

**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
GOVERNOR 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 ALBERTA

Respondent

- and -

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEW
BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF**
(Style of cause continued on next page)

**FACTUM OF THE INTERVENER, SMART PROSPERITY INSTITUTE
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

SMART PROSPERITY INSTITUTE
1 Stewart St, 3rd Floor
Ottawa, ON, K1N 6N5

Jeremy de Beer

Tel.: 613-562-5800 1290, ext 3169
Email: Jeremy.deBeer@uOttawa.ca

Guy Régimbald

Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, Smart Prosperity
Institute

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Agent for the Intervener, Smart Prosperity
Institute

SASKATCHEWAN, CANADIAN TAXPAYERS ASSOCIATION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. and SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL, SASKATCHEWAN POWER CORPORATION and SASKENERGY INCORPORATED, INTERNATIONAL EMISSIONS TRADING ASSOCIATION, PROGRESS ALBERTA COMMUNICATIONS LIMITED, OCEANS NORTH CONSERVATION SOCIETY, CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL COOPERATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKATOON CHAPTER, NEW BRUNSWICK ANTI-SHALE GAS ALLIANCE, YOUTH OF THE EARTH, ASSEMBLY OF FIRST NATIONS, DAVID SUZUKI FOUNDATION, GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD and YOUTH CLIMATE LAB, CANADA'S ECOFISCAL COMMISSION, CANADIAN PUBLIC HEALTH ASSOCIATION and THUNDERCHILD FIRST NATION

Interveners

**FACTUM OF THE INTERVENER, SMART PROSPERITY INSTITUTE
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

SMART PROSPERITY INSTITUTE
1 Stewart St, 3rd Floor
Ottawa, ON, K1N 6N5

Jeremy de Beer
Tel.: 613-562-5800 1290, ext 3169
Email: Jeremy.deBeer@uOttawa.ca

Guy Régimbald
Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, Smart Prosperity
Institute

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald
Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Agent for the Intervener, Smart Prosperity
Institute

ATTORNEY GENERAL OF BRITISH COLUMBIA

Legal Services Branch
1001 Douglas Street
Victoria, BC, V8W 2C5

J. Gareth Morley

Phone: 250-952-7644
Fax: 250-356-9154
Email: Gareth.Morley@gov.bc.ca

Counsel for the Intervener, Attorney
General of British Columbia

GALL LEGGE GRANT ZWACK LLP

Suite 1000 - 1199 West Hastings Street
Vancouver, BC V6E 3T5

Peter A. Gall, Q.C / Benjamin J. Oliphant

Tel: 604-891-1152 / 604-891-1181
Fax: 604-669-5101
E-mail: pgall@glgzlaw.com
boliphant@glgzlaw.com

McLENNAN ROSS LLP

600, 12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Steven A. A. Dollansky

Phone: 780-482-9217
Fax: 780-482-9100
Email: sdollansky@mross.com

DEPARTMENT OF JUSTICE AND SOLICITOR GENERAL

10th Floor, Oxford Tower
10025 – 102A Avenue
Edmonton, AB T5J 2Z2

L. Christine Enns, Q.C

Phone: 780-422-9703
Fax: 780-638-0852
Email: Christine.Enns@gov.ab.ca

MICHAEL SOBKIN

331 Somerset Street, W.
Ottawa, ON, K2P 0J8

Phone: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Agent for the Intervener, Attorney General
of British Columbia

CAZASAIKALEY LLP

220 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5ZP

Alyssa Tomkins

Tel: 613-565-2292
Fax: 613-565-2087
E-mail: atomkins@plaideurs.ca

Counsel for the Respondent the Attorney
General of Alberta

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Region
301 – 310 Broadway
Winnipeg, MB, R3C 0S6

**Sharlene Telles-Langdon / Christine Mohr
/ Mary Matthews and Neil Goodridge**

Phone: 204-983-0862
Fax: 204-984-8495
Email: sharlene.telleslangdon@justice.gc.ca

Counsel for the Intervener Attorney General
of Canada

**MINISTRY OF JUSTICE AND
ATTORNEY GENERAL OF
SASKATCHEWAN**

820-1874 Scarth Street
Regina, SK S4P 4B3

P. Mitch McAdam, Q.C.

Phone: 306-787-7846
Fax: 306-787-9111
Email: mitch.mcadam@gov.sk.ca

Alan Jacobson

Phone: 306-787-1087
Fax: 306-787-9111
Email: alan.jacobson@gov.sk.ca

MLT AIKINS LLP

1500 - 1874 Scarth Street
Regina, Saskatchewan S4P 4E9

Deron Kuski, Q.C.

Jodi Wildeman

Phone : 306- 347-8404
Fax : 306-352-5250
Email : dkuski@mltaikins.com
jwildeman@mltaikins.com

Agent for Respondent the Attorney
General of Alberta

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
50 O'Connor Street, Suite 500
Ottawa, ON, K1A 0H8

Christopher Rupar

Phone: 613-670-6290
Fax: 613-954-1920
Email: christopher.rupar@justice.gc.ca

Agent for Counsel for the Intervener
Attorney General of Canada

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Phone: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Attorney General
of Saskatchewan

ATTORNEY GENERAL OF ONTARIO

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON, M7A 2S9

Josh Hunter / Padraic Ryan / Otto Ranalli

Phone: 416-326-3840

Fax: 416-326-4015

Email: joshua.hunter@ontario.ca

Padraic.ryan@ontario.ca

Otto.ranalli@ontario.ca

Counsel for the Intervener, Attorney
General of Ontario

**MINISTÈRE DE LA JUSTICE DU
QUÉBEC**

1200, route de l'Église, 4^e étage
Québec, QC, G1V 4M1

Jean-Vincent Lacroix / Laurie Anctil

Phone: 418-643-1477, poste 20779

Email: jean-

vincent.lacroix@justice.gouv.qc.ca

Laurie.anctil@justice.gouv.qc.ca

Avocats de l'Intervenante, la Procureure
générale du Québec

**ATTORNEY GENERAL OF NEW
BRUNSWICK**

Legal Services Branch, Constitutional Unit
P.O. Box 6000, Stn. A.
675 King Street, Suite 2018
Fredericton, NB, E3B 5H1

Rachelle Standing / Rose Campbell

Isabel Lavoie Daigle

Phone: 506-453-2222

Fax: 506-453-3275

Agent for Counsel for the Intervener,
Attorney General of Saskatchewan

SUPREME ADVOCACY LLP

340 Gilmour Street
Ottawa, ON, K2P 0R3

Marie-France Major

Phone: 613-695-8855

Fax: 613-695-8560

Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener,
Attorney General of Ontario

NOËL & ASSOCIÉS s.e.n.c.r.l.

111, rue Champlain
Gatineau, QC, J8X 3R1

Pierre Landry

Phone: 819-503-2174

Fax: 819-771-5397

Email: p.landry@noelassociés.com

Correspondant pour les avocats de
l'Intervenante, la Procureure générale du
Québec

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Email: rachel.standing@gnb.ca
Rose.campbell@gnb.ca

Counsel for the Intervener, Attorney
General of New Brunswick

Agent for Counsel for the Intervener,
Attorney General of New Brunswick

ATTORNEY GENERAL OF MANITOBA
Constitutional Law
1230 – 405 Broadway Avenue
Winnipeg, MB, R3C 3L6

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

Michael Conner / Allison Kindle Pejovic
Phone: 204-945-6723
Fax: 204-945-0053
Email: michael.conner@gov.mb.ca
allison.pejovic@gov.mb.ca

D. Lynne Watt
Phone: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Attorney
General of Manitoba

Agent for Counsel for the Intervener,
Attorney General of Manitoba

NANDA & COMPANY
3400 Manulife Place
10180- 101 Street N.W.
Edmonton, AB T5J 4K1

MCGUINTY LAW OFFICES
1192 Rockingham Avenue
Ottawa, ON K1H 8A7

Avnish Nanda / Martin Olszynski
Phone: 780-801-5324
Fax: 587-318-1391
Email: avnish@nandalaw.ca
molszynski@nandalaw.ca

Dylan Jr. McGuinty
Phone: 613-526-3858
Fax: 613-526-3187
Email: dylanjr@mcguintylaw.ca

Counsel for the Intervener, Progress Alberta
Communications Limited

Agent for the Intervener, Progress
Alberta Communications Limited

WESTAWAY LAW GROUP

55 Murray Street
Suite 230
Ottawa, ON K1N 5M3

Cynthia Westaway / Patricia Lawrence

Phone: 613-722-6339
Fax: 613-722-9097
Email: cynthia@westawaylaw.ca
patricia@westawaylaw.ca

Counsel for the Intervener, Anishinabek
Nation and United Chiefs and Councils of
Mnidoo Mnising

ARVAY FINLAY LLP

1512-808 Nelson Street
Vancouver, BC V6Z 2H2

David W.L. Wu

Phone: 604-696-9828
Fax: 888-575-3281
Email: dwu@arvayfinlay.ca

Counsel for the Intervener, Oceans North
Conservation Society

ASSEMBLY OF FIRST NATIONS

55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

**Stuart Wuttke / Julie McGregor /
Adam Williamson / Victor Carter**

Phone: 613-241-5689 Ext: 228
Fax: 613-241-5808
Email: swuttke@afn.ca

Counsel for the Intervener, Assembly of First
Nations

WESTAWAY LAW GROUP

55 Murray Street
Suite 230
Ottawa, ON K1N 5M3

Geneviève Boulay

Phone: 613-702-3042
Fax: 613-722-9097
Email: genevieve@westawaylaw.ca

Agent for the Intervener, Anishinabek
Nation and United Chiefs and Councils of
Mnidoo Mnising

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener, Oceans North
Conservation Society

SUPUREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener, Assembly of First
Nations

CREASE HARMAN LLP

800-1070 Douglas Street
Victoria, BC V8W 2C4

R. Bruce E. Hallsor, Q.C. / Hana Felix

Phone: 250-388-9124
Fax: 250-388-4294
Email: bhallsor@crease.com

Counsel for the Intervener, Canadian
Taxpayers Federation

UNIVERSITY OF OTTAWA

Faculty of Law

57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Stewart Elgie, LSM

Phone : 613-562-5800 Ext : 1270
Email: stewart.elgie@uottawa.ca

Counsel for the Intervener, Canada's
Ecofiscal Commission

**CANADIAN ENVIRONMENTAL LAW
ASSOCIATION**

1500 - 55 University Avenue
Toronto, ON M5J 2H7

Joseph F. Castrilli / Richard D. Lindgren

Phone: 416-960-2284 Ext: 7218
Fax: 416-960-9392
Email: castrilli@sympatico.ca

Counsel for the Interveners,
Canadian Environmental Law Association,
Environmental Defence Canada Inc. and
Sisters of Providence of St. Vincent de Paul

McKERCHER LLP

374 Third Avenue South
Saskatoon, SK S7K 1M5

David M.A. Stack, Q.C.

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Phone: 613-695-8855
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Canadian
Taxpayers Federation

CHAMP & ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Phone: 613-237-4740
Fax: 613-232-2680
Email: broy@champlaw.ca

Agent for the Intervener, Canada's Ecofiscal
Commission

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Phone: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Interveners, Canadian
Environmental Law Association,
Environmental Defence Canada Inc. and
Sisters of Providence of St. Vincent de Paul

GOWLING WLG (CANADA) LLP

2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Phone: 306-664-1277
Fax: 306-653-2669
Email: d.stack@mckercher.ca

Counsel for the Interveners, Saskatchewan
Power Corporation and SaskEnergy
Incorporated

STOCKWOODS LLP
TD North Tower, suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

Justin Safayeni / Zachary Al-Khatib
Phone: 416-593-7200
Fax: 416-593-9345
Email: justins@stockwoods.ca

Counsel for the Intervener, Amnesty
International Canada

UNIVERSITY OF OTTAWA
57 Louis Pasteur St.
Ottawa, ON K1N 6C5

Nathalie Chalifour / Anne Levesque
Phone: 613-562-5800 Ext: 3331
FAX: 613-562-5124
Email: Nathalie.Chalifour@uottawa.ca

Counsel for the Intervener, National
Association of Women and the Law and
Friends of the Earth

DEMARCO ALLAN LLP
625-333 Bay Street
Toronto, ON M5H 2R2

Elizabeth DeMarco / Jonathan McGillivray
Phone: 647-991-1190
Fax: 888-734-9459
Email: lisa@demarcoallan.com

Counsel for the Intervener, International
Emissions Trading Association

Phone: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Interveners,
Saskatchewan Power Corporation and
SaskEnergy Incorporated

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Phone: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conway.pro

Agent for Intervener, Amnesty International
Canada

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Marion Sandilands
Phone: 613-288-0149
Fax: 613-688-0271
Email: msandilands@conway.pro

Agent for the Intervener, National
Association of Women and the Law and
Friends of the Earth

**FASKEN MARTINEAU DUMOULIN
LLP**
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Phone: 613-696-6904
Fax: 613-230-6423
Email: sarseneault@fasken.com

Agent for the Intervener, International
Emissions Trading Association

**ECOJUSTICE ENVIRONMENTAL LAW
CLINIC,
University of Ottawa**
216-1 Stewart Street
Ottawa, ON K1N 6N5

Joshua Ginsberg / Randy Christensen
Phone: 613-562-5800 Ext: 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Counsel for the Intervener, the David Suzuki
Foundation

**ECOJUSTICE ENVIRONMENTAL LAW
CLINIC,
University of Ottawa**
216-1 Stewart Street
Ottawa, ON K1N 6N5

Amir Attaran
Phone: 613-562-8500 Ext: 3382
Fax: 613-562-5319
Email: aattaran@ecojustice.ca

Counsel for the Intervener, Chipewyan First
Nation

GOWLING WLG (CANADA) LLP
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto, ON M5X 1G5

**Jennifer L. King / Michael Finley /
Liane Langstaff**
Phone: 416-862-7525
Fax: 416-862-7661
Email: jennifer.king@gowlingwlg.com

Counsel for the Intervener, Canadian Public
Health Association

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Phone: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener, Canadian Public
Health Association

KOWALCHUK LAW OFFICE

18 Patton Street
Regina, SK S4R 3N9

**Larry W. Kowalchuk Taylor-Anne Yee,
Jonathan Stockdale**
Phone: 306-529-3001
Email: larry@kowalchuklaw.ca

Counsel for the Interveners, Climate Justice
Saskatoon, National Farmers Union,
Saskatchewan Coalition for Sustainable
Development, Saskatchewan Council for
International Cooperation, Saskatchewan
Environmental Society, SaskEV

KOWALCHUK LAW OFFICE

18 Patton Street
Regina, SK S4R 3N9

Larry W. Kowalchuk
Phone: 306-529-3001
Email: larry@kowalchuklaw.ca

Counsel for the Interveners, Council of
Canadians: Prairie and Northwest Territories
Region, Council of Canadians: Regina
Chapter, Council of Canadians: Saskatoon
Chapter, New-Brunswick Anti-Shale Gas
Alliance and Youth of the Earth

MICHEL BÉLANGER AVOCATS INC.

454, avenue Laurier Est
Montreal, QC H2J 1E7

**David Robitaille
Marc Bishai**
Phone : 514-844-4646
Fax : 514-844-7009
Email : david.robitaille@uottawa.ca

Counsel for Centre Québécois de
l'environnement et Équiterre

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Interveners, Climate Justice
Saskatoon, National Farmers Union,
Saskatchewan Coalition for Sustainable
Development, Saskatchewan Council for
International Cooperation, Saskatchewan
Environmental Society, SaskEV

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Interveners, Council of
Canadians: Prairie and Northwest Territories
Region, Council of Canadians: Regina
Chapter, Council of Canadians: Saskatoon
Chapter, New-Brunswick Anti-Shale Gas
Alliance and Youth of the Earth

JURISTES POWER

130 Rue Albert, bureau 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Phone: 613-702-5560
Fax: 613-702-5561
Email: mvincelette@juristespower.ca

Agent for Intervener, Centre Québécois de
l'environnement et Équiterre

RATCLIFF & COMPANY LLP

500-221 West Esplanade
North Vancouver, BC V7M 3J3

Nathan Hume / Emma Hume /

Cam Brewer

Phone: 604-988-5201

Fax: 604-988-1452

Email: nhume@ratcliff.com

Counsel for the Interveners, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

PUBLIC INTEREST LAW CENTRE

200-393 Portage Avenue
Winnipeg, MB R3B 3H6

Joëlle Pastora Sala / Byron Williams /

Katrine Dilay

Phone: 204-985-8540

Fax: 204-985-8544

Email: jopas@pilc.mb.ca

Counsel for the Intervener, Assembly of Manitoba Chiefs

LIDSTONE & COMPANY

Sun Tower, Suite 1300
128 Pender Street West
Vancouver, BC V6B 1R8

Paul A. Hildebrand / Olivia French

Phone: 604-899-2269

Fax: 604-899-2281

Email: hildebrand@lidstone.ca

Counsel for the Interveners, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland and City of Vancouver

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé

Phone: 613-702-5566

Fax: 613-702-5566

Email: DBosse@juristespower.ca

Agent for the Interveners, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ONf K1P 5G4

Maxine Vincelette

Phone: 613-702-5566

Fax: 613-702-5566

Email: mvincelette@powerlaw.ca

Agent for the Intervener, Assembly of Manitoba Chiefs

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ONf K1P 5G4

Maxine Vincelette

Phone: 613-702-5566

Fax: 613-702-5566

Email: mvincelette@powerlaw.ca

Agent for the Interveners, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland and City of Vancouver

McKERCHER LLP

374 Third Avenue South
Saskatoon, SK S7K 1M5

Dusty T. Ernewein / Lorne R. Fagnan

Phone: 306-664-1296

Fax: 306-653-2669

Email: d.ernewein@mckercher.ca
l.fagnan@mckercher.ca

Counsel for the Intervener, Thunderchild First
Nation

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Agent for the Intervener, Thunderchild First
Nation

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PART I – OVERVIEW AND FACTS

1. How do international treaties fit into the analysis of federal responsibility “for the Peace, Order, and good Government of Canada”¹? That is the only question the Smart Prosperity Institute’s memorandum in the Saskatchewan and Ontario appeals addresses. In this appeal, Smart Prosperity builds on its submission that the transboundary subject-matter of the *Paris Agreement*² and the nature of Canada’s reciprocal commitments to the world support the *Act*’s³ validity.

PART II – POSITION ON THE APPELLANT’S QUESTION

2. Smart Prosperity’s position—that, under POGG, Parliament can fulfil agreements with reciprocal commitments between Canada and other nations to solve true transboundary problems—supports the Attorney General of British Columbia’s position that the *Act* wholly constitutional.

PART III – STATEMENT OF ARGUMENT

3. Three points related to treaties arise from the Alberta Court of Appeal’s judgment. One is about *Labour Conventions*.⁴ A second is about constitutional provisions outside sections 91 and 92. A third is about what other countries do or don’t do.

A. *Labour Conventions* is distinguishable, not determinative.

4. The majority opinion of Chief Justice Fraser and Justices Watson and Hughes approached the treaty issue like the Saskatchewan majority: some key background (¶¶65-74) but a quick dismissal (at ¶259) of a treaty-making power based on *Labour Conventions*. Justice Feehan (at ¶¶1037-1041) integrated treaty obligations into his legal analysis, but mainly as indicative of a national concern.

5. Segregating rather than integrating the treaty analysis is the wrong approach, for reasons fully explained in Smart Prosperity’s earlier submissions (¶¶2-3, 10-11, 24-33). To avoid repetition, the bottom

¹ [Constitution Act, 1867 \(UK\)](#), 30 & 31 Victoria, c 3.

² [Paris Agreement](#), 16 February 2016 (entered into force 4 November 2016); see also [United Nations Framework Convention on Climate Change](#), 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

³ The “Act” at issue is the [Greenhouse Gas Pollution Pricing Act](#), SCC 2018, c 12, s 186.

⁴ [Canada \(A-G\) v Ontario \(A-G\)](#), [1937] AC 326 [“*Labour Conventions*”].

line is that the treaties in *Labour Conventions* were different than in this case. The treaties in this case are more like *Radio Reference*⁵ and *Johannesson*.⁶

6. Moreover, the issue to be determined here is not whether a separate power to implement treaties exists outside of sections 91 and 92, but rather how treaties are relevant to the POGG power within section 91. Justice Feehan was on the right track. But Smart Prosperity’s earlier submissions go further, explaining how treaties are not merely indicative of singleness, indivisibility, inter-provincial concerns, or provincial inabilities (¶8). More than that, treaty implementation under POGG fills a constitutional gap (¶22-23) or is presumptively a *transnational* concern (¶¶34-40).

B. *If other constitutional provisions are relevant, then section 132 cannot be ignored.*

7. In reaching its decision, the Alberta majority reviewed (at ¶¶41-63) and relied on (¶¶125-128, 265, 272, 281, 283, 328, 341) the political history and constitutional law of provincial resource ownership under sections 92A and 109. Smart Prosperity has no problem in principle looking beyond sections 91 and 92 to inform analysis of the division of powers. The problem arises when doing so only selectively.

8. If provisions outside of sections 91 and 92 are relevant to constitutional interpretation, then section 132 must be among those considered. Smart Prosperity’s earlier submissions (¶¶4-5, 22-23) explain the literal gap created when the British empire stopped making treaties for Canada and Canada started making treaties for itself. To summarize: the fact that section 132 explicitly contemplated a Parliamentary power to implement treaties—granted, only “Empire” treaties because it was never imagined Canada could negotiate its own—supports the argument that POGG must now be used fill the constitutional gap.

9. The Alberta majority felt it impossible to deal with section 35 based on the record and arguments, in contrast to its reliance on sections 92A and 109. Meanwhile, however, section 132 was not even mentioned. If sections 92A and 109 can shed light on the provinces’ powers, section 132 does the same for Parliament’s.

C. *Treaties exist because provinces contribute to but cannot solve climate change.*

10. Among the reasons offered by the Alberta majority against the constitutionality of the *Act* are that provincial GHG emissions will “not cause measurable harm” to other provinces and that the atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries” (at

⁵ *Quebec (A-G) v Canada (A-G)*, [1932] AC 304 [“*Radio Reference*”].

⁶ *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292 [“*Johannesson*”].

¶324). These reasons boil down to a “drop-in-the-bucket” and a “can’t-make-a-dent” argument. The first argument is that provincial GHG emissions are merely a drop-in-the-bucket, so do not really have extra-provincial impacts. The second argument is that Canada alone “can’t-make-a-dent” in global climate change anyways, so does not have the power to try.

11. Leaving aside the contradiction with scientific consensus and voluminous evidence that provincial emissions do cause extra-provincial harm, there are both logical and legal flaws with the Alberta’s majority’s reasoning. Logically, the fact that provincial emissions are proportionally small does not lead to the conclusion that provincial emissions are insignificantly harmful. Relative to other countries in the abstract, Canada’s emissions can be made to seem small. Yet the same is true of ocean pollution—Canada is just one small contributor to a global problem requiring international coordination—which is partly why the SCC upheld federal ocean dumping legislation.⁷ And furthermore, as the AG of British Columbia points out in its memorandum (¶51), relative to other countries’ populations, Canadian and provincial *per capita* emissions rank high.

12. Rather than manipulating statistics or rankings to support one’s position, the better approach is grounded in legal principle. The legal principle guiding analysis of extra-provincial impacts is material contribution not but/for causation. Provincial contributions to global GHG emissions do matter elsewhere, even if they alone do not cause climate change.

13. The corollary of the Alberta majority’s mistaken reasoning—that the atmosphere is largely affected by other countries’ action or inaction—is that climate change is a problem that other countries created and should solve. As the AG of British Columbia also points out (¶50-54), however, this is an argument for, not against, global collective action.

14. Smart Prosperity adds that this collective action problem is not solved by global governance in general, but through the making and implementation of international treaties. The *UN Framework Convention on Climate Change* and the subsequent *Paris Agreement* exist because marginal emissions in one nation state or substate, which in isolation may seem inconsequential, combine to cause an existential threat to the whole world.

15. Canada’s federal government has confronted the collective action problem with reciprocal commitments between Canada and other nation states. The requirement for coordinated global governance of an inherently transboundary issue offers a litmus test both for the exercise of a POGG power to

⁷ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, ¶37.

implement certain treaties and for the limits of that power. While not every treaty topic and foreign undertaking would meet this test, an international exchange of pledges to address an indisputably global problem surely does.

16. By recognizing the well-justified and appropriately limited POGG power to fill gaps and/or address transnational concerns, this Court will avoid making Canada constitutionally unable to fulfil its international obligations.

PART IV – SUBMISSIONS ON COSTS

17. Smart Prosperity does not seek costs and asks that it not be liable for costs to any party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August, 2020.



SMART PROSPERITY INSTITUTE
1 Stewart St, 3rd Floor
Ottawa, ON, K1N 6N5

Jeremy de Beer

Tel.: 613-562-5800 1290, ext 3169
Email: Jeremy.deBeer@uOttawa.ca

Guy Régimbald

Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Counsel for the Intervener, Smart Prosperity
Institute



GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Agent for the Intervener, Smart Prosperity
Institute

PART VI – TABLE OF AUTHORITIES & LEGISLATION

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