SCC Court File No. 39116

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

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT

- and –

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

- and –

(Continued on next page)

FACTUM OF THE INTERVENER, DAVID SUZUKI FOUNDATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

Joshua Ginsberg
Tel: 613-562-5800 ext. 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Randy Christensen
Tel: 604-685-5618 ext. 234
Fax: 604-685-7813
Email: rchristensen@ecojustice.ca

Counsel for the Intervener, David Suzuki Foundation

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
216-1 Stewart Street
Ottawa, ON K1N 6N5

Joshua Ginsberg
Tel: 613-562-5800 ext. 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Agent for the Intervener, David Suzuki Foundation

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF QUEBEC, CANADIAN TAXPAYERS FEDERATION, 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 AND 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, SMART PROSPERITY INSTITUTE, ATHABASCA CHIPEWYAN FIRST NATION, AMNESTY INTERNATIONAL CANADA, CANADIAN PUBLIC HEALTH ASSOCIATION, THUNDERCHILD FIRST NATION

INTERVENERS

COPIES TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0K1

ATTORNEY GENERAL OF BRITISH COLUMBIA
6th Floor – 1001 Douglas Street
PO Box 9280, Stn Prov Govt
Victoria, BC V7W 9J7

J. Gareth Morley
Tel: 250-952-7644
Fax: 250-356-0064
Email: gareth.morley@gov.bc.ca

Counsel for the Attorney General of British Columbia

MICHAEL SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael Sobkin
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Agent for the Attorney General of British Columbia

GALL LEGGE GRANT ZWACK LLP
1199 W. Hastings St., Suite 1000
Vancouver, BC V6E 3T5

Peter A. Gall, Q.C.
Benjamin J. Oliphant
Steven A. A. Dollansky
Tel: 604-891-1152
Fax: 604-669-5101
Email: pgall@glgzlaw.com

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

Alyssa Tomkins
Tel: 613-564-8269
Fax: 613-565-2087
Email: atomkins@plaideurs.ca

Agent for Attorney General of Alberta

DEPARTMENT OF JUSTICE AND SOLICITOR GENERAL
10th Floor, Oxford Tower
10025 – 102A Avenue
Edmonton, AB T5J 2Z2

L. Christine Enns, Q.C.
Tel: 780-422-9703
Fax: 780-638-0852
Email: Christine.Enns@gov.ab.ca

Counsel for 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 E. Mohr, Ned Djordjevic, Mary C. Matthews, J. Neil Goodridge
Tel: 204-983-0862
Fax: 204-984-8495
Email: sharlene.telles-langdon@justice.gc.ca

Counsel for the Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 O'Connor Street – Suite 500, Room 557
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 613-967-6290
Fax: 613-954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Attorney General of Canada

ATTORNEY GENERAL OF SASKATCHEWAN
Aboriginal Law Branch
820 - 1874 Scarth Street
Regina, SK, S4P 4B3

P. Mitch McAdam, QC
Alan Jacobson
Tel: 306-787-7846
Fax: 306-787-9111
Email: mitch.mcadam@gov.sk.ca
alan.jacobson@gov.sk.ca

Counsel for the Attorney General of Saskatchewan

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

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

Agent for the Attorney General of Saskatchewan

ATTORNEY GENERAL OF NEW BRUNSWICK
PO Box 6000, Stn A
675 King Street, Suite 2018
Fredericton, NB E3B 5H1

Rachelle Standing, Rose Campbell
Tel: 506-453-2222
Fax: 506-453-3275
Email: rachelle.standing@gnb.ca

Counsel for the Attorney General of New Brunswick

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

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

Agent for the Attorney General of New Brunswick

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

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

Counsel for the Attorney General of Manitoba

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

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

Agent for the Attorney General of Manitoba

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
4th Floor – 720 Bay Street
Toronto, ON M7A 2S9

Joshua Hunter
Tel: 416-908-7465
Fax: 416-326-4015

Email: joshua.hunter@ontario.ca

Counsel for the Attorney General of Ontario

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, ON K2P OR3

Marie-France Major
Tel: 613-695-8855, ext. 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Attorney General of Ontario

PROCUREURE GÉNÉRALE DU QUÉBEC
Ministère de la justice du Québec
1200, route de l'Église, 4e étage
Québec, QC G1V 4M1

Jean-Vincent Lacroix
Tel: 418-643-1477, poste 20779
Fax: 418-644-7030
Email:
jean-vincent.lacroix@justice.gouv.qc.ca

Avocats de la Procureure générale du Québec

NOËL & ASSOCIÉS S.E.N.C.R.L.
111 rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel: 819-503-2178
Fax: 819-771-5397
Email: p.landry@noelassocies.com

Correspondant pour la Procureur générale du Québec

CREASE HARMAN LLP
1070 Douglas Street, Unit 800
Victoria, BC V8W 2C4

R. Bruce E. Hallsor
Hana Felix
Tel: 250-388-9124
Fax: 250-388-4294
Email: Bhallsor@crease.com

Counsel for Canadian Taxpayers Federation

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 ext. 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Canadian Taxpayers Federation

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
1500 – 55 University Avenue
Toronto, ON M5J 2H7

Joseph F. Castrilli
Theresa McClenaghan
Richard D. Lindgren
Tel: 416-960-2284 ext. 7218
Fax: 416-960-9392
Email: castrillij@sympatico.ca

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

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

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

Agent for 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.
Tel: 306-664-1277
Fax: 306-653-2669
Email: d.stack@mckercher.ca

Counsel for Saskatchewan Power Corporation and SaskEnergy Incorporated

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

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

Agent for Saskatchewan Power Corporation and SaskEnergy Incorporated

DEMARCO ALLAN LLP
333 Bay Street, Suite 265
Toronto, ON M5H 2R2

Elisabeth DeMarco
Jonathan McGillivray
Tel: 647-991-1190
Fax: 888-734-9459
Email: lisa@demarcoallan.com

Counsel for International Emissions Trading Association

FASKEN MARTINEAU DUMOULIN LLP
55 rue Metcalfe, Bureau 1300
Ottawa, ON K1P 6L5

Sophie Arseneault
Tel: 613-236-3882
Fax: 613-230-6423
Email: sarseneault@fasken.com

Agent for International Emissions Trading Association

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

Avnish Nanda
Tel: 780-801-5324
Fax: 587-318-1391
Email: avnish@nandalaw.ca

Counsel for Progress Alberta Communications Limited

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

Dylan Jr. McGuinty
Tel: 613-526-3858
Fax: 613-562-3187
Email: dylanjr@mcguintylaw.ca

Agent for Progress Alberta Communications Limited

ARVAY FINLAY LLP
1512 – 808 Nelson Street
Box 12149, Nelson Square
Vancouver, BC V6Z 2H2

David W. L. Wu
Tel: 604-696-9828
Fax: 888-575-3281
Email: dwu@arvayfinlay.ca

Counsel for Oceans North Conservation Society

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

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

Agent for Oceans North Conservation Society

KOWALCHUK LAW OFFICE
18 Patton Street
Regina, SK S4R 3N9

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

Counsel for 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
Tel: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for 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
Tel: 306-529-3001
Email: larry@kowalchuklaw.ca

Counsel for 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

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

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

Agent for 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

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

Stuart Wuttke
Julie McGregor
Adam Williamson
Victor Carter
Tel: 613-241-6789 ext. 228
Fax: 613-241-5808
Email: swuttke@afn.ca

Counsel for Assembly of First Nations

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

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

Agent for Assembly of First Nations

RATCLIFF & COMPANY LLP
221 West Esplanade, Suite 500
North Vancouver, BC V7M 3J3

Nathan Hume
Emma Hume
Cam Brewer
Tel: 604-988-5201
Fax: 604-988-1452
Email: nhume@ratcliff.com

Counsel for Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Pubic 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, ON K1P 5G4

Darius Bossé
Tel: 613-702-5573
Fax: 613-702-5561
Email: DBosse@juristespower.ca

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

UNIVERSITY OF OTTAWA
FACULTY OF LAW
57 Louis Pasteur St.
Ottawa, ON K1N 6N5

Stewart Elgie, LSM
Tel: 613-562-5800 ext. 1270
Email: stewart.elgie@uottawa.ca

Counsel for Canada's Ecofiscal Commission

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel: 613-237-4740
Fax: 613-232-2680
Email: broy@champlaw.ca

Agent for Canada's Ecofiscal Commission

UNIVERSITY OF OTTAWA
FACULTY OF LAW
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

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

Counsel for Smart Prosperity Institute

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

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

Agent for Smart Prosperity Institute

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

Amir Attaran
Matt Hulse
Tel: 613-562-5800 ext. 3382
Fax: 613-562-5319
Email: aattaran@ecojustice.ca

Counsel for Athabasca Chipewyan First Nation

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

Amir Attaran
Tel: 613-562-5800 ext. 2889
Fax: 613-562-5319
Email: aattaran@ecojustice.ca

Agent for Athabasca Chipewyan First Nation

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

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

Counsel for Amnesty International Canada

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

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

Agent for Amnesty International Canada

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

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

Counsel for Canadian Public Health Association

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

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

Agent for Canadian Public Health Association

MCKERCHER LLP
374 Third Avenue South
Saskatoon, SK S7K 1M5

Dusty T. Ernewein
Lorne R. Fagnan
Tel: 306-664-1296
Fax: 306-653-2669
Email: d.ernewein@mckercher.ca

Counsel for Thunderchild First Nation

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

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

Agent for Thunderchild First Nation

TABLE OF CONTENTS

PART I. OVERVIEW AND FACTS

1. In the appeals of the references brought by Ontario and Saskatchewan, the David Suzuki Foundation ("DSF") argued that Parliament had a rational basis to enact the *Greenhouse Gas Pollution Pricing Act* ("GGPPA" or the "Act")[1] in response to a national emergency. These submissions address the Alberta Court of Appeal's rejection of Parliament's emergency powers – the majority without engaging in any meaningful analysis, the concurring opinion having set the bar for emergency enactments absurdly high, and the dissenting opinion having drawn an erroneous conclusion from a correct finding of fact. Properly understood, the GGPPA is a short-term measure that is proportional to the emergency it addresses.

PART II. POSITION ON THE QUESTION ON APPEAL

2. The GGPPA is constitutional in whole, supported by the "National Emergency" branch of the peace, order and good government ("POGG") power under s. 91 of the *Constitution Act, 1867*.

PART III. ARGUMENT

3. The Court of Appeal rejected the emergency branch of POGG as a foundation for the GGPPA, with the majority relying on the reasons of the Saskatchewan Court of Appeal.[2] DSF has addressed the errors in the Saskatchewan judgment in its factum on the appeal also before the Court, demonstrating that Parliament was acting rationally in response to the climate emergency and that the GGPPA is temporary in character. DSF relies on those submissions here.

Misapplication of the emergency doctrine and misunderstanding of carbon pricing

4. Justice Wakeling's concurring judgment rejects the emergency branch not for failure to meet *Anti-Inflation's* requirement of temporariness, but rather based on his crabbed view of what sort of crisis counts as an emergency.[3] This is problematic on two fronts.

5. First, Justice Wakeling rejects the role of an elected Parliament in determining whether an emergency exists and instead replaces it with his own assessment of the whether the climate emergency is an appropriate subject for federal powers. Not only is this approach contrary to the

---

[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [**GGPPA**].
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at para 258 [***AB Judgment***].
[3] *Ibid* at paras 702 – 825.

established roles of Parliament and the judicial branch, it rejects this Court's law in *Anti-Inflation* that the judiciary owes "deference to Parliament's judgment that there was an evil of nationwide proportions to which it was entitled to address general legislation to effect a cure."[4]

6. In Justice Wakeling's erroneous construct, the emergency branch is not available if, in the view of a judge, "'co-operation of the Provincial Legislatures' would adequately address the problem".[5] He relies on *Board of Commerce*,[6] but takes it out of context. *Board of Commerce* was not an emergency case, rather it concerned price controls without urgent or exceptional circumstances. Viscount Haldane remarked that such controls might be covered by s.91 in "special circumstances, such as those of a great war".[7] Only absent such circumstances was provincial cooperation a prerequisite.[8] This is consistent with the norm of deference to Parliament set out in *Anti-Inflation.* As in the present case, failure of provinces to cooperate exacerbates the emergency.

7. Second, while Justice Wakeling allows that environmental conditions could support the use of emergency powers,[9] the severity and scale of the emergency he requires is, frankly, absurd. As an example of the type of emergency that supports use of the POGG power, Justice Wakeling conjures an asteroid that

> …destroys everything within a 400-mile radius of the contact point. The explosion sends a shock wave that knocks out Canada's communication system. The debris from the impact immediately turns day into night around the world.[10]

8. Justice Wakeling's standard for what qualifies as an emergency — a calamity as terrible as what wiped out the dinosaurs 66 million years ago — would nullify the POGG emergency doctrine. Not even a once-in-a-century pandemic like COVID-19 would qualify. In the case of climate change, Parliament must act within the next decade while it is still possible to prevent the most severe impacts. A threshold for the severity of an environmental emergency that destroys most life on the planet is unlikely to leave a functional federal government intact to exercise its powers.

---

[4] *Re Anti-Inflation Act*, 1976 CanLII 16 (SCC); [1976] 2 SCR 373, at p 397, per Laskin CJC ["***Anti-Inflation***"].
[5] *AB Judgment*, *supra* note 2, at para 713.
[6] *Canada (Attorney General) v Alberta (Attorney General)*, 1921 CanLII 399 (UK JCPC); [1922] 1 A.C. 191.
[7] *Ibid* at paras 516.
[8] *Ibid* at paras 519-520.
[9] *AB Judgment*, *supra* note 2, at paras 720–721.
[10] *Ibid* at para 722.

9. In dissent, Justice Feehan upholds the GGPPA under the "national concern" branch of POGG and makes the important finding of fact that the Act "only mandates actions until 2030 for the purpose of meeting Canada's commitments under the Paris Agreement."[11] Unfortunately he then falls into error by reasoning that, because "climate change in general" is not a temporary issue, the emergency branch cannot support the GGPPA.[12] The GGPPA is not about "climate change in general", but only addresses one aspect: the need for rapid emissions reduction through carbon pricing, which according to the evidence is a short term measure.[13] This Court should affirm Justice Feehan's finding of fact, and as a result conclude that the GGPPA is within the emergency branch.

The COVID-19 example and proportionality

10. Since DSF filed its main factum, COVID-19 has demonstrated what emergencies, and a salutary response to them, look like. The climate emergency is unfolding on a longer scale but this Court may take notice that elements of it are playing out similarly to COVID-19: a pending threat; disputes about the existence of the threat, including outright denial, and its potential impact; opportunities to head off or lessen the impact which are championed by some and opposed by others; debates about what level of response can be justified given existing political and societal arrangements and individual interests that will be affected; and finally the need to take immediate and drastic action to limit now unavoidable damage with the invocation of emergency powers. If Parliament saw a need to ensure collective action to avoid worsening of the pandemic, would it have a constitutional basis to do so? We hope the answer is yes. Parliament's response should not be obstructed, as Justice Wakeling suggests, by a theoretical possibility of cooperation.

11. There can be little doubt that the direst effects of climate change, which will arise unless collective action is taken now to prevent them, will support an exercise of federal emergency powers, and in far more intrusive ways than the GGPPA. It would be injurious to the wellbeing of Canada if emergency powers could not *ex ante* prevent or lessen climate-related disasters such as drought, wildfires, extreme temperatures, and crop failure, but were restricted to dealing *ex post* with their aftermath. The primary check on emergency legislative power – temporariness – should

---

[11] *Ibid* at para 1026.
[12] *Ibid*.
[13] Affidavit of John Moffet, at para 54 and Exhibit J at p 10, **Supplementary Record of the Intervener Attorney General of Alberta in SCC Files 38663 and 38781 ["Supp. Record"]**, Vols. 11 and 12.

not be interpreted so as to foreclose prevention of harm. As Professor Hogg observed, "an emergency, although itself temporary, may be caused by structural defects in the social or economic order which need to be corrected not only to cure the emergency, but also to prevent the occurrence of future emergencies."[14] DSF has argued that temporariness should be understood in terms of the natural timescale of the emergency, and that the court may define an end date for Parliament's emergency jurisdiction in view of that timescale.[15]

12. The concept of proportionality also justifies use of emergency powers in fluid and uncertain situations like COVID-19 and the climate crisis.[16] Proportionality does not replace the test in *Anti-Inflation*.[17] However, it is useful to consider the "temporariness" of legislation in proportion to the stage and severity of the emergency and the level of intervention in provincial jurisdiction. When Parliament uses a limited intervention to prevent the worst consequences of an emergency, as in the case of the GGPPA, it may have good reason to prefer a more flexible time limit over a hard expiration date. This Court has endorsed Parliament's ability to make that choice, holding that emergency legislation must be of a "temporary character" but need not actually not expire.[18] Based on the commonly used indicia, the GGPPA is proportionate to the emergency it addresses.

13. The objective of the GGPPA is legitimate and important. Whether characterized as "ensuring minimum national standards of price stringency for GHG emissions" per the majority of Saskatchewan Court of Appeal, "establishing minimum national standards to reduce greenhouse gas emissions" per the majority of the Ontario Court of Appeal, or a variation of these, the Act addresses a pressing matter which Parliament had a rational basis to apprehend as an emergency.

---

[14] Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007) (loose-leaf 2018 supplement), ch 17.4(e), **Book of Authorities, Tab 1**.

[15] Factum of DSF, dated Jan. 27, 2020, filed in SCC file nos. 38663 and 38781, at paras 35-36.

[16] See Paul Daly, "The Covid-19 Pandemic and Proportionality: A Framework" (March 31, 2020), Administrative Law Matters (blog), online:<https://www.administrativelawmatters.com/blog/2020/03/31/the-covid-19-pandemic-and-proportionality-a-framework/> ["**Daly**"].

[17] In *Reference Re: Firearms Act (Can)*, 2000 SCC 31 (CanLII), at para 48, this Court rejected Alberta's invitation to incorporate proportionality directly into division of powers analysis. However proportionality is used as a lens in s. 35(1) Aboriginal law cases (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII), at paras. 77-88) as well as in administrative decisions that interact with Charter values (*Doré v Barreau du Québec*, 2012 SCC 12 (CanLII) at para 5).

[18] *Anti-Inflation*, *supra* note 4 at 427, per Laskin CJC and at 437 per Ritchie J.

14. Carbon pricing, the "means" of the GGPPA, is rationally connected, or even an integral part of, its objective. Since, as the Saskatchewan majority found, "the *Act* is the product of Canada's efforts to meet its commitments under the *Paris Agreement*",[19] it is rational that the timescale of the GGPPA is connected to the *Paris Agreement*, i.e. achieving targets by 2030.

15. The GGPPA does not in any way impair, let alone "minimally impair" provincial legislative jurisdiction.[20] The GGPPA actually protects the rights of jurisdictions for which unilateral action or inaction on climate change within the next ten years will negatively affect their vital interests.[21] The GGPPA's carbon price also protects Aboriginal rights under s.35 of the Constitution, which are at risk of infringement or extinguishment if Canada fails to control emissions in the short term.[22]

16. The salutary effects of the GGPPA far outweigh any deleterious ones. There is extensive evidence on the need for and effects of national carbon pricing,[23] but scant evidence of interference with the exercise of provincial powers. Avoiding climate change's worst consequences justifies any limited encroachment into provincial space during the emergency. As Professor Daly observes with respect to COVID-19, "the outcome of a proportionality analysis can shift over time as more evidence comes to light".[24] Similarly, when the GGPPA has achieved its purpose of near-term emission reductions, its necessity will be re-evaluated. Until then it should be allowed to operate.

17. Parliament is entitled to deference in its choice of how to make emergency legislation "temporary". While DSF does not discount the possibility of an egregious case warranting court intervention, the GGPPA is not such a case. It is a proportional measure that Parliament has reasonably taken in discharge of its responsibility to protect the country from disaster.

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

Joshua Ginsberg

Randy Christensen

Counsel for the Intervenor, David Suzuki Foundation

---

[19] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para 119.
[20] Factum of the Attorney General of Canada, dated Dec. 3, 2019, filed in SCC file nos. 38663 and 38781, at paras 108, 112 and 119; *AB Judgment*, *supra* note 2, at paras 999-1009.
[21] Factum of the Attorney General of British Columbia, dated May 20, 2020, at para 47.
[22] Factum of the Athabasca Chipewyan First Nation, dated Jan. 27, 2020, filed in SCC file nos. 38663 and 38781, at paras 24-25.
[23] Affidavit of John Moffet, at paras 46-69, **Supp. Record**, Vol. 11; Affidavit of Dr. Nicholas Rivers, at para 6, **Supp. Record**, Vol. 14.
[24] Daly, *supra* note 16.

PART IV. TABLE OF AUTHORITIES