

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 UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c C-29.01

The Constitutional Questions Act, 2012

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PART I – OVERVIEW & STATEMENT OF FACTS

a) 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 Saskatchewan questions whether Canada has the jurisdiction to enact such legislation and has proceeded with the within Reference pursuant to s. 7 of the *Constitutional Questions Act, 2012*.
2. The Attorney General of Saskatchewan (“Saskatchewan”) submits that the *GGPPA* imposes a tax on provinces and violates constitutional principles of federalism. It is their position that sections 91 and 92 of the *Constitution Act, 1867* delineate limits on powers afforded to federal and provincial government.¹ Saskatchewan submits that the federal government imposing a “carbon tax” on the provinces encroaches on the province’s individual authority to decide how best to address the reduction of GHG emissions. It is also their position that the tax violates the principle of “no taxation without representation” enshrined in section 53 of the *Constitution Act, 1867*.
3. The Attorney General of Canada (“Canada”) submits that Government of Canada passing the *GGPPA* falls within their jurisdiction to enact legislation for the peace, order, and good governance of Canada on matters of national concern. The *GGPPA* aims to ensure that one province’s failure to act does not adversely affect Canada as a whole. Canada submits that the *GGPPA* imposes a regulatory fuel charge. If this Court characterizes the charge as a tax, Canada submits the tax is validly imposed under Government of Canada’s taxation power.
4. It is the Assembly of First Nations (“AFN”) position the Government of Canada has the jurisdiction to impose a charge, or in the alternative a tax, in provinces and territories that do not meet minimum GHG emission standards pursuant to its peace order and good government

¹ RSC 1985, Appendix II, No5., ss 53, 91, 92.

powers as GHG's are a matter of national concern, particularly where provinces and territories fail to take sufficient action. However, prior to enacting the *GGPPA*, Canada has a legal obligation² to recognize Aboriginal and Treaty rights in Canada. 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. The AFN submits that the *GGPPA*, in its current draft form, is unconstitutional because it lacks consideration of First Nation jurisdictional interests.

b) Statement of Facts

5. The Assembly of First Nations (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 and their relationships with the Crown are founded on the inherent self-governing authority of First Nations, the *Royal Proclamation of 1763* and the fiduciary obligations that it gives rise to, as well as historic peace and friendship treaties, military alliance treaties; treaties relating to trade, pre-Confederation treaties, the numbered treaties, modern treaties, self-government agreements, and other arrangements. 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."³

² *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"*].

³ 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
www.afn.ca/uploads/files/env/report_2_cc_uniquely_impacts_physical_social_and_cultural_aspects_final_001.pdf

8. A 2011 Policy Brief prepared by researchers from the University of Ottawa citing data from Statistics Canada 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.”⁴ As people living in poor quality housing are more vulnerable to damages from extreme weather events, it is clear that First Nation communities and their infrastructure are far more susceptible to climate change impacts when compared to other Canadians.

9. The situation of Indigenous Peoples of Canada was further explored by the federal government within the document *Pan-Canadian Framework on Clean Growth and Climate Change*.⁵ Although the federal government limited its area of concern mostly those communities along coastal and northern regions, it addressed the susceptibility 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.”⁶

10. A 2016 Research Article entitled *Projected Scenarios for Coastal First Nations’ Fisheries Catch Potential under Climate Change: Management Challenges and Opportunities*⁷ examined the impact of climate change on First Nations’ fisheries along the British Columbia coast and ultimately concluded that with limited exceptions, modest to severe declines in catch potential was suggested for all commercial fisheries with known First Nation participation. The researchers estimated that regional losses in landed revenue for a selection of First Nation’ fisheries were projected to suffer a 16.4%- 28.9% reduction in total landed revenue by 2050 as a result.⁸

11. Over and above the environmental impacts of climate change, First Nations also tend to be disproportionately impacted from the implementation of regulations over GHG emissions and

⁴ Sustainable Prosperity- Policy Brief 2011- Carbon Pricing and Fairness.
<https://institute.smartprosperity.ca/sites/default/files/publications/files/Carbon%20Pricing%20and%20Fairness.pdf>
 [“Policy Brief”]

⁵ 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”]

⁶ Pan Canadian Framework at pp. 8.

⁷ 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. 8 [“Fisheries Catch Potential”].

⁸ Fisheries Catch Potential at pp. 8.

the resulting charges/taxes. The aforementioned Policy Brief confirmed that “Indigenous communities, in addition to their lower average incomes, may be more vulnerable to the regressive impacts of a carbon price due to factors such as remote living conditions, poor quality housing and subsistence lifestyle.”⁹

12. For many indigenous communities within Ontario the 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 Nation communities who rely on continuous diesel-fired electricity generation. These First Nations were disproportionately affected by the cap-and-trade system based on their reliance on this fuel source and suffered far greater economic disadvantages than other Ontarians.

13. The impact of carbon pricing on remote First Nations was further explored in the aforementioned Policy Brief. 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 communities will be greater than those facing shorter distances and lower costs to access basic necessities.”¹⁰

14. Further, the Policy Brief speculated that as remote Aboriginal communities 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.¹¹

PART II – STATEMENT OF ISSUES

15. The issues in this matter are as follows:

- a. Does the Government of Canada’s have the constitutional authority over the regulation of GHG emissions in Canada on the basis that it is a matter of national concern?

⁹ Policy Brief, supra note 7 at pp. 5.

¹⁰ Policy Brief, Ibid at pp. 10.

¹¹ Policy Brief, Ibid at pp. 10.

- b. Does the Government of Canada have the constitutional onus to address First Nations' authority as decision-maker in the area of greenhouse gas emission regulation and associated carbon pricing regimes based on the Crown's obligations to First Nations derived from the principle of the honour of the Crown, as supported by the *UN Declaration* and international law?

PART III –ARGUMENT

Government of Canada's jurisdiction over the regulation of GHG emissions

16. The AFN submits that that the passing of the *GGPPA* and regulation of GHG emissions should be viewed as a matter of national concern.

17. The AFN submits that Government of Canada has met the threshold for the determination that GHGs are a matter which constitutes a national concern pursuant to the federal peace, order and good government power derived under s.91 the *Constitution Act, 1867* by satisfying the test identified in the Supreme Court case of *R. v. Crown Zellerbach Canada Ltd.*¹², where the court stated 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. 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

18. In examining the singleness, distinctiveness and indivisibility of a matter of provincial concern, the Supreme Court of Canada provided that it is relevant to consider the effect on interests outside of the province in question arising as a result of a province's failure to deal with the regulation of the intra-provincial aspects of the matter.¹⁴

19. The concern over GHGs did not exist at the time of Confederation but has since become a matter of vital interest, having both extra-provincial as well as global impacts. Further, GHGs have the singleness, distinctiveness and indivisibility distinguishing them from matters of merely

¹² *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 423-34.

¹³ *Ibid* at para. 33.

¹⁴ *Ibid* at para. 33.

provincial concern as they do not stay within one jurisdiction. GHGs are transboundary by nature. There would also be a very real impact and harm to other provinces and territories should a province fail to address the issue of GHGs, most notably the adverse impacts to First Nation Territories and on the exercise of Aboriginal and Treaty Rights.

20. The AFN submits that despite meeting the threshold and establishing that GHG emissions are a matter which constitute a national concern, the Government of Canada is constitutionally bound to address the impact of GHG emissions and their regulation in First Nations territories, including any associated economic benefits derived therefrom.

21. The AFN submits that First Nations are an order of government within the constitutional framework and the right to self-determination in the area of GHG regulation is an Aboriginal right and that the honour of the Crown dictates that Government of Canada has a positive constitutional obligation to address the issue and the role of First Nations in instituting GHG regulation within their respective territories.

22. GHG regulation should also not be used as a limiting factor on First Nation economies and development. Instead, as stated, 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 governance which engages First Nations and promotes the growth of their respective economies and development.

The Honour of the Crown

23. Per the Supreme Court in *Mikisew Cree First Nation v. Canada (Governor General in Council)*¹⁵, the honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and Indigenous peoples. Its underlying purpose is the reconciliation of Crown and Indigenous interests.¹⁶

24. While the regulation of GHG's may not have been in the contemplation of First Nations at the time of European contact, it is clear that 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

¹⁵ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40.

¹⁶ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40. para 21.

harvesting resources without jeopardizing the integrity, diversity or productivity of the environment, as passed down through the generations by Elders and parents¹⁷.

25. GHG emission regulation will also clearly have an adverse impact on traditional aboriginal rights, including but not limited to hunting as well as fishing as affirmed previously by the Supreme Court for various First Nation 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 will be more significantly impacted.

26. The AFN submits that reconciliation of First Nation interests and that the construction of s. 35(1) must be viewed not in the context of simply “continuity” but grounded by the “living tree” doctrine. As per the Supreme Court, “our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.”¹⁸

27. Climate change and the regulation of GHG emissions are modern issues which have had and will continue to have significant impacts on the practices, customs and traditions integral to the distinctive culture of First Nation peoples across Canada, who have at all times maintained jurisdiction regarding the regulation of GHG emissions throughout their respective territories. This includes jurisdiction over carbon pricing.

28. The Supreme Court in *Mikisew* confirmed that determining what constitutes honourable dealing, and what specific obligations are imposed by the honour of the Crown, depends heavily on the circumstances faced by the court in effect acknowledging that 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.¹⁹

29. The AFN states that to fully pursue the goal of reconciliation and their fiduciary duty to First Nations, due deference must be given to the modern realities facing all First Nation peoples. The effects of climate change and GHG emission regulation and its impacts on First Nations are unique circumstances and the honour of the Crown must evolve to not only acknowledge the historical role of individual First Nations in resource management on their respective territories

¹⁷ Suzanne Berneshawi. “Resource Management and the Mi’kmaq Nation”. The Canadian Journal of Native Studies XVII, 1 (1997); 115-148 at pp. 118-119.

¹⁸ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.

¹⁹ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40 at para 24.

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.

30. This is in line with Canada and the provinces plan to address climate change using the four pillars identified in the *Pan-Canadian Framework on Clean Growth and Climate Change*.²⁰ “The federal and provincial governments agreed to move forward respecting, protecting, and safeguarding the rights of Indigenous Peoples, with robust, meaningful engagement drawing on their Traditional Knowledge and recognizing opportunities of Indigenous Peoples as drivers of climate action”.²¹

The United Nations Declaration on the Rights of Indigenous Peoples

31. The AFN submits that the Government of Canada’s obligation to act honourably in its dealings with First Nations requires that it recognize the role of the *UN Declaration* as a guide on the path of reconciliation.

32. The *UN Declaration* has been made a priority of the Government of Canada which has committed to implementing the *UN Declaration* “without qualification”²² 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.²³

33. The *UN Declaration* recognizes First Nations 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.²⁴ This includes the right to maintain and develop their own economic systems and to engage freely in all other economic activities.²⁵

²⁰ Four pillars include: pricing carbon pollution; complementary measures to further reduce emissions across the economy; measures to adapt to the impacts of climate change and build resilience; and actions to accelerate innovation, support clean technology, and create jobs.

²¹ 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, Pp 2-4.

²² Minister of Indigenous and Northern Affairs Carolyn Bennett, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.

²³ Bill C-262. <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8160636&Language=E>

²⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, articles 3 and 4.

²⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, articles 20.

34. The *UN Declaration* further requires that the Government of Canada is required to obtain the free, prior and informed consent (“FPIC”) of First Nations prior to the adoption of regulations that impact them.²⁶

35. 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.” As per the Supreme Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, reconciliation is the “fundamental objective of the modern law of aboriginal and treaty rights.”²⁷

36. As the Supreme Court has confirmed that the underlying purpose of the principle of the honour of the Crown is the reconciliation of Crown and Indigenous interests,²⁸ the AFN therefore submits that the honour of Crown supports the Government of Canada giving due consideration to the role of the *UN Declaration* as a guide on the path of reconciliation. This includes recognizing First Nations inherent right to self-determination and governance in the area of GHG emission regulation as provided for in the *UN Declaration*. This also includes the onus to obtain First Nations free, prior and informed consent before proceeding with the implementation of the *GGPPA*.

International Obligations supporting First Nation jurisdiction over carbon pricing

37. The AFN submits that relationship between First Nations and Canada is of an international nature. Prior to confederation, First Nations governments exercised their authority to enter into treaty and international agreements. The Treaty of Guswente (Two-row Wampum) is an early example of the nation to nation relationship intended to remain between First Nations and the various European entities arriving on the shores of Turtle Island. Later examples include the signing of Peace and Friendship treaties. At this time the actions of the Canadian governments were limited by an actual monarch. The Royal Proclamation of 1763 serves as an example in which the Imperial Crown limits the authority of Crown actors and intrinsically recognizes First Nation jurisdictions in the creation of law and title to land. The nation to nation relationship is embedded within the text of the document.

²⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, articles 19.

²⁷ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1.

²⁸ *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40 at para 22.

38. International aspects of the relationship faded as Canada began to encroach upon First Nations laws and jurisdiction to manage affairs. First Nations made treaties with the Imperial British Crown prior to confederation in order to establish the government-government, nation-nation relationship which was to continue in perpetuity.

39. This Constitutional Question must also focus on reconciliation which must occur in the government sphere. The *GGPPA* purports to assert that only the federal, provincial and territorial governments have authority to impose a price on GHGs. This assertion is reflective of steps Canada has taken in the past to diminish the power of First Nations people in this country. The AFN submits that international discourse calls for the recognition that First Nations have jurisdictions in this area, which also form part of the First Nations' inherent rights.

40. As noted, Canada has endorsed the *UN Declaration* without qualification and is taking steps to honour their new commitments. In its current form, the *UN Declaration* cannot dictate the relationship Canada should have with First Nations people but it can serve as a guide on the path of reconciliation.

41. Acknowledging the self-determination of First Nations in Canada means the Crown will refrain from unilaterally imposing conditions on a nation. The *GGPPA*, must be interpreted to enable First Nations an option to participate or specify how they would fit into the regulatory models. Jurisdictional challenges arise which AFN submits is the lynchpin on whether or not the *GGPPA* is constitutional. Nations may elect to implement their own carbon pricing as an act of self-determination. Cooperative federalism requires that the *GGPPA* work in tandem with First Nations exercising their constitutional rights.

42. Canada and Saskatchewan have each questioned the AFN's involvement in this case. The question of respecting First Nation's authority is a constitutional issue the AFN submits was not contemplated by the two "Crown" representatives. Their internal debate has kept them blind to the third party with legitimate interests. The Crown may not want to acknowledge the obligations created in 1725 and beyond but it is honour bound. The *GGPPA* must be interpreted to allow the exercise of self-determination in order to meaningfully engage in reconciliation with respect to the Constitutional orders of government.

43. The AFN submits that the *GGPPA* is a clear instance where attitudes of the past must not prevail in contemporary times. The *UN Declaration* is a tool to assist Canada and its First

Nations people to reconcile relations. Self-determination being recognized would allow First Nations to participate more broadly in the regulatory models imposed in their territories. These models would include carbon pricing but could also be developed in the areas of environment and wildlife conservation.

44. As discussed, the *UN Declaration* and the Government of Canada's undertaking to apply it on a domestic level supports AFN's submissions that First Nations should be afforded the right to develop and enact their own carbon pricing programs within the *GGPPA*²⁹.

45. Other international documents also provide valuable insight on the inclusion of First Nations people in the regulation of GHG emissions, allowing for the application of an international lens to a domestic issue. This includes the *United Nations Framework Convention on Climate Change* ("UNFCCC")³⁰. The UNFCCC says adaptation action should be guided by the best science, traditional knowledge and Indigenous knowledge.

46. Initiatives such as the *Reducing Emissions from Deforestation and forest Degradation (REDD+)*³¹ also acknowledge 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.

47. The *UN Declaration*, the UNFCCC and REDD+ initiative are all international protocols which have been supported by Canada. AFN submits that the inclusive nature of these protocols support the argument that the *GGPPA* be interpreted in ways which grant First Nation governments authority to develop internal measures aimed at the reduction of GHG emissions.

48. The AFN further submits that these international protocols and the Government of Canada's support for same are additional circumstances which be given weight in analyzing the Crown's obligations to First Nations arising by virtue of the honour of the Crown and the Government of Canada's implementation of the *GGPPA*.

Right to Self-determination within Territories

²⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, articles 3, 29.1 and 32.1.

³⁰ *United Nations Framework Convention on Climate Change*, Preamble, article 7.5

³¹ Reducing emissions from deforestation and forest degradation in developing countries (REDD+), https://unfccc.int/files/land_use_and_climate_change/redd/application/pdf/compilation_redd_decision_booklet_v1.2.pdf

49. The AFN submits that in order to meet its obligation to act honourably to First Nations in relation to the implementation of carbon pricing and GHG emission regulation, the Government of Canada must meaningfully implement the *UN Declaration* and give effect to its commitments in the *UNFCCC*, including the accommodation of First Nations right to develop and enact their own incentive programs to reduce GHG emissions in their traditional territories. Monitoring and enforcement measures can be implemented with the assistance of First Nation bodies.

50. The AFN further submits that carbon and other GHGs are being commodified by the *GGPPA*. A significant own-source revenue commodity market now exists which First Nations can benefit from and support traditional land practices.³² First Nations mechanisms for the implementation of a comparable regulatory charge are not mentioned in the *GGPPA*. The AFN submits that the *GGPPA* in its current form is inconsistent with articles of the *UN Declaration*, including Article 3,³³ and is again a breach of the Crown's duty to act honourably in its dealings with First Nations.

Right to participate in economy

51. Canada and the provinces have established robust economies from centuries of pollution and the emission of GHGs. These economies have largely excluded First Nations and government policies were structured to diminish the aboriginal economy. In essence, Canada and the provinces have effectively used up all the carbon space in the atmosphere. First Nations are just beginning to develop their economies and industries, but there is no more room for any further carbon releases.

52. Through the *GGPPA*, Canada can provide tailored approaches, with First Nations, to address climate change impacts, mitigation and green projects with First Nations. 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 and promotes the growth of their respective economies and development.

53. The *GGPPA* contemplates the possibility of exemptions being made available but does not specifically entitle First Nations or their people to economic benefits to address the adverse

³² Don Richardson, Ph.D, *First Nations Participation in Climate Markets Study*, (Guelph Ontario, Shared Value Solutions, 2018)

³³ *United Nations Declaration on the Rights of Indigenous Peoples*, article 3

economic impacts of carbon pricing³⁴. The only meaningful consideration given by the Crown has been representations that carbon pricing policies will include revenue recycling. The automatic application of the federal backstop to First Nations would be discriminatory because it limits First Nation's ability to develop in the same fashion as other stakeholders in the same industries.

54. The federal government and provinces have the ability to grant First Nations necessary authority to implement pricing measures without offending the doctrine of interjurisdictional immunity. Federal and provincial redistribution models, for funds allocated through carbon pricing, currently lack compensation mechanisms correlated to First Nations' existing title over traditional territories. The *GGPPA* excludes First Nations from directly acquiring a portion of the substantial economic benefits which States receive for implementing carbon pricing

Conclusion

55. The AFN therefore submits that the honour of the Crown, a constitutionally embedded principle, must evolve and adapt to modern circumstances as a result of the Constitution being a "living tree". In weighing the constitutional obligations of the Government of Canada to First Nations as a result of its attempts to implement the *GGPPA* on the basis that GHG emissions are a matter of national concern, the court must give due consideration to the impacts of both climate change and GHG regulation on vulnerable First Nation peoples, including their Aboriginal and Treaty rights.

56. Further, in evaluating the Crown's obligations to First Nations, consideration must be given to the principles as outlined in the *UN Declaration* and the undertakings that the Government of Canada has subscribed to in its endorsement of other relevant international law.

57. The current iteration of the *GGPPA* must therefore be modified to incorporate a more appropriate system of GHG regulation and governance which engages First Nations and promotes the growth of their respective economies and development. This includes making adequate provision for First Nation participation in the regulation of GHG emissions and carbon pricing within their respective territories and the use of any resulting economic benefits derived from the First Nations inherent right to self-determination and to participate in the economy. The honour of the Crown requires no less.

³⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, articles. 5 and 20

PART V – ORDER REQUESTED

58. Climate change will adversely impact First Nations. As such, First Nations have the jurisdiction to create their own greenhouse gas emission regulations. The *GGPPA* must be read in a manner that gives effect to First Nation participation in the regulation of GHG emissions and carbon pricing within their respective territories and the use of any resulting economic benefits.

59. The AFN respectfully requests the following Order:

- a. 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 Regina, Saskatchewan, this 25th day of January, 2018.

SIGNED BY:

“Scott Hopley”

Scott Hopley

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PART IV – TABLE OF AUTHORITIES

Authorities
<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i>, 2005 SCC 69, [2005] 3 SCR 388
<i>Mikisew Cree First Nation v. Canada (Governor General in Council)</i>, [2018] SCC 40.
<i>R. v. Crown Zellerbach Canada Ltd.</i>, [1988] 1 SCR 401
<i>Reference re Same-Sex Marriage</i>, [2004] 3 S.C.R. 698

PART V - STATUTORY PROVISIONS

<i>Constitution Act, 1867</i> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

PART VI – SECONDARY SOURCES AND OTHER MATERIALS

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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 www.afn.ca/uploads/files/env/report_2_cc_uniquely_impacts_physical_social_and_cultural_aspects_final_001.pdf
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<u>Minister of Indigenous and Northern Affairs Carolyn Bennett, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, May 10, 2016.</u>
<u>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</u>
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PART VII – INTERNATIONAL MATERIAL

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United Nations Framework Convention on Climate Change, article 7.5