File Number: **SCC No. 39116**

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

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(pursuant to rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

1. Without urgent and immediate behaviour change, anthropogenic climate change poses an **existential** threat to humanity.[1] Our children are at risk of unthinkable perils that are difficult to exaggerate. The time for emotion[2] has passed. Collectively, we are missing greenhouse gas (GHG) emission reduction target after target.[3] Now, we must act – all of us – and urgently, because we are facing the potential end of our civilization. This is why climate change is defined as an **existential** threat.

2. The realities of climate change were described in the Saskatchewan and Ontario references concerning the *Greenhous Gas Pollution Pricing Act* (*GGPPA)*:

   a. Climate change is an "existential threat to human civilization" and a "major threat… to the planet itself";[4]
   b. We must reduce our CO2 emissions by 45 percent below 2010 levels by 2030 and reach "net zero" by 2050 in order to limit the global average surface warming to 1.5 degrees Celsius and "avoid the significantly more deleterious impacts of climate change";[5] and
   c. Pricing greenhouse gas emissions is an "*essential* aspect…of the global effort to limit GHG emissions".[6]

3. These important truths were not mentioned in the Alberta Court of Appeal (ABCA) majority and concurring decisions, and respectfully, the majority did not properly contextualize the division of powers analysis of the *GGPPA*. A division of powers analysis without proper contextualization risks losing the forest for the trees.

4. Furthermore, we respectfully submit that governments have a positive *Charter*[7] obligation to mitigate the worst impacts of climate change. As a result, we suggest a liberal interpretation of provincial and federal spheres of jurisdiction and a division of powers analysis that is consistent with maintaining a right to life for future generations.

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[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 4, 215, 236 and 476 [*Saskatchewan Reference*]. See also in the dissenting opinion of Justice Feehan in *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*Alberta Reference*] at para 877.

[2] *Alberta Reference* at para 1 [*Alberta Reference*].

[3] Dr. Mark Bigland-Pritchard affidavit at paras 16-24, AGC's Record of the Respondent Part II-Volume X at 177-180, filed with SCC #38553.

[4] *Saskatchewan Reference, supra* note 1 at para 144; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 104 [*Ontario Reference*].

[5] *Ontario Reference, supra* note 4 at para 16.

[6] *Saskatchewan Reference, supra* note 1 at para 147.

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

PART II – STATEMENT OF POSITION ON QUESTION IN ISSUE

5. Climate Justice *et al.* say that the *Act* is wholly constitutional. If required, the Court can analyse the constitutional question with reference to a) the Living Tree Doctrine; b) the precautionary principle; c) Canada's international obligations; and d) in a manner that reconciles the *Charter*'s s.7 protection of our fundamental human right to life, as explained in our factum filed in relation to SCC 38663 and 38781.[8]

PART III – ARGUMENT

i) Finding climate change an existential crisis is required

6. The findings of fact cited in paragraph 2 above, and the extent of the climate change crisis, are uncontested facts on the record that were not acknowledged in the ABCA majority decision or Alberta Attorney General's (ABAG) factum. A division of powers analysis without this lens is incomplete. One cannot properly deliberate on climate change legislation without clearly understanding the realities of climate change.

7. The ABCA majority states that constitutionality does not depend on the "wisdom or efficacy of legislative choices".[9] Despite that, the ABCA majority at paragraphs 94 to 113 discusses Alberta's efforts to reduce GHG emissions. We suggest that if the provinces' actions are relevant, noting the Court's comments that Alberta "has acted, and continues to act", so too is the evidence on the necessity of carbon pricing and the severity of climate change.[10]

8. Specific to the evidence on carbon pricing, the Saskatchewan Court of Appeal (SKCA) found several "unchallenged features of the record", including the "widespread international consensus that carbon pricing is a necessary measure", an "indispensable part of a strategy for reducing emissions", and "widespread… favour of carbon pricing".[11] This was not mentioned by the ABCA majority.

9. The ABAG also undertakes their own evaluation of the efficacy of the *Act* and carbon pricing, suggesting that the *GGPPA* is not necessary.[12] Their position is largely reliant on the

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[8] This factum supplements the factum filed by *Climate Justice et al.,* as an intervenor in the companion appeals (SCC Files 38663 and 38781), dated January 27, 2020.

[9] *Alberta Reference, supra* note 1 at para 113.

[10] *Ibid.*

[11] *Saskatchewan Reference*, *supra* note 1 at para 147.

[12] AGAB Intervenor Factum at paras 25-32 [*AGAB Factum*].

isolated opinion of Alexis Bélanger, author of *Canadian Federalism in the Context of Combating Climate Change*[13], from which the ABCA majority also quotes.[14] At paragraph 26 of their factum, the AGAB relies on this non-peer reviewed article from 2011 to suggest that "there is no basis to believe that giving the federal government supervisory control over how they exercise their powers will lead to better overall outcomes in terms of national (or global) emissions" and that the opposite might be true.[15] With respect, the article does not draw that conclusion, and further, it contemplates the imposition of a national carbon tax where the federal government controls all of the revenues and lacks any backstop provision, which is quite the contrary to the nature of the *GGPPA*. The article does not use any data or empirical analysis which could credibly support the extrapolation tenured by the ABAG that carbon pricing is not necessary or effective. Ironically, Bélanger's article is not incompatible with the spirit of the *GGPPA,* which allows for provinces to take the lead in regulating climate emissions:

> … one reality stands out: **environmental challenges call for new forms of governance**. Exercising federalism can facilitate this transition. Above all, it enables the advantages emanating from **centralization and decentralization to be balanced** [emphasis added].[16]

10. Similarly, on the issue of balanced federalism and the Living Tree Doctrine, the Honourable Justice Feehan's dissent recognizes that federal and provincial governments "must have jurisdictional room to act in relation to the environment" and the *GGPPA's* backstop provision does allow the "provincial legislation to have primacy".[17]

11. Courts around the world readily consider the severity and extent of the climate change issue, as well as what governments are doing to mitigate the problem, when tasked with assessing natural resource or environmental policies.

12. In the *Netherlands v Urgenda* case, the Supreme Court of the Netherlands found climate policy to be justiciable and that the state—which is both smaller in net and per capital emissions than Canada—was negligent in their climate policy.[18] They ordered the state to reduce their

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[13] Alexis Bélanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21 [*Bélanger*].
[14] *Alberta Reference, supra* note 1 at para 135.
[15] *ABAG Factum*, *supra* note 12 at para 26.
[16] *Bélanger*, *supra* note 13 at 29.
[17] *Alberta Reference, supra* note 1 at para 1050.
[18] [2019] ECLI:NL:HR:2019:2007.

emissions by 25% compared to their 1990 emissions.[19] The Court focused extensively on the evidence of the *severity* and *extent* of the climate change problem, citing evidence from the Intergovernmental Panel on Climate Change (IPCC), the United Nations Framework Convention on Climate Change (UNFCC), the Paris Agreement, the UNEP reports, and various other policies.[20] The ABCA majority and Ontario dissent are the only decisions to not have cited the IPCC and to have not mentioned the existential nature of the climate change issue.

13. In Australia, the Land and Environment Court in *Gloucester Resources Limited v Minister for Planning* rejected a single mine because the GHG emissions would increase the *global* total concentrations of GHGs:

> [T]he GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused.[21]

14. In Colombia, the Supreme Court of Justice dealt with a specific industry – forestry – in the context of deforestation in the Amazon region. The court acknowledged that deforestation contributed to climate change, which threatened the plaintiffs' (a group of 25 children, youth, and young adults) rights to a healthy environment and life.[22]

15. The severity and extent of the climate change issue led the SKCA to state:

> If it is necessary to apply established doctrine in a slightly different way to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem to be entirely appropriate. It is also in keeping with what the Supreme Court has said about the utility of, where possible, allowing both Parliament and the provincial legislatures jurisdictional room to act in relation to the environment.[23]

16. As held by the SKCA majority, the climate change issue gives rise and authority to apply established doctrine in a slightly different way. Without the acknowledgement that we are facing an existential crisis, there is less impetus to allow the living tree to grow in step with the needs of Canadians.

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[19] *Ibid*.
[20] *Ibid* at para 2.1.
[21] [2019] NSWLEC 7 at para 699.
[22] STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, Bagota D.C, M.P. Luis Armando Tolosa Villabona, April 05, 2018 with excepts translated by Dejusticia available at: <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf>.
[23] *Saskatchewan Reference*, *supra* note 1 at para 144.

ii) The role of the right to life in this reference

17. It is our respectful submission that both federal and provincial governments have a positive obligation to mitigate climate change in accordance with s. 7 of the *Charter*.[24]

18. Section 31 of the Constitution states that the *Charter* cannot be used to *expand* the powers of parliament or legislatures. In asserting that the *Charter* imposes a positive obligation on the government to avert severe impacts of anthropogenic climate change, we are not suggesting that the *Charter* would fundamentally alter the distribution of powers. Rather, in the context of a positive mutual constitutional obligation precipitating from an existential crisis, spheres of jurisdiction must be interpreted contextually and liberally.

19. Without due consideration to the values underpinning ss. 7 and 15 of the *Charter*, as well as s. 35, the rights of children, women, and Indigenous people fall into a constitutional void, held hostage by the unwillingness and inability of certain provinces to commit to minimal standards. We beg for a baseline of international and Canadian values, including respect for the right to life, to inform the division of powers analysis if necessary. In closing, we encourage this Court "**not to read the provisions of the Constitution like a last will and testament lest it become one**."[25]

PART IV – COSTS

20. The Interveners request no costs be awarded to or against them in respect of these appeals.

PART V – RELIEF SOUGHT

21. Climate Justice *et al.* suggests that the act is wholly constitutional.

ALL OF WHICH IS RESPECFULLY SUBMITTED, dated this 11th day of August, 2020.

Taylor-Anne Yee *for* Jonathan Stockdale, and Larry Kowalchuk

[24] Between 1986 and May 2020, there have been 1,587 cases of climate litigation around the world, with 58% of all non-US cases to have resulted in outcomes where the judge ruled in favour of more effective climate regulation or against an outcome that would have resulted in increased GHGs. See Crockett et al. "Human rights arguments increasingly deployed in climate change litigation", (July 30, 2020), online:
https://www.lexology.cohttps://www.lexology.com/library/detail.aspx?g=9b6564bd-6ca2-437c-bc64-03293ded2928.m/library/detail.aspx?g=9b6564bd-6ca2-437c-bc64-03293ded2928.

[25] *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at 155 [emphasis added].

PART VI – TABLE OF AUTHORITIES

Case Law	**Para No.**
1. *Hunter et al. v Southam Inc.*, [1984] 2 SCR 145 at 155	21
2. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544	2
3. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40	1, 2, 8, 15
4. *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74	1, 7, 9, 10

International Case Law

5. *Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7	13
6. STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, Bagota D.C, M.P. Luis Armando Tolosa Villabona, April 05, 2018	14
7. *The State of the Netherlands v Stitchting Urgenda*, [2019] ECLI:NL:HR:2019:2007	12

Legislation

8. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11	4-5, 17-19

Secondary Sources

9. Alexis Bélanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21 ("Bélanger")	9
10. Crockett et al. "Human rights arguments increasingly deployed in climate change litigation", (July 30, 2020), online: <https://www.lexology.com/library/detail.aspx?g=9b6564bd-6ca2-437c-bc64-03293ded2928>.	17