellerbach* considered it relevant, as a question of mixed fact and law, whether Saskatchewan is able or unable to regulate GHGs in a manner that avoids "an adverse effect on extra-provincial interests."[40] Canada submits, and ACFN agrees, that Saskatchewan lacks this ability.

47. Saskatchewan's approach to GHG emissions affects First Nations both within and beyond its provincial borders. Yet Saskatchewan has no ability to consult all the First Nations in Canada who are and will be affected by its emissions.

48. For Saskatchewan to prove provincial ability (the other side of the "provincial inability" coin) as is its burden, it must not only demonstrate in evidence that it has the capacity to regulate GHG emissions, but that it can do so in conformity with s. 35 of the *Constitution Act*, 1982. This is because so-called provincial "ability" which violates the constitution is not real ability at all, and on the contrary, is evidence of provincial inability.

49. Saskatchewan's flagship climate change strategy, known as *Prairie Resilience*, touted in its Factum, demonstrates exactly this provincial inability.[41]

50. After publishing but before implementing the *Prairie Resilience* strategy, Saskatchewan consulted extensively: fully 85 different provincial stakeholders were

38 [1979] 1 S.C.R. 984 at pp. 997 and 1000, BOA, Tab 8.
39 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63-65, Canada's BOA, Vol 1, Tab 12.
40 *Crown Zellerbach*, *supra* note 34, at para. 35, Canada's BOA, Vol 1, Tab 24.
41 Record of Saskatchewan, Tab 10; Factum of Saskatchewan, at para. 9.

consulted, according to the resulting consultation report.[42] Yet it never consulted (much less accommodated) ACFN, Fond Du Lac First Nation, or any other First Nation; literally not a single First Nation is named in the consultation report.[43] Instead, the Ministry of Environment chose to "seek out input"—a euphemism—from Indigenous leaders, and sidelined them from the formal consultation process.[44]

51. Saskatchewan's decision to exclude First Nations from the consultation process on its GHG strategy is fatal to its contention of provincial ability. The Supreme Court held in the *Rio Tinto* case that when a government lays plans at a high level—as Saskatchewan did beginning with *Prairie Resilience*—that in itself affects Aboriginal rights:

> 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* adverse impact on land and resources.[45]

52. *Prairie Resilience* did "set the stage for further decisions," including GHG legislation. As the Environment Minister said when introducing Bill 132 in the Legislature, "this legislation [is] the main legislative response as a part of *Prairie Resilience*."[46]

53. Although this case does not challenge it, *Prairie Resilience* is still relevant. When Saskatchewan is unable to fulfill the relatively easy task of consulting ACFN, Fond du Lac First Nation, and others in the province—which is what the record shows—then is it arguable that Saskatchewan has "ability" to consult and accommodate all First Nations elsewhere in Canada whose Aboriginal or Treaty rights are infringed by its GHG emissions? Certainly not: Saskatchewan botched the job even in its own backyard.

54. Thus to answer POGG's provincial inability test and whether Saskatchewan is able to avoid "an adverse effect on extra-provincial interests" of First Nations, the answer is no, Saskatchewan is unable. Worse, Saskatchewan's inability affects not a trivial matter, but a

42 Affidavit of Lisa Tssessaze, Exhibit L at p. 4.
43 Affidavit of Lisa Tssessaze, at para. 62 and Exhibit L at p. 36.
44 Affidavit of Lisa Tssessaze, Exhibit L at p. 4.
45 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 47, BOA, Tab 12.
46 Hansard, Legislative Assembly of Saskatchewan (28th), 26 November 2018, at p. 638.

binding Crown duty under s. 35 of the *Constitution Act, 1982* to consult and accommodate First Nations with respect to Saskatchewan's GHG emissions and infringement of their rights. Since inability to uphold a constitutional duty is the severest, most unacceptable type of inability known to law, that is extremely strong reason to uphold the GGPPA.

C. The *Act* is *intra vires* Parliament's s. 91 powers:

55. Contrary to Saskatchewan's belief that the GGPPA "backstop" unconstitutionally singles out or punishes certain provinces, the GGPPA is facially neutral, non-discriminatory, and constitutional. Its legal force and effect in setting a minimum price is uniform across Canada (although provinces may choose to operationalize pricing using legislation of their own). The GGPPA applies to all provinces, even if only some provinces (the naysaying ones) become subject to the carbon price "backstop".

56. These facts are germane to this striking concession in Saskatchewan's factum:

> "the Attorney General [of Saskatchewan] would have no constitutional objection if the federal government adopted a national carbon tax that applied uniformly all across the country. The Attorney General would also have no constitutional objection if the national carbon tax provided for variations based on objective criteria. <u>The Attorney General's fundamental objection to the application of the federal carbon tax is that it is directly tied to how Provinces have chosen to exercise or not exercise their own legislative jurisdiction… This is constitutionally illegitimate</u>."[47]

57. Saskatchewan's concession is actually dispositive of this case, for three reasons.

58. First, it is settled law that Parliament can legislate a "backstop", whose operation is contingent on there being provincial legislation or not. Per the unanimous Supreme Court in *R. v. Furtney*, Parliament "may incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely the existence of provincial legislation."[48]

59. Second, when Saskatchewan complains in the above passage that "objective criteria" are lacking to invoke the GGPPA's "backstop", that is actually an administrative law question about the reasonableness of Cabinet's decision applying the backstop in Saskatchewan, <u>not</u> a question about the GGPPA's core constitutionality. Sections 166(3)

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47 Factum of Saskatchewan, at para. 39.
48 *R. v. Furtney*, [1991] 3 S.C.R. 89, at pp. 104-105, BOA, Tab 7.

and 189(2) of the GGPPA contain the criteria that Cabinet considered when it decided to list Saskatchewan for the "backstop". Saskatchewan's submission that Cabinet was "politically motivated" and did not exercise its discretion objectively is properly dealt with in a judicial review of the reasonableness of Cabinet's implementation decision—but Saskatchewan never filed a judicial review impugning that decision (and neither did Ontario or New Brunswick).[49] Its complaint that the criteria are not "objective" is thus purely hypothetical, and unsupported by any record of fact and evidence showing that Cabinet abused the criteria non-objectively. A hypothetical submission that the GGPPA's "backstop" lacks objectivity is imaginative, but falls short of Saskatchewan's burden of proof that the GGPPA *per se* is unconstitutional. There are numerous cases where the Supreme Court upheld a statute as constitutional, even though a challenger argued that a power of decision in the statute *might be* (or even *was*) exercised unconstitutionally.[50]

60. Third, how Saskatchewan has "chosen to exercise or not exercise [its] own legislative jurisdiction" is not a variable in this case as the Attorney General believes. The Court need observe that the Constitutional Question as worded by the Lieutenant Governor is limited to the GGPPA's statutory construction *stricto sensu*, and not the constitutionality (or not) of the GGPPA's effects in some presumed, hypothetical fact situation. Were that the intent, the Lieutenant Governor would have posed a quite different Constitutional Question outlining the fact situation to the Court. But that is not what the Lieutenant Governor did, and so when the Attorney General's "fundamental objection" rests on assumptions about "how Provinces have chosen to exercise or not exercise the own legislative jurisdiction", that is simply not a germane objection in this case.

61. ACFN agrees with the Supreme Court in *R. v. Hydro-Québec* that the environment, including the emission of polluting substances like GHGs, is a double aspect subject that Parliament and the provincial legislatures may concurrently regulate.[51] Saskatchewan's Legislature also seems to agree, because one week after Saskatchewan's Attorney General filed its Reply Factum, the *Management and Reduction of Greenhouse Gases Act* was amended to insert this new clause as section 3.1:

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49 Reply Factum of Saskatchewan, at para. 24.
50 *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69, at paras. 132-139, BOA, Tab 4.
51 *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 112, Canada's BOA, Vol 1, Tab 25.

> If the minister is satisfied that the greenhouse gas emissions of a regulated emitter or class of regulated emitters are regulated by another Act or an Act of the Parliament of Canada, the Lieutenant Governor in Council may exempt that regulated emitter or class of regulated emitters from this Act.[52]

62. There is an irony here: The same "backstop" architecture that Saskatchewan assails in the GGPPA is emulated in its own *Management and Reduction of Greenhouse Gases Act*, albeit with fewer statutory criteria to constrain the Lieutenant Governor in Council's discretion (*i.e.* none at all). Thus, when Saskatchewan submits that Canada's "recognition of provincial jurisdiction is fatal", that submission lacks credibility and an air of reality because Saskatchewan's law does the analogous thing—except more so.[53]

63. The preferable view is that the double aspect doctrine and cooperative federalism allow Canada to defer to Saskatchewan's laws and vice versa—within the presumption of constitutionality, and without fabricating conflict where none exists.

PART IV – ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 25, 2018

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52 *The Management and Reduction of Greenhouse Gases Amendment Act*, 2018, Bill 28-132, received Royal Assent on December 5, 2018.
53 Reply Factum of Saskatchewan, at para. 8.

SCHEDULE A – TABLE OF AUTHORITIES

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