

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

**IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018,
c. 12, s. 186**

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

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PART I –OVERVIEW AND FACTS

1. In this appeal, the Attorney General of British Columbia (“British Columbia”) argues that through a proper interpretation of its pith and substance, the *Greenhouse Gas Pollution Pricing Act* (“GGPPA”) properly falls under the national concern branch of the federal government’s residual Peace, Order and Good Government (“POGG”) power, with minimum intrusion on provincial jurisdiction or the structure of the federation.

2. The Assembly of First Nations (“AFN”) states that the Alberta Court of Appeal erred in refuting this contention and their finding that the GGPPA was *ultra vires* on the basis that upholding the constitutionality of the GGPPA pursuant to the federal government’s POGG powers would fundamentally alter the constitutional balance that exists between the federal and provincial governments. In addition, the Court of Appeal failed to consider how section 35 of the *Constitution Act, 1982*¹ informs the federal government’s powers under s. 91 of the *Constitution Act, 1867*² and the division of powers analysis.

3. There is no dispute that First Nations will experience the impacts of climate change in ways that most non-First Nations Canadians will not due to a heavy reliance on the environment, their locations and their economic situations. This was accepted by the majority of the Ontario Court of Appeal in the *Ontario Reference*, which noted that climate change has had a particularly serious impact on First Nations communities in Canada, which tend to be exacerbated by the close relationship between First Nations and the land and waters on which they live.³ Feehan J.A. in his dissent in the *Alberta Reference* further noted that the risks of climate change include infrastructure damage for remote First Nations communities, as well as the disruption of caribou migration and the gathering of food on which particular First Nations depend.⁴

4. The AFN submits that the effects of anthropogenic climate change and its disproportionate impacts on First Nations across Canada and the exercise of their Constitutionally protected s. 35

¹ [The Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [s. 35](#).

² [The Constitution Act, 1867](#) (UK), 30 & 31 Victoria, c 3, ss. [91-92](#).

³ [Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544](#) at [para 12](#) [“*Ontario Reference*”].

⁴ [Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74](#) at [para 880](#) [“*Alberta Reference*”].

and inherent rights demands that consideration be given to the entirety of the Constitution, and not be restricted solely to ss. 91 and 92 of the *Constitution Act, 1867*. The AFN will demonstrate how this approach ultimately supports a finding that the *GGPPA* is wholly *intra vires*.

PART II – QUESTION IN ISSUE IN THIS APPEAL

5. The AFN submits that section 35 of the *Constitution Act, 1982*, must be considered in a division of powers analysis and that with this consideration in mind, the *GGPPA* is wholly constitutional.

PART III –STATEMENT OF ARGUMENT

A. Section 35 and its interrelationship with the division of powers in Canada

6. In its consideration of the impacts of s. 35 of the *Constitution Act, 1982*, on a division of powers analysis, the majority in the *Alberta Decision* opted to not address the issue, citing that fact that it in its consideration there was an insufficient factual record and argument from which it could properly consider the broad issues raised. It noted that, as in the *Saskatchewan Reference*, it was not possible to deal with this submission on the interrelationship between s. 35 and the division of powers generally in Canada.⁵

7. The AFN submits that without a doubt, GHG emissions and their effect on the climate are disproportionately affecting First Nations who depend on their environment in fundamentally different ways than average Canadians, including hunting, fishing and the continuity of their overall traditional way of life. No party to this matter has disputed this. There is therefore arguably a *prima facie* case that s. 35 is a live issue in this matter warranting consideration, as these practices have been affirmed as inherent rights for a variety of First Nations and guaranteed within the text of various Treaties. For example, the Robinson-Huron and Superior Treaties guaranteed First Nations signatories the “full and free privilege to hunt over the territory now ceded by them, and to fish in the waters thereof as they have *heretofore been in the habit of doing*”⁶ [emphasis added].

8. With respect to the evidentiary record on which the majority relied to dismiss any

⁵ *Alberta Reference* at [para. 285](#).

⁶ [Robinson Huron Treaty](#) and [Robinson Superior Treaty](#).

consideration of s. 35 in the division of power analysis, the AFN contends that this is not a basis on which to dismiss to the applicability of s. 35. On the contrary, Alberta's failure to show any evidence that it consulted local First Nations (e.g. the Athabasca Chipewyan First Nation) before adopting climate policies that injured Treaty rights in itself is an admission that s. 35 was not upheld. Not a single province opposed to the constitutionality of the *GGPPA* has filed evidence showing it consulted First Nations on the impact of its policies on anthropogenic climate change and s. 35 inherent or Treaty rights. For example, Alberta's focus was and continues to be on addressing GHG emissions in ways that it believes best meets its unique needs and circumstances, particularly economic, with no mention or regard for the First Nations residing within the province and the disproportionate impacts that its actions, or lack thereof, will have on them.⁷

9. Alberta's disregard for the effects of their proposed GHG emission plan on First Nations, tailored to protect its economic circumstances and its GHG emission intensive industries, in addition to the fact that its record demonstrates the lack of any measurable efforts at consultation with First Nations, reflects the pervasive and systemic disregard First Nations peoples continue to be subjected to in Canada, even where climate change has the potential to extinguish rights.

10. The question in the *Alberta Reference* broadly asked the Alberta Court of Appeal to consider whether the *GGPPA* was "unconstitutional in whole or in part." It was therefore not solely about section 91 and 92 powers but rather required an analysis of the entirety of the *Constitution Acts of 1867 and 1982*, including interplay with s.35 rights. The inclusion of an analysis of the interrelated nature of s. 35 in a division of powers analysis would have properly reflected how the individual elements of the Constitution are linked, and as per this Court's decision in the *Secession Reference*, how they should "be interpreted by reference to the structure of the Constitution as a whole."⁸

11. Further, as the constitution is a "living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life"⁹, the majority in the *Alberta Reference* should have interpreted the national concern branch of the federal government's POGG's powers generously to consider the disproportionate impacts of climate change and greenhouse gas

⁷ Factum of the Respondent at paras.20, 31, 33, 60 and 79.

⁸ [Reference re Secession of Quebec, \[1998\] 2 S.C.R. 217](#), at [para. 50](#) ("*Secession Reference*").

⁹ [Reference re Same-Sex Marriage, \[2004\] 3 S.C.R. 698](#) at [para 22](#).

emissions on First Nations, and the infringement or extinguishment of their inherent and Treaty rights as affirmed by s. 35.

12. The AFN therefore submits that as the Crown’s division of powers must be reconciled and understood according to the constitutionally protected rights of First Nations peoples, the majority in the *Alberta Reference* erred by failing to consider the interplay of s. 35 in its division of power analysis on the basis of a deficient factual record. As discussed, the deficiency in the record reflects the pervasive and systemic disregard First Nations peoples continue to be subjected to in Canada, and *absence of evidence* of First Nations consultation by Alberta is not *evidence of absence* that s. 35 rights are at stake. Reconciling the divergent interests of First Nations and the Crown, as well as the principle of the “living tree” and interconnected nature of the Constitution, demands consideration of s. 35 and its import within the majority’s division of powers analysis.

B. The Honour of the Crown – GGPPA validity

13. The majority in the *Alberta Reference* held that the effect on extra-provincial interest of provincial inaction in pricing GHG emissions are “policy” concerns, irrelevant to the division of powers.¹⁰ The AFN submits that majority erred as the extra-provincial impacts of provincial action or inaction in the “provincial inability” test is fundamentally constitutional and plays a role in informing the singleness, distinctiveness and indivisibility analysis as required by *Zellerbach* which delineates the matter before the court from a matter of merely provincial concern.¹¹

14. As noted by Professor Hogg, the most important element of the doctrine of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to co-operate would carry with it *grave* consequences for the residents of other provinces.¹² The AFN submits that this incorporates the potential grave consequences faced by First Nations and the exercise of their inherent and Treaty rights as a result of substandard action on the regulation of GHG emissions by a province. The AFN further submits that the effects are not merely “policy” concerns, but constitutional in nature. First Nations are limited in the actions they can take to address the erosion of these guaranteed rights, which will be

¹⁰ *Alberta Reference* at paras. [314-316](#).

¹¹ *Ontario Reference* at [para 117](#).

¹² [R. v. Crown Zellerbach Canada Ltd., \[1988\] 1 SCR 401](#) at para. 32 (“*Zellerbach*”).

the inevitable result of provincial inaction or substandard action.

15. The AFN submits that a constitutional onus existed, grounded in the Crown's obligation to act honourably to First Nations, to proactively make efforts to mitigate the effects of GHG emissions and climate change on First Nations in accordance with globally and nationally accepted standards.

16. The honour of the Crown is a foundational principle of Aboriginal law.¹³ In all dealings with First Nations, the Crown must act honourably and nothing less is required if reconciliation is to be achieved.¹⁴ Because of its connection with s. 35, the honour of the Crown is in essence a constitutional principle.¹⁵ Determining what constitutes honourable dealing depends on the circumstances and the divergent interest of First Nations and the Crown.¹⁶

17. The AFN submits that the honour of the Crown compelled Canada to adopt the *GGPPA*. A broad national plan was necessary to mitigate the harms associated with substandard or inaction by the provinces in the area of GHG emission regulation, including the disproportionate impacts of climate change on First Nations and the exercise of their inherent and Treaty rights. The AFN further submits that the protection of inherent and Treaty rights are constitutional considerations. As the individual elements of the Constitution are linked, and as it is a living tree meant to adapt to modern circumstances, the majority in the *Alberta Reference* erred by failing to weigh these considerations in its division of power analysis.

PART IV – ORDER SOUGHT AND COSTS

18. The AFN respectfully requests that the Court allow the appeal and advise the Lieutenant Governor in Council that the answer to the question of whether the *GGPPA* is unconstitutional in whole or in part, is “no”. The AFN seeks no costs and asks that no costs be awarded against it.

¹³ [Mikisew Cree First Nation v. Canada \(Governor General in Council\)](#), 2018 SCC 40 at para. 21 [“*Mikisew*”].

¹⁴ [Haida Nation v. British Columbia \(Minister of Forests\)](#), [2004] S.C.J. No. 70 at para 17.

¹⁵ [Manitoba Métis v. Canada](#), [2013] 1 S.C.R. 623 at para 69 [“*Manitoba Métis*”].

¹⁶ *Mikisew* at para 24.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on August 12, 2020.



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PART V- TABLE OF AUTHORITIES

No.	Case Law	Para # in factum
1.	<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 2 S.C.R. 511, [2004] S.C.J. No. 70	16
2.	<i>Manitoba Métis v. Canada</i> , [2013] 1 S.C.R. 623	16
2.	<i>Mikisew Cree First Nation v. Canada (Governor General in Council)</i> , 2018 SCC 40, [2018] 2 S.C.R. 765	16
3.	<i>R. v. Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	14
5.	<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2020 ABCA 74	3, 4, 6, 10, 12, 13, 17
6.	<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 ONCA 544	3, 13
7.	<i>Reference re Same-Sex Marriage</i> , [2004] 3 S.C.R. 698	11, 17
8.	<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	10, 17
	Secondary Sources	
9.	Robinson Huron Treaty	7
10.	Robinson Superior Treaty	7
	Legislation	
11.	The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3	2, 4, 10, 12, 17
12.	The Constitution Act, 1982 , being Schedule B to the <i>Canada Act 1982</i> (UK), 1982, c 11	2, 5, 6, 8, 10, 12, 16, 17