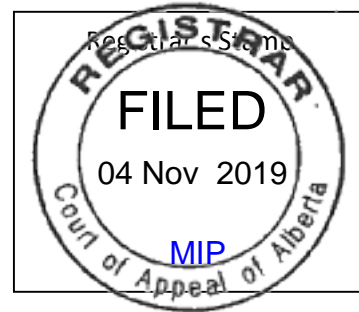


COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 1903-0157-AC

REGISTRY OFFICE EDMONTON



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

DOCUMENT

**FACTUM OF THE INTERVENOR
THE DAVID SUZUKI FOUNDATION**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 20th day of June, 2019

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OVERVIEW

1. Canada and the world are engaged in an existential struggle against climate change. The *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (the “GGPPA” or the “Act”) is urgently necessary to address a national emergency: Canada is running out of time to mitigate climate change’s disastrous health, economic, environmental and social impacts. The GGPPA is within the “National Emergency” branch of the federal “peace, order, and good government” (“POGG”) power under s. 91 of the *Constitution Act, 1867*.¹

2. Parliament may legislate to prevent or respond to a national emergency if there is a rational basis for doing so. The threat of climate change and the need to curtail it is surely as grave as, and most probably graver than, past emergencies for which the Courts have upheld Parliament’s legislative response under POGG. The warming climate has already harmed Canadians by causing or exacerbating floods, wildfires and other extreme weather events. Unless Canada takes its share of decisive action over the next decade to lower emissions, the damage will become increasingly dire and irreversible.

3. Federal power to legislate in response to a national emergency is limited only insofar as the legislation must be of a temporary character. The GGPPA is inherently temporary. It is an emergency measure required in the short term to set in motion the transition to a low-carbon economy and society for Canada.

4. In the emergency circumstances in which Canada now finds itself, which are exacerbated by the insufficient responses of some provinces including Alberta, the GGPPA is a constitutional measure that Parliament has reasonably taken in discharge of its responsibility to protect the country from disaster.

PART 1. FACTS

5. The David Suzuki Foundation (“DSF”) agrees with the statement of facts in Canada’s factum. Additional facts below illustrate Parliament’s subjective apprehension of a climate emergency, and the objective existence and scale of that emergency.

¹ Constitution Act, 1867, 30 & 31 Vict, c 3, section 91 [“**Constitution Act**”].

A. Parliament apprehends an emergency and proposes a response

6. In his speech in favor of Canada’s ratification of the *Paris Agreement*, Prime Minister Justin Trudeau announced Canada’s intention to implement national carbon pricing. He described the need for pricing in emergency terms:

If one lives in Canada’s north or in our coastal communities, or really in any community that is subject to extreme weather conditions and the resulting floods, droughts, and wild fires, the effects of climate change itself cannot be denied. There is no hiding from climate change. It is real and it is everywhere.²

7. When Joël Lightbound – Parliamentary Secretary to the Minister of Finance and sponsor of the legislation – introduced the GGPPA, he noted that climate change has already caused serious damage such as “coastal erosion, thawing permafrost, and increases in heat waves, droughts and flooding”. He stated that putting a price on carbon pollution would help “put Canada on a course to meet our 2030 emission target” under the *Paris Agreement*.³

8. Explaining the need for the GGPPA, Catherine McKenna, Minister of the Environment and Climate Change, recounted vivid scenes of devastation from climate change on Canadian families. She described meeting victims of climate related disasters, commenting that: “[w]e are seeing devastation like this across Canada and around the world”. She also recounted a discussion with an Inuit boy in Nunavut where the thawing permafrost threatens his community’s way of life, commenting that: “[t]oday Canada’s high Arctic is warming at three times the rate of the rest of Canada. Climate change is real, and it is having a real impact on Canadians from coast to coast to coast”.⁴

9. Jonathan Wilkinson, Parliamentary Secretary to the Minister of Environment and Climate Change, said that “climate change is not a distant threat, something only for future generations to worry about. It is affecting us now, here at home and around the world”.⁵

10. Bill Morneau, Minister of Finance, warned of the costs associated with the effects of climate change, saying that they are expected to cost Canada’s economy \$5 billion a year by 2020,

² *House of Commons Debates*, 42nd Parl, 1st Sess [*Debates*], No 086 (3 October 2016) at 1215 (Right Hon Justin Trudeau), Book of Authorities [“BOA”], Tab 8.

³ *Debates*, No 279 (16 April 2018) at 1210 (Joël Lightbound), BOA, Tab 10.

⁴ *Debates*, No 289 (1 May 2018) at 1045 (Hon Catherine McKenna), BOA, Tab 12.

⁵ *Debates*, No 146 (23 February 2017) at 1515 (Jonathan Wilkinson), BOA, Tab 9.

and as much as \$43 billion a year by 2050, “if we do not take action”.⁶

11. On October 15, 2018, Parliament held an emergency debate – which occurs when the matter proposed for discussion is of “genuine emergency, calling for immediate and urgent consideration”⁷ – in response to the Special Report of the Intergovernmental Panel on Climate Change (“IPCC Special Report”), which explains the urgent need to keep the human-caused rise in global temperatures to no more than 1.5 degrees Celsius.⁸ According to the IPCC Special Report, a rise above 1.5 degrees would have severe consequences for the high latitudes of the Northern Hemisphere which includes Canada:

Reaching 2°C instead of 1.5°C of global warming would lead to substantial warming of extreme hot days in all land regions. It would also lead to an increase in heavy rainfall events in some regions, particularly in the high latitudes of the Northern Hemisphere, potentially raising the risk of flooding... The impacts of any additional warming would also include stronger melting of ice sheets and glaciers, as well as increased sea level rise, which would continue long after the stabilization of atmospheric CO2 concentrations.⁹

12. The IPCC Special Report further warns that “[t]o limit warming to 1.5°C, mitigation would have to be large-scale and rapid”¹⁰ (i.e., within the next decade). Unless the global community, including Canada, takes action, the Earth’s climate will pass “tipping points”, or “thresholds beyond which certain impacts can no longer be avoided, even if temperatures are brought back down later on”.¹¹ One such unavoidable impact would be the collapse of the Greenland and Antarctic ice sheets over the course of centuries or millennia.¹²

13. In her remarks during the emergency debate, Minister of the Environment and Climate Change Catherine McKenna said that “the emergency we are talking about now was an emergency 10 years ago”¹³ and emphasized the need for immediate action to avoid more climate-related disasters such as the 2016 Fort McMurray wildfire:

⁶ *Debates*, No 283 (23 April 2018) at 1220 (Hon Bill Morneau), BOA, Tab 11.

⁷ House of Commons, *Standing Orders of the House of Commons*, at Standing Order 52(6)(a), Book of Authorities [“BOA”], Tab 15.

⁸ Record of the Attorney General of Canada [CR] Vol 1, Tab 1, Exhibit F, Intergovernmental Panel on Climate Change, “Special Report on the impacts of global warming of 1.5°C: Frequently Asked Questions”, October 2018 [IPCC Report FAQ].

⁹ *Ibid* at R296.

¹⁰ *Ibid* at R298

¹¹ *Ibid* at R297

¹² *Ibid*

¹³ *Debates*, No 334 (15 October 2018) at 1900 (Hon Catherine McKenna), BOA, Tab 13.

When we look at some examples of disasters, we can look at the Fort McMurray wildfire in 2016. It cost almost \$9 billion. We know that we are going to continue to see wildfires like that, and they are going to get worse. However, if we take action, we can limit the impact.¹⁴

14. Several other MPs echoed the Minister. MP Nathaniel Erskine-Smith said: “[w]e’re running out of time”¹⁵ describing climate change as “the most pressing issue of the day” and “an urgent issue to deal with”.¹⁶ He linked climate impacts to the failure to price GHG emissions, quoting the 2018 Nobel Prize winner in Economics who said that: “[t]he most perilous of all environmental problems, climate change, is taking place because virtually every country puts a price of zero on carbon dioxide emissions”.¹⁷ MP Mark Gerretsen said that “we have to do something immediately as this is an extremely dire situation”.¹⁸ Sean Fraser, now Parliamentary Secretary to the Minister of Environment and Climate Change, called the consequences outlined in the IPCC Special Report “catastrophic”, threatening the “livability of the ecosystems human beings inhabit today”.¹⁹

15. On June 17, 2019, Parliament voted to declare a climate emergency in Canada. The resolution states that the emergency requires Canada to meet its international emissions reduction targets:

Canada is in a national climate emergency which requires, as a response, that Canada commit to meeting its national emissions target under the Paris Agreement and to making deeper reductions in line with the Agreement’s objective of holding global warming below two degrees Celsius and pursuing efforts to keep global warming below 1.5 degrees Celsius.²⁰

B. Climate change is a national emergency

16. According to the World Meteorological Organization, the world is entering a new climate reality with an extreme level of CO₂ that is up to 145% that of pre-industrial levels. Such levels have not existed in the atmosphere for the last 3,000,000-5,000,000 years, which is unprecedented in human history.²¹

¹⁴ *Ibid* at 1850 (Hon Catherine McKenna), BOA, Tab 13.

¹⁵ *Ibid* at 1725 (Nathaniel Erskine-Smith), BOA, Tab 13.

¹⁶ *Ibid* at 1730 (Nathaniel Erskine-Smith), BOA, Tab 13.

¹⁷ *Ibid* at 2150 (Nathaniel Erskine-Smith), BOA, Tab 13.

¹⁸ *Ibid* at 2200 (Mark Gerretsen), BOA, Tab 13.

¹⁹ *Ibid* at 2250 (Sean Fraser), BOA, Tab 13.

²⁰ *House of Commons, Journals*, 42nd Parl, 1st Sess, No 435 (June 17, 2019) at p. 5661, BOA, Tab 14.

²¹ CR, Vol 1, Tab 1, Exhibit A, World Meteorological Organization, *WMO Statement on the State of the Global*

17. Rising greenhouse gas (GHG) emissions have already led to an increase in average global temperature of 1 degree Celsius, which has contributed to the catastrophic frequency and severity of natural disasters, including forest fires, droughts, flooding, coastal erosion, thawing permafrost, invasive species, and the spread of diseases previously foreign to Canada.²² Such extreme climate-related events have been longer and harsher than ever before, devastating local economies and leaving thousands of Canadians without homes, as in the 2016 Fort McMurray fire, which explains why they are rated by the World Economic Forum as among the most significant risks facing humanity in terms of likelihood and impact.²³

18. Canada is in an unfortunately unique position as our Arctic temperatures are rising even faster than elsewhere.²⁴ This leads to changes in relative sea level (sea level as measured in relation to land), rising water temperatures, increased ocean acidity, and loss of sea ice and permafrost which threatens Canada's coastal areas.

19. Climate change has severe health impacts. A major Canadian Government report set out the litany of ways in which climate change damages health:

Heat waves can cause heat-related illness and death, as well as exacerbate existing conditions, such as respiratory and cardiovascular diseases. Higher temperatures also contribute to increased air pollution and production of pollens, worsening allergies and asthma and exacerbating some existing health conditions. Smoke from wildland fires also impacts air quality. Increased contamination of drinking and recreational water by run-off from heavy rainfall can cause illness and disease outbreaks (e.g., acute gastrointestinal illness, *E. coli*).²⁵

20. Canada's economic impacts from climate change are equally severe. At the turn of the century, insurance claims for severe storm damage were around \$300 million annually; that number has now surged to over \$1 billion a year.²⁶ Globally, 2017 – the last year covered in the record, had the highest documented economic losses from severe weather.²⁷

Climate in 2017, WMO-No. 1212, (Geneva: Publications Board World Meteorological Organization, 2018) [**WMO Statement**] at R77-R78

²² Record of the Attorney General of Alberta, Vol. 7, Tab 1, Exhibit BBBB, "Vancouver Declaration on Clean Growth and Climate Change" 3 March, 2018 at A2601.

²³ CR, Vol 1, Tab 1, Exhibit A, *WMO Statement*, *supra* note 21 at R74.

²⁴ CR, Vol 2, Tab 1, Exhibit I, Government of Canada, *Canada's 7th National Communication and 3rd Biennial Report*, (Environment and Climate Change Canada, 2017) [**National Communication and Biennial Report**] at R398.

²⁵ *Ibid* at R399.

²⁶ *Debates*, No 146 (23 February 2017) at 1515 (Jonathan Wilkinson), BOA, Tab 9.

²⁷ CR, Vol 1, Tab 1, Exhibit A, *WMO Statement*, *supra* note 21 at R74.

21. Climate change threatens international security and trade relations, and Canada's allies consider it to be an emergency. The North Atlantic Treaty Organization ("NATO") warned that climate change is having serious negative impacts on global security. It noted in a 2017 report that climate change could be a factor in "triggering violent conflicts".²⁸ Indeed, "[t]he impact of climate change on water supplies alone could constitute a global emergency".²⁹

C. Alberta's emissions performance

22. Even if all provincial targets were fully achieved, Canada would still need to reduce GHG emissions by an additional 45 Mt in 2020 and 55 Mt in 2030 to meet its international commitments of restricting emissions to 622 Mt by 2020 and 525 Mt by 2030.³⁰

23. Currently, Alberta has one of the highest levels of emissions *per capita* in Canada. The *per capita* rate of annual emissions in Alberta is more than three times the level for the entirety of Canada, and over six times the *per capita* emissions rate in Quebec.³¹

24. DSF has sought leave to file the expert evidence of Amin Asadollahi, who reviewed and evaluated the evidence of both Canada and Alberta, and in particular the evidence of Alberta affiant Robert Savage.³² Mr. Asadollahi drew, among others, the following conclusions:

- i. Alberta's climate target is misaligned with the fair share of GHG reductions that it needs to pursue in order for Canada to meet its international commitments. If Canada's 2030 climate target (of 30 per cent below 2005 levels) were to be applied equally to every province, Alberta's emissions would need to be no more than 161Mt by 2030. However, the province is currently on the trajectory of reaching 272Mt by 2030, which is 70 per cent above its fair share. Moreover, although GHG emissions from rest of Canada are expected to decrease over the next decade, Alberta's emissions are forecasted to increase.³³
- ii. Alberta's oil sands will be a critical factor in Canada's ability to meet its international climate commitments. In 1990, oil sands represented 2 per cent of Canada's emissions. This is expected to grow by near seven-fold, accounting for near one-sixth of Canada's

²⁸ CR, Vol 1, Tab 1, Exhibit H, NATO Parliamentary Assembly (Economics and Security Committee), *Assessing and Mitigating the Cost of Climate Change*, 167 ESCTER 17 (NATO, 7 October 2017) at para 28.

²⁹ *Ibid.*

³⁰ Record of the Intervenor, Athabasca Chipewyan First Nation, Vol. 2, Tab 1, Exhibit I, "By the Numbers: Canadian GHG Emissions", Paul Boothe and Felix A. Boudreault, published by the Ivey Business School of Western University (2016) at p. I234

³¹ *Ibid.*, at p. I240-I241

³² Paragraph 24 is subject to the Court's determination on leave to admit the Asadollahi affidavit.

³³ Affidavit of Amin Asadollahi, ["**Amin Affidavit**"] Exhibit B, Expert Report of Amin Asadollahi, "*Alberta's Greenhouse Gas Emissions and Climate Change Policies, Response to the Affidavit of Robert Savage*," ["**Amin Report**"] at para 18.

emissions by 2030.³⁴ Contrary to Mr. Savage’s assertion that Alberta’s emission intensity has improved, the emission intensity of oil sands has remained relatively flat over the past decade. In any event, the oil sands sector’s total emissions are expected to grow, primarily driven by an increase in “in-situ” production.³⁵

- iii. Contrary to Mr. Savage’s assertion that Alberta’s past climate policy, the Specified Gas Emitters Regulation (SGER) “avoided GHG emissions at regulated facilities”, there is no evidence linking that policy to any reductions in greenhouse gas emissions.³⁶ Alberta’s proposed new policy, the Technology Innovation and Emissions Reduction (TIER) program is comparable to the SGER model. There is no evidence to suggest that TIER will be more effective than SGER.³⁷

PART 2. STATEMENT OF ISSUE

25. Does the “National Emergency” branch of the POGG power under s. 91 of the Constitution Act, 1867 provide constitutional support for the GGPPA?

PART 3. STANDARD OF REVIEW

26. As this is a matter determining the constitutionality of the GGPPA by way of reference with no previous administrative or judicial proceedings, the standard of review is correctness. Parliamentary enactments benefit from a presumption of constitutionality.³⁸

PART 4. ARGUMENT

27. The leading case on the National Emergency power, *Re: Anti-Inflation Act*³⁹ (the “*Anti-Inflation Reference*”), supports the GGPPA as valid federal legislation. Parliament had a rational basis to implement the GGPPA as a temporary emergency measure.

A. The nature of the emergency branch power

28. The *Supreme Court* has said that Parliament has “power to deal with a grave emergency without regard to the ordinary division of legislative power under the Constitution”.⁴⁰ The power is available in the following circumstances:

where there can be said to be an urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the

³⁴ *Ibid*, at para 21.

³⁵ *Ibid*, at para 32.

³⁶ *Ibid*, at para 36.

³⁷ *Ibid*, at para 44.

³⁸ *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 [“*Rogers Communications*”] at paras 81-83, BOA, Tab 6.

³⁹ [1976] 2 SCR 373 [*Re Anti-Inflation Act*], BOA, Tab 4.

⁴⁰ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at pp 444-445, BOA, Tab 3.

Legislatures of the Provinces and thus presenting an emergency which can only be effectively dealt with by Parliament in the exercise of the powers conferred upon it by s. 91 of the *British North America Act* “to make laws for the peace, order and good government of Canada”.⁴¹

29. The National Emergency power has most often been interpreted to justify economic measures – such as controls on prices and rents – to deal with crises in times of war and the aftermath of war, but also during times of peace.⁴² As a constitutional power, no statutory action under the *Emergencies Act* is required.⁴³

30. Parliament is entitled to a high degree of curial deference regarding the need for emergency legislation and its means and scope. The Court 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”.⁴⁴

B. The GGPPA is emergency legislation

31. In *Anti-Inflation Reference*, the Supreme Court upheld peacetime federal legislation implementing economic controls to curb runaway inflation, specifically by restraining “profit margins, prices, dividends, and compensation”, which was a much broader and more prescriptive Parliamentary intrusion than the impugned “backstop” features of the GGPPA.

32. In the *Anti-Inflation Reference*, Chief Justice Laskin determined that, for legislation to be validly enacted under the National Emergency branch of POGG, there must be a “rational basis” to characterize it as a measure responding to “exceptional circumstances”.⁴⁵ To determine whether such a rational basis exists, the Court referred to the language of the statute, particularly the preamble, and the relevant extrinsic evidence.⁴⁶ Chief Justice Laskin noted that it is not necessary to prove the crisis as a matter of fact, as one would in civil litigation on a balance of probabilities, since such matters concern “social and economic policy and hence governmental and legislative judgment”.⁴⁷ Rather, “it may be that the existence of exceptional circumstances is so notorious as

⁴¹ *Re Anti-Inflation Act*, *supra* note 39 at 436-437, per Ritchie J, BOA, Tab 4.

⁴² See *Fort Frances Pulp and Power Co v Manitoba Free Press Co*, [1923] UKPC 64 [*Fort Frances*], BOA, Tab 2; *Reference re Wartime Leasehold Regulations*, [1950] SCR 124 [*Wartime*], BOA, Tab 5.

⁴³ *Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.); Monohan, PJ, *Constitutional Law*, 3rd ed, Essentials of Canadian Law (Toronto: Irwin Law, 2006) at 257, BOA Tab 16.

⁴⁴ *Re Anti-Inflation Act*, *supra* note 39 at 397, per Laskin CJC, BOA, Tab 4.

⁴⁵ *Re Anti-Inflation Act*, *supra* note 39 at 419-420 and 422-423, per Laskin CJC, BOA, Tab 4.

⁴⁶ *Ibid* at 391, 422-423, per Laskin CJC, and 438-439, per Ritchie J.

⁴⁷ *Ibid* at 423.

to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it”.⁴⁸

33. Following Chief Justice Laskin in *Anti-Inflation Reference*, this Honourable Court can take judicial notice of the national peril that climate change is causing and will continue to cause and conclude that Parliament has a rational basis upon which to legislate a response. The Court can equally draw a reasoned inference and apprehend an emergency from the text of the legislation, the parliamentary record, and the extrinsic material.

34. When the Court considers extrinsic material, that material “need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity”.⁴⁹ The material in this case (canvassed in Part 1, above) shows far more than just a “rational basis”; rather it shows cause for genuine alarm. It vividly illustrates the dire nature of the national emergency, including its environmental, social, economic, and health aspects.

35. Parliament’s emergency response to the climate crisis is also reflected in the urgent language of the GGPPA’s preamble. As in the *Anti-Inflation Act*, Parliament did not use the word “emergency” in enacting the GGPPA. The Court in *Anti-Inflation Reference* found that the preamble to the legislation in question was “sufficiently indicative that Parliament was introducing a far-reaching programme prompted by what in its view was a serious national condition” and that it provided a “base for assessing the gravity of the circumstances which called forth the legislation”.⁵⁰ A formal declaration of emergency was not required. It was enough that Parliament was “motivated by a sense of urgent necessity created by highly exceptional circumstances”.⁵¹ The Court held that legislation need not “use any particular form of words in order to disclose [Parliament’s] belief that an emergency existed”.⁵²

36. Parliament was clearly motivated by a sense of urgent necessity created by highly exceptional circumstances in enacting the GGPPA. The Act’s preamble recounts the damage the current level of GHGs has caused and the consequences of ongoing, rising emissions:

⁴⁸ *Ibid.*

⁴⁹ *Re Anti-Inflation Act*, *supra* note 39 at 423, per Laskin CJC, BOA, Tab 4.

⁵⁰ *Ibid* at 422, per Laskin CJC.

⁵¹ *Ibid* at 439, per Ritchie J.

⁵² *Ibid* at 438, per Ritchie J.

Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change;

Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity;

Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities;

37. The preamble for the GGPPA is far more indicative of the emergency circumstances apprehended by Parliament than that in the *Anti-Inflation Act*, which read:

WHEREAS the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern;

AND WHEREAS to accomplish such containment and reduction of inflation it is necessary to restrain profit margins, prices, dividends and compensation.⁵³

38. The rational basis for apprehending an emergency or crisis is further supported by the statements (summarized in Part 1, above) of Members of Parliament in the debates on the GGPPA, and in an emergency debate on climate change during which the Minister of the Environment and Climate Change called climate change “an emergency” and warned of “catastrophic impacts in 30 years...if we do not take action”.⁵⁴

39. Moreover Parliament voted to declare a climate emergency in Canada.⁵⁵ As the centrepiece federal effort to meet Canada’s emission reduction targets, the GGPPA is the response that Parliament determined is “required” to deal with the emergency.

40. In addition to its general burden of overcoming the presumption of constitutionality, Alberta must refute a rational basis for the GGPPA.⁵⁶ This is an extremely high bar: Chief Justice Laskin quoted Lord Wright approvingly in holding that “very clear” evidence is needed to refute the presumption:

⁵³ *Re Anti-Inflation Act*, *supra* note 39 at 381, BOA, Tab 4.

⁵⁴ *Debates*, No 334 (15 October 2018) at 1850 (Hon Catherine McKenna), BOA, Tab 13.

⁵⁵ *Supra* note 20, at para 15.

⁵⁶ *Rogers Communications*, *supra* note 38, at paras 81-83, BOA, Tab 6.

[V]ery clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of *ultra vires*, in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a corollary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation.⁵⁷

41. In this case, Alberta has furnished no evidence, as is its burden, and certainly not “clear” evidence, that an emergency has not arisen. The available evidence emphatically establishes the contrary. In the circumstances, DSF submits that the Court should defer to Parliament’s judgment that mitigating GHG emissions must proceed on an emergency basis. The pricing mechanisms in the GGPPA are Parliament’s chosen means of addressing the crisis, and there is a more than rational basis to believe that those mechanisms are well chosen.

C. The GGPPA is temporary in character

42. The GGPPA is an emergency measure required for the coming decade to set in motion the transition to a low carbon future for Canada. This satisfies the requirement that the emergency, or the measures to address the emergency, be temporary.

43. More specifically, the “emergency” which justifies federal action that allegedly impinges on provincial jurisdiction is the risk that Canada will miss the tight deadline to fulfill its commitments under the *Paris Agreement*, undermining the global effort to stave off the most disastrous effects of climate change that would in turn harm Canadians.

44. While the legislation Parliament chooses to address the emergency must be of a “temporary character”, it need not be explicitly time limited. Chief Justice Laskin wrote:

...that a statutory provision valid in its application under circumstances envisaged at the time of its enactment can no longer have a constitutional application to different circumstances under which it would, equally, not have been sustained had they existed at the time of its enactment.⁵⁸

45. In other words, the nature of the legislation can make it time-bound apart from any explicit reference to its termination. Accordingly, the National Emergency branch has been held to support

⁵⁷ *Re Anti-Inflation Act*, *supra* note 39 at 439, per Ritchie J, BOA, Tab 4; citing Lord Wright in *Co-Operative Committee on Japanese Canadians v Canada (Attorney General)*, [1947] AC 87, [1947] 1 DLR 577 at para 2, BOA, Tab 1.

⁵⁸ *Re Anti-Inflation Act*, *supra* note 39 at 427, per Laskin CJC, BOA, Tab 4.

legislation and orders-in-council that lacked explicit termination clauses.⁵⁹ Indeed, Professor Hogg questions the usefulness of formal time limitations for emergency measures, observing that “an ostensibly temporary measure can always be continued in force by Parliament, while an ostensibly permanent measure can be repealed at any time”.⁶⁰

46. National emergencies, for example – wars, rarely have easily predicable end dates. In the case of climate change, the emergency has developed over decades and will take years to resolve. However, it also has acute dimensions, notably the need to take immediate action to put the country on a path to mitigating climate change’s worst effects.

47. Viscount Haldane, whom Chief Justice Laskin cites with approval, clarified that the nature of the emergency dictates the longevity of the legislation enacted to deal with it: once the emergency has abated, legislation enacted to deal with it will cease to be valid and will become *ultra vires* Parliament. In the context of legislation to deal with the effects of war, he said that “it may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for”.⁶¹

48. Since the emergency power has supported legislation to address war, which has no fixed timetable, it should certainly address the climate crisis, which does. Canada can and has placed a timeline on itself in its “Nationally Determined Contribution” (“NDC”) under the *Paris Agreement*. The GGPPA’s preamble is clearly linked to Canada’s commitments under the *Paris Agreement*:

Whereas Canada has also ratified the Paris Agreement, done in Paris on December 12, 2015, which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Whereas the Government of Canada is committed to achieving Canada’s Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the

⁵⁹ *Fort Frances*, *supra* note 42 at paras 8-10, 20 and 24, BOA, Tab 2.

⁶⁰ Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007) (loose-leaf 2018 supplement), ch 17.4(e), BOA Tab 7; *Re Anti-Inflation Act*, *supra* note 39 at 427, per Laskin CJC, BOA Tab 4.

⁶¹ *Re Anti-Inflation Act*, *supra* note 39 at 408-409, per Laskin CJC, BOA Tab 4; citing Viscount Haldane in *Fort Frances*, *supra* note 42 at para 20, BOA, Tab 2; *Wartime*, *supra* note 42, at p 5.

economy, accelerate clean economic growth and build resilience to the impacts of climate change;

49. Canada's NDC created a 12-year timeline (now 10 years) to achieve the purpose of the Act: Canada must reduce its GHG emissions by 30 per cent below 2005 levels by 2030.⁶² The IPCC Special Report underlines the urgency of meeting the 10-year deadline, for it warns that Canada and the world have only that amount of time – until 2030 – to make the changes necessary to hold emissions to 1.5°C above pre-industrial levels.⁶³ To fail is to suffer irreversible effects of climate change.

50. When the GGPPA, combined with other efforts of both federal and provincial governments, has fulfilled its stated purpose it will arguably no longer be necessary and can be repealed, amended, or subject to a further challenge as to its *vires* at that time. If in 2030 Canada falls short of its *Paris Agreement* commitments, then the GGPPA could remain operative to the extent that Parliament has a rational basis to find that it is still necessary to achieve belated compliance.⁶⁴

51. Practically, if the GGPPA and other mitigation efforts do not achieve Canada's emissions reduction target by the 2030 deadline, Parliament and the provinces may have to devise a different and likely stronger approach given the urgency of the crisis. The GGPPA should be upheld as constitutional and given an opportunity to address the climate crisis now, for without it the likelihood increases that stronger, more stringent measures – which Alberta would find even more objectionable – will perforce become necessary.

D. Submissions related to Amin Asadollahi evidence⁶⁵

52. Continuing the discussion on the temporary character of the legislation, Mr. Asadollahi, who has significant experience and expertise in evaluating the performance and efficacy of measures to reduce greenhouse gases, opined that the GGPPA is, by design, a “temporary measure”.⁶⁶

⁶² CR, Vol 1, Tab 1, Affidavit of John Moffet at para 53.

⁶³ CR, Vol 1, Tab 1, Exhibit F, IPCC Report FAQ, *supra* note 8 at R292.

⁶⁴ The Court has confirmed that it is possible, and indeed may be necessary, to leave emergency legislation in place in order to deal with the continuing effects of a crisis. For example, it was permissible under the National Emergency branch of POGG that war measures could outlive the end of the war “while the effects of war conditions might still be operative”. See *Fort Frances*, *supra* note 42 at para 24, BOA, Tab 2.

⁶⁵ Subject to the Court's determination on leave to admit the Asadollahi affidavit.

⁶⁶ Amin report, *supra* note 33, at para 54.

53. Specifically, Mr. Asadollahi notes in respect of the industrial benchmarks set out in part 2 of the Act, “the federal carbon pricing policy would prove to have been effective when emissions intensity of a facility declines to the benchmark level, and at which point, the regulated entity no longer pays a price on carbon”.⁶⁷ In other words, the pricing measures in the act will no longer be needed once facilities have reduced their emissions in line with Canada’s overall goal, which is calibrated to 2030. Much the same is true of the “demand-side” or consumer measure set out in part 1 of the Act, since when behaviour changes such that consumers no longer demand fossil fuels at the current unsustainable rate, it will be “no longer necessary to pay a price on GHGs”.⁶⁸

54. Mr. Asadollahi’s assessment confirms that the GGPPA is designed to render itself obsolete, the essence of temporary legislation. Having achieved its policy goal of re-orienting industrial and individual practices towards de-carbonization in line with Canada’s goals, it will be, in the words of Viscount Haldane, “no longer called for”.⁶⁹

Alberta’s poor climate performance shows the rational basis for emergency legislation

55. Mr. Asadollahi also analyzes Alberta’s extensive evidence and concludes that it is misleading, inaccurate, or incomplete in a number of areas. This undermines a pillar of Alberta’s constitutional argument and confirms the rational basis for emergency legislation to address climate change.

56. Alberta asserts that it has an “effective” track record on greenhouse gas emissions management, and that “demand-side” mechanisms such as those in place under Alberta’s former government and mandated by Part 1 of the GGPPA are ineffective or even “contribute to the problem of global climate change”.⁷⁰ This gives Alberta cover to pretend that there is “considerable doubt as to what policy mix within each jurisdiction will best achieve global reductions”, and that the GGPPA merely imposes a federal “policy preference”.⁷¹

57. In fact, as Mr. Asadollahi’s analysis shows, there is no “doubt” at all: Alberta has exacerbated and continues to exacerbate the climate emergency in Canada. It lacks “effective policies against the backdrop of a climate emergency” and what policies it does have are

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Fort Frances*, *supra* note 42, at para 20.

⁷⁰ Factum of the Attorney General of Alberta, at paras 66 and 262.

⁷¹ *Ibid* at para 266-268.

“misaligned with climate science and the need for urgency policy intervention to reduce GHG emissions from fossil fuels and other sources, and fails to address rising GHG emissions from Alberta’s oil sands sector”.⁷²

58. Alberta’s contribution to the climate emergency renders it unable to credibly deny a rational basis for a federal response. Its intransigence and inaction have helped make climate change “a crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament’s stern intervention in the interests of the country as a whole”.⁷³ In the circumstances, Parliament is constitutionally competent to invoke its emergency jurisdiction to ensure that all provinces, including Alberta, conform to minimum GHG mitigation standards.

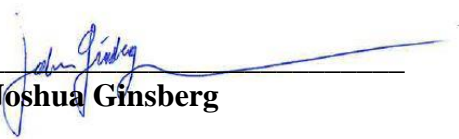
E. Conclusion

59. With atmospheric CO₂ already at a level not seen in the last several million years and the planet in a climatological state never before experienced in human history, Canada and its people – especially future generations – are in peril. The unprecedented climate crisis Canada faces is an emergency requiring an extraordinary response. It justifies and requires the use of all federal power, including National Emergency powers under POGG.

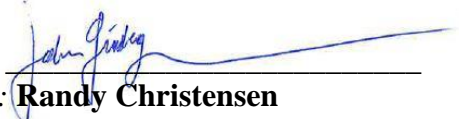
PART 5. RELIEF SOUGHT

60. That the Reference question be answered: The GGPPA is constitutional in whole.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2019.



Joshua Ginsberg



For: **Randy Christensen**

Counsel for the Intervenor, David Suzuki Foundation

⁷² Amin Affidavit, *supra* note 33, at para 10. See also para. 24, above.

⁷³ *Anti-Inflation* at p. 425.

TABLE OF AUTHORITIES

Cases

1. *Co-Operative Committee on Japanese Canadians v Canada (Attorney General)*, [1947] AC 87, [1947] 1 DLR 577
2. *Fort Frances Pulp and Power Co v Manitoba Free Press Co*, [1923] UKPC 64
3. *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, excerpted
4. *Re: Anti-Inflation Act*, [1976] 2 SCR 373
5. *Reference re Wartime Leasehold Regulations*, [1950] SCR 124
6. *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23, excerpted

Secondary Sources

7. Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough: Carswell, 2007) (loose-leaf 2018 supplement), excerpted
8. *House of Commons Debates*, 42nd Parl, 1st Sess, No 086 (3 October 2016), excerpted
9. *House of Commons Debates*, 42nd Parl, 1st Sess, No 146 (23 February 2017), excerpted
10. *House of Commons Debates*, 42nd Parl, 1st Sess, No 279 (16 April 2018), excerpted
11. *House of Commons Debates*, 42nd Parl, 1st Sess, No 283 (23 April 2018), excerpted
12. *House of Commons Debates*, 42nd Parl, 1st Sess, No 289 (1 May 2018), excerpted
13. *House of Commons Debates*, 42nd Parl, 1st Sess, No 334 (15 October 2018), excerpted
14. *House of Commons, Journals*, 42nd Parl, 1st Sess, No 435 (June 17, 2019), excerpted
15. House of Commons, *Standing Orders of the House of Commons*, at Standing Order 52(6)(a)
16. Monohan, PJ, *Constitutional Law*, 3rd ed, *Essentials of Canadian Law* (Toronto: Irwin Law, 2006), excerpted