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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 CLIMATE JUSTICE *ET AL.***

Reference by the Lieutenant Governor in Council
To the Court of Appeal of Alberta

FACTUM OF THE INTERVENOR: CLIMATE JUSTICE *ET AL.*

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PART 1 – POSITION AND OVERVIEW

1. We support the position of Canada, that the *Greenhouse Gas Pollution Pricing Act*[1] is a valid exercise of Parliament's jurisdiction under the national concern branch of its Peace, Order, and good Government (POGG) power. We agree with the opinion of Richards CJ in Saskatchewan's *Reference re Greenhouse Gas Pollution Pricing Act*[2], and the opinion of Hoy ACJ in Ontario's *Reference re Greenhouse Gas Pollution Pricing Act*[3].

2. Climate change caused by anthropogenic greenhouse gas (GHG) emissions poses an increasingly urgent threat to the existence of humanity unless net emissions are reduced in accordance with the natural limits of our ecosystems. Accordingly, we submit that the federal government is compelled to mitigate emissions in a manner consistent with the right to life. The justiciability for review and intervention of government decision-making in relation to climate change with respect to section 7 of the *Canadian Charter of Rights and Freedoms*[4] is supported by Canadian and international precedent, and is consistent with the precautionary principle, and Canada's international obligations. The right to life may obscure the division of powers analysis. Regardless, we respectfully submit that the *Act*, which balances federalisms in both legal and practical terms, and is *intra vires* Parliament.

PART 2 – FACTS

i) The Record and Evidence of Canada and Alberta

3. We agree with the record and evidence filed by the Attorney General of Canada, as well as their objection to the record and evidence of the Attorney General of Alberta.

ii) Findings of Fact in the Saskatchewan and Ontario References

4. We agree with the findings of fact by all of the Justices in both the Saskatchewan and Ontario references.

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[1] SC 2018, c 12, s 186 [*Act*].
[2] 2019 SKCA 40 [*Saskatchewan Reference*], Alberta's Book of Authorities [ABBA], Vol 3, Tab 21.
[3] 2019 ONCA 544 [*Ontario Reference*], ABBA, Vol 3, Tab 20.
[4] *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*].

5. The dissenting judgement in the *Saskatchewan Reference* referred to the "existential necessity of mitigating anthropogenic GHG emissions" as "proven and true"[5] noting the uncontested record in that case. The majority similarly found that "climate change has emerged as a major threat, not just to Canada, but to the planet itself".[6] Similarly, Strathy CJ in *Ontario's Reference* notes parliament's finding that "atmospheric accumulation of [greenhouse gases] causes climate changes that pose an existential threat to human civilization and the global ecosystem".[7]

6. The majority in the *Ontario Reference* explain the quantity and timing of emission reductions required to avoid the most deleterious impacts of climate change:

> [A]nthropogenic CO2 emissions must be reduced by approximately 45 percent below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change.[8]

7. GHG pricing, "is regarded as an essential aspect or element of the global effort to limit GHG emissions"[9] The majority in the *Saskatchewan reference* describe how carbon pricing relates to emissions reductions:

> (a) "There is widespread international consensus that <u>carbon pricing is a necessary measure</u>, though not a sufficient measure, to achieve the global reductions in GHG emissions necessary to meet the Paris Agreement targets" …
> (b) "A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way" …
> (c) There is a widespread trend in favour of carbon pricing … Overall, 67 jurisdictions … are putting a price on carbon" …
> (d) "The existing literature is highly convergent in finding that carbon prices that have been implemented around the world have been successful in reducing greenhouse gas emissions" …[10] [emphasis added]

iii) Evidence from Saskatchewan reference modified to Alberta

8. In the *Saskatchewan Reference*, Climate Justice *et al.* provided four affidavits, and respectfully offers affidavits from those same four affiants in this reference.

9. The four affidavits, updated and modified to focus on this reference, are:

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[5] *Saskatchewan Reference* at para 236*,*
[6] *Saskatchewan Reference* at para 144*,* ABBA, Vol 3, Tab 21.
[7] *Ontario Reference* at para 3*,* ABBA, Vol 3, Tab 20.
[8] *Ontario Reference* at para 16*,* ABBA, Vol 3, Tab 20.
[9] *Saskatchewan Reference* at para 147*,* ABBA, Vol 3, Tab 21.
[10] *Saskatchewan Reference* at para 147*,* ABBA, Vol 3, Tab 21.

- Affidavit of Dr. Mark Bigland-Pritchard, sworn October 31, 2019 ("Dr. Mark Bigland-Pritchard") (*Climate Justice et al.*'s Record [CJR], Vol 1, Tab 1)
- Affidavit of James Emberger, sworn October 29, 2019 ("Emberger Affidavit") (CJR, Vol 1, Tab 2)
- Affidavit of Dr. David Maenz, sworn November 1, 2019 ("Dr. Maenz Affidavit") (CJR, Vol 1, Tab 3)
- Affidavit of Glenn Wright, sworn November 1, 2019 ("Wright Affidavit") (CJR, Vol 1, Tab 4)

PART 3 – ARGUMENT

10. This factum discusses contextual and interpretive principles, such as i) the living tree doctrine, and ii) the precautionary principle both of which support a finding of that the *Act* is constitutional. This factum also discusses the justiciability of the right to life in the context of iii) section 7 of the *Charter*, and iv) our international obligations, which also support a finding of that the *Act* is constitutional.

i) The Living Tree Doctrine

11. The Supreme Court of Canada ("SCC") in *Re Residential Tenancies Act, 1979,*[11] reminds us of the broad context in which references occur:

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in *Edwards and Others v. Attorney-General for Canada and Others.* Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction.[12]

12. Similarly, in *Hunter et al. v. Southam Inc.*[13], Dickson J. cautioned against restrictive interpretations of the *Charter*:

> It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these

[11] 1981 CanLII 24 (SCC), [1981] 1 SCR 714 at 723, *Climate Justice at al.*'s Book of Authorities [CJBA], Vol 1, Tab 15.
[12] *Ibid* at 723.
[13] [1984] 2 SCR 145, 11 DLR (4th) 641, at 155 [*Southam*], CJBA, Vol 1, Tab 8. Dickson also cited the 1929 UK JCPC decision, *Edwards v Canada (Attorney General)* [1930] AC 124, [1930] 1 DLR 98 at 106-107, CJBA, Vol 1, Tab 5: The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

> considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one."[emphasis added].

13. With the greatest of respect, the signalling towards a narrower contextualization of the climate change issue in Huscroft J's dissent in the *Ontario Reference* at paragraph 192 – where he states that "The court is not required to decide anything about the science of climate change in order to provide that advice" and classifying climate change as simply a "real and pressing problem that must be addressed" (as opposed to an existential problem) – are submitted to be in tension with Dickson J's ruling in *Hunter et al. v. Southam Inc*:, namely, that "[t]he need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence".[14]

14. The majority in the *Saskatchewan Reference* considered the applicability of the living tree doctrine in relation to the constitutionality of the *Act*, promoting jurisdictional space for both heads of power:

> [A]s La Forest J. noted in Hydro-Québec at paragraph 86, "the Constitution must be interpreted in a manner that is fully responsive to emerging realities". 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. See: Hydro-Québec at para 154. The choices of whether and how to use the tools available to Parliament or a legislature will, of course, be made by elected officials, not by judges.[15]

15. We are not suggesting that the majority in Saskatchewan applied established doctrine in any "slightly different" way. However, the option to apply established doctrine in a slightly different way is available in the present context.

16. It is noteworthy that in both references, the dissent in the *Ontario Reference* is the only opinion that does not characterize the issue before the Court as one of an existential threat. It is also noteworthy that the factum the Attorney General of Alberta does not characterize the climate issue as an existential threat. Neither threat nor existential are words contained in Alberta's factum. While legal analysis must remain objective and dispassionate,

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[14] *Ibid* at p 155.

[15] *Saskatchewan Reference* at 144*,* ABBA, Vol 3, Tab 21.

minimizing the gravity of the situation will also not assist in characterizing the pith and substance of the legislation or in undertaking a contextual POGG analysis.

17. Where a constitutional question relates to an issue of gravity such as climate change, we respectfully submit large and liberal interpretations are not only required by virtue of precedent, but also to avoid characterizations that are disconnected from the acuteness of the issue. For example, the dissent in the *Ontario Reference* suggests that a finding of constitutionality changes the constitutional order and would do so on a permanent basis.[16] The unfortunate reality is that nothing is permanent if governments do not act meaningfully in addressing an existential threat.

ii) Precautionary Principle and International Law

18. In summary, the precautionary principle says: "it is better safe than sorry" when it comes to irreversible environmental harms. In the case at hand, the science is confident, and there is little uncertainty of the gravity of the risk of inaction. This provides great impetus for precaution in the Court's consideration of the facts.

19. The precautionary principle is described in Principle 15 of the *Rio Declaration*[17]*,* which states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

20. The SCC in *Castonguay Blasting Ltd. v Ontario (Environment)*,[18] describes the precautionary principle as an emerging principle of international law, and one that "recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation".[19]

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[16] *Ontario Reference* at 195*,* ABBA, Vol 3, Tab 20.
[17] Annex I of the Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992), CJBA, Vol 1, Tab 25.
[18] 2013 SCC 52, 3 SCR 323, CJBA, Vol 1, Tab 3.
[19] *Ibid* at 20, foll'd in *Prospective Appellant v Mudjatik Enterprises Inc*, 2015 SKCA 15; *Morton v Canada (Fisheries and Oceans),* 2015 FC 575 [*Morton*].

21. In 2001, The SCC explored the meaning of the precautionary principle in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson*[20] , a case often cited for the adoption of the precautionary principle and its application as an element of statutory interpretation[21]:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation.

22. In *Spraytech*, the SCC empowered the municipality to restrict pesticide use in the absence of scientific certainty of its health risks, noting the bylaw's compliance with international law and policy, and character of preventative action.[22] With respect to the precautionary principle and subsidiarity, the court referenced UN's 1987 report titled, *Our Common Future*: local governments [should be] empowered to exceed, but not to lower, national norms.[23]

23. Following the SCC's decision in *R v Hape*, Canadian courts have the power to adopt international law into common law rules.[24] Specifically, the SCC stated:

> 39 … Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.

24. Consistent with the above, the precautionary principle as it relates to environment protection has been used in judicial reasoning. Also the principle is used by Parliament in statute, such as section 9(1) of the *Federal Sustainable Development Act*[25,] which states:

> Within two years after this Act comes into force and within every three-year period after that, the Minister shall develop, in accordance with this section, a Federal Sustainable Development Strategy based on the precautionary principle.

25. .

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[20] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 31, 2 SCR 241 [*Spraytech*], foll'd *Morton,* ABBA, Vol 1, Tab 1.
[21] *Newfoundland and Labrador (Environment and Climate Change) v Atlantic Salmon Federation (Canada),* 2018 NLCA 53 at 304 [*Atlantic Salmon*], CJBA, Vol 1, Tab 10.
[22] *Spraytech* at 32, ABBA, Vol 1, Tab 1.
[23] *Spraytech* at 32, ABBA, Vol 1, Tab 1.
[24] *R v Hape*, 2007 SCC 26 at paras 35-39, 2 SCR 292, CJBA, Vol 1, Tab 13, foll'd *Bulmer v Nissan Motor Co., Ltd.*, 2017 SKCA 19.
[25] *Federal Sustainable Development Act*, SC 2008, c 33, s 9(1), CJBA, Vol 1, Tab 23. We note that Climate change more generally, as well as carbon pricing more specifically, is part of Canada's Federal Sustainable Development Strategy. See e.g. Environment and Climate Change Canada, *Achieving a Sustainable Future,* Cat. No.: En4-136/2019E-1-PDF (Gatineau: ECCC, 2019), online: < https://www.fsds-sfdd.ca/downloads/FSDS_2019-2022.pdf>.

26. The precautionary principle is not limited in application to contexts of subsidiarity. The precautionary principle can help inform contextualization or questions concerning causation of future harm as to avoid statutory interpretations that are "emasculated through unduly narrow interpretation".[26]

27. With respect to subsidiarity, or the provincial inability test, we respectfully submit that the issue of Alberta's emissions cannot be viewed narrowly as simply the quantity and associated impacts of the GHG emissions coming from Alberta. In order for the world to bring its emissions under control, all levels of government across the globe[27] will be required to reduce their emissions and to do so in a relatively coordinated way in order to promote economic stability.[28] As such, a province not only has the potential of having the primary ability to frustrate Canada's ability to reduce emissions in accordance with the Paris Agreement, but also, and perhaps more importantly from a causation perspective, a province's inaction in reducing emissions will have secondary impacts, and Canada's associated inability to meet its NDC, would promote lack of global buy-in to the emissions reduction program. Such is the breeding ground for the existential character of the climate change threat.

28. In applying the test for provincial inability discussed in *R v Hydro-Québec*[29] to this case as informed by the precautionary principle, the science is clear that GHG emissions pose a "diffuse, persistent, and serious". In view of the primary and secondary impacts of a province failing to contribute to emissions reductions in manner consistent with the Paris Agreement, such failures will result in "grave consequences".[30] With the greatest of respect, the current policies of the Alberta government are anticipated to result in such

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[26] *Atlantic Salmon*, *supra* note 21 at 309.
[27] Record of *Climate Justice et al.,* [RCJ] Vol 1, fTab 1*,* Affidavit of Mark Bigland-Pritchard, affirmed November 1, 2019, at para 15. See also "A Collaborative Report from Auditors General" attached to Affidavit of James Emberger at I42 for a summary of what might be described as lack of cohesive strategies between provinces.
[28] [RCJ] Vol 2, Tab 3*,* Affidavit of Dr. David D. Maenz, affirmed November 1, 2019, at paras 11-15.
[29] 3 SCR 213, 1997 CanLII 318 (SCC) [*Hydro-Quebec*], ABBA, Vol 2, Tab 13, foll'd *Groupe Maison Candiac Inc. v Canada (Attorney General)*, 2018 FC 643.
[30] *Hydro-Quebec* at 76, ABBA, Vol 2, Tab 13. See also James Hanes, "Climate Change in a Nutshell: The Gathering Storm", attached in Exhibit "L" of Affidavit of Glenn A. Wright, at RCJ, .Vol 2, I343.

failures. The standards offered by the *Act* in such a case as this one, are indeed, minimal, but necessary.

29. We therefore ask the Court to consider applying the precautionary principle in their constitutional analysis.

iii) Section 7 of the Charter

30. What if Parliament is *compelled* to act in relation to mitigating climate change? If the federal government is obliged, either in tort law, or by virtue of an obligation pursuant to section 7 of the *Charter,* how, if at all, would that obligation impact on question of constitutional validity of the *Act*? This question need not necessarily be answered in this reference, but we respectfully submit that it is important to recognize and acknowledge that i) government inaction on climate change is justiciable, and ii) that if a finding is made that the *Act* is *ultra vires* Parliament, this could place the federal government in an impossible position where they are both liable for lack of climate action and unable to address climate action through carbon pricing, which from an academic perspective is undisputedly the most cost effective and practical means of addressing this issue.

31. Pursuant to section 7 of the *Charter*: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[31]

32. In 2002, the SCC in *Gosselin v Québec (Attorney General)*[32], foreshadowed the potential dimensions of section 7 of the *Charter*. The dominant strand of jurisprudence on section 7 safeguards against certain kinds of deprivation of life, liberty and security of the person in relation to an individual's interaction with the justice system and its administration.[33] In *Gosselin*, the majority held that this strand of jurisprudence is not exhaustive of the scope of section 7, and that section 7 can be implicated in a variety of circumstances.[34] The Court, citing the living tree doctrine, explained that the scope of section 7 remains unanswered:

> 79 … The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is

[31] *Charter, supra* note 4.
[32] [2002] 4 SCR 429, 2002 SCC 84, CJBA, Vol 1, Tab 7.
[33] *Ibid* at 77.
[34] *Ibid* at 78.

> implicated — plainly it is not — but whether the Court ought to apply s. 7 despite this fact.
>
> 80 Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. …
>
> 81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> 82 One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in Edwards v. Attorney-General for Canada, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136, the Canadian Charter must be viewed as "a living tree capable of growth and expansion within its natural limits": … It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in Blencoe, supra, at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the Charter. It is certainly true that we must avoid collapsing the contents of the Charter and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the Charter.

33. Since `, the justiciability of section 7 in the context of governmental exercise of power in relation to climate change was confirmed in, *Environnement Jeunesse c. Procureur général du Canada,*[35] (*Environnement Jeunesse*) a decision by the Québec Superior Court in 2019.

34. The class action in *Environnement Jeunesse* was ultimately dismissed for the claimant's failure to articulate an identifiable class. However, as noted above, the applicant's claim for section 7 relief was found to be justiciable at the certification stage.

35. In coming to this conclusion, the Court in *Environnement Jeunesse* referenced SCC authority instructing that courts should not decline to adjudicate a subject matter only

[35] 2019 QCCS 2885 at 60, 71, CJBA, Vol 1, Tab 6.

because of its political context.[36] Rather, all government power must be exercised in accordance with the Constitution.[37]

36. Similarly, in *Turp v Canada (Justice)*[38], the Government of Canada's decision to withdraw from the Kyoto Protocol was not justiciable, absent a *Charter* challenge.[39]

37. It is our position that the right to a climactic system capable of sustaining life is the right to life enshrined in section 7 of the *Charter*. Without a right to life supported by a predictable climatic system, our other rights, privileges, and powers, including those enumerated in 92A of the *Constitution*, endure little utility. On this point, Judge Ann Aiken of the District Court Judge of the State of Oregon *Juliana v USA et al.*[40], described the importance of a climatic foundation in relation to other rights:

> In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "[h]istoty and tradition guide and discipline this inquiry but do not set its outer boundaries." Id. The genius of the Constitution is that its text allows "future generations [to] protect ... the right of all persons to enjoy liberty as we learn its meaning." Id.
>
> Often, an unenumerated fundamental right draws on more than one Constitutional source. The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated.
>
> Exercising my "reasoned judgment," id at 2598, I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the "foundation of the family," a stable climate system is quite literally the foundation "of society, without which there would be neither civilization nor progress." [emphasis added]

38. "All law is about line drawing"[41]. It is our respectful submission that the line drawing process in this case is unclear. The line drawing process is complexified in the context of powers being divided vertically between provinces and the federal government, and then

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[36] *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC) at paras 55 – 67, CJBA, Vol 1, Tab 11.
[37] *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3 at para 36 and 37, CJBA, Vol 1, Tab 2.
[38] 2012 FC 893, CJBA, Vol 1, Tab 19.
[39] *Ibid* at 18.
[40] Case No. 6:15-cv-01517-TC (November 10, 2016) at 31 to 32, CJBA, Vol 1, Tab 9. See also James Hansen, "Declaration of Dr. James E Hanson in Support of Plaintiffs' Complaint for Declaratory and Injunctive Relief", Affidavit for *Kelsey Cascadia Rose Juliana, Xiuhtezcatl Tonatiuh M. et al. v United States, Barack Obama et al.* at Tab 28.
[41] *R v Hajar,* 2016 ABCA 222 at para 96, CJBA, Vol 1, Tab 12.

again horizontally between the both levels of government and those protected by the *Charter*.

39. Just as the *Canada Health Act*, an act promoting the health of Canadians, maintains minimum standards and consistent levels of coverage across the country for health care through financial levers, so too does the *Act* for mitigation of climate pollution. In *Chaoulli v. Quebec (Attorney General)*[42], in a concurring judgment of three members of the SCC, it was opined that preventing access to health engages and violates section 7 of the *Charter*:

> In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, is not constitutional where the public system fails to deliver reasonable services. Life, liberty and security of the person must prevail. To paraphrase Dickson C.J. in *Morgentaler*, at p. 73, if the government chooses to act, it must do so properly.[43]

40. The affidavits submitted by Climate Justice *et al.,* as well as Canada's record, all demonstrate that the findings of climate science are clear: the world faces an urgent problem of a magnitude which it is difficult to exaggerate. If ever there was a context to develop and expand the interpretation and application of section 7, we respectfully submit that it will be in the context of climate change. The extent to which any jurisdiction's emissions contribute to the problem is of vital importance, because the world needs to get to net zero by about mid-century, preferably earlier. No jurisdiction may be considered so much of a special case that it be able to avoid taking responsibility - not Canada, not Alberta, not Ontario, not Quebec, not Beijing, not Shanghai, not anyone. Everyone - including Alberta - needs to be planning for net zero within a few decades.

iv) International Trends and Obligations

41. In the recent case *Saskatchewan Federation of Labour v Saskatchewan*[44] (*SFL*) involving the relationship of international law and the *Charter*, the SCC reinforced jurisprudential history that when interpreting and applying words in our *Charter*, we must be guided by international law and look to similar words being given a meaning at least equal to that of international law. As stated by the Supreme Court of Canada in *SFL*:

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[42] [2005] 1 SCR 791, 2005 SCC 35, CJBA, Vol 1, Tab 4.
[43] *Ibid* at 158.
[44] *Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4 at paras 64-67, 1 SCR 245, CJBA, Vol 1, Tab 18.

> [64] LeBel J. confirmed in R. v. Hape, [2007] 2 S.C.R. 292, that in interpreting the Charter, the Court "has sought to ensure consistency between its interpretation of the Charter, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other": para. 55. And this Court reaffirmed in Divito v. Canada (Public Safety and Emergency Preparedness); [2013] 3 S.C.R. 157, at para. 23, "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

42. Canada is a signatory to the *International Covenant on Civil and Political Rights* ("*ICCPR*"). In 2018, the UN Human Rights Committee, gave following opinion regarding the meaning of the "right to life"[45]contained in article 6.1 of the *ICCPR*:

> 2. Article 6 recognizes and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation. The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights.
>
> 3.The right to life is a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.
> 4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of his life and that the right shall be protected by law. It lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life…
> 25. The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant… States parties are thus under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State…
> 65. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life

[45] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Human Rights Committee OR, 124th Sess, CCPR/C/GC/36 (2018), CJBA, Vol 1, Tab 26.

> should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach. [emphasis added]

43. Courts around the world are recognizing that citizens including future generations have the right to life which support explicitly the submissions stated above and herein regarding the legal obligations on all governments to act to mitigate the causes and effects of climate change, including the reduction and elimination of GHG emissions. Reflective of this jurisprudential trend appear in courts in the Ukraine, South America, Australia, the Philippines, and the Netherlands.

44. In a 2018 decision by Colombia's Supreme Court of Justice[46], the plaintiffs, consisting of a group of 25 children, youth, and young adults, petitioned the state to protect their right to a healthy environment. The Court acceded to their claim, ordering *inter alia*, the Presidency of the Republic, as well as various other ministers:

> to formulate in the five (5) following months from today's notice, with the active participation of the plaintiffs, affected communities, scientific organizations or environmental research groups, and interested population in general, the construction of an "**intergenerational pact for the life of the Colombian Amazon – PIVAC**," to adopt measures aimed at reducing deforestation to zero and greenhouse gas emissions, and has national, regional and local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation. (original emphasis). [47]

45. In coming to this decision, the court referenced the works of James E. Hansen, whose works are also offered in this reference:

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[46] STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, Bagota D.C, M.P. Luis Armando Tolosa Villabona, April 05, 2018; available online: <https://observatoriop10.cepal.org/sites/default/files/documents/stc4360-2018.pdf> with excepts translated by Dejusticia available at: <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/>, CJBA, Vol 1, Tab 21.

[47] *Ibid* at 45.

> While we are late in acting with purpose to arrest global warming, the precautionary principle still counsels us to act now to avert calamitous climate change before every last detail is fully known (or fully appreciated). Similarly, while sea level rise and ocean acidification derived from deforestation-induced regional and global warming conflicts with the fundamental rights and interests of the present generation, it will impact and thus violate the rights of future generations more severely still.
>
> Accordingly, the principle of intergenerational equity compels action without further delay so as not to burden disproportionately young persons and future generations. As well, the principles of solidarity, participation, and the best interest of children counsel consideration of interests retained by persons beyond those wielding present political authority. Considered interests, as well, must not be limited to those within the specific region of this Court's usual jurisdiction. Neither should they be limited to those of the present generation. [48]

46. The Court, offered the following insights concerning the right to life:

> p. 13 … By virtue of what has been said, it can be preached, that the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed.
>
> … pg. 18 … 5.3 The environmental rights of future generations are based on the (i) ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature.
>
> …p.20 The first is explained by the fact that natural resources are shared by all inhabitants of Planet Earth, and by their descendants or future generations who do not yet have a physical hold of them, but who are tributaries, recipients, and owners of them, even if they, in a contradictory way, are increasingly insufficient and limited. Thus, without an equitable and prudent approach to consumption, the future of humankind may be compromised due to the scarcity of essential life resources. In this way, solidarity and environmentalism are "related until they become the same. The second transcends the anthropocentric perspective, and focuses on "ecocentric-anthropic" criteria, which places the human being on par with the environmental ecosystem, whose purpose is to avoid arrogant, dismissive, and irresponsible treatment of the environmental resources, and its entire context, to satisfy materialistic ends, without any protectionist or conservationist respect…
>
> …p. 21… 11.3 The previous reality, in addition to transgressing the regulations pertaining to the Environmental Charter of the country, and the international instruments that make up the global ecological public order, constitutes a serious ignorance of the obligations acquired by the State in the Framework Convention on Climate Change of Paris 2015…

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[48] *Ibid* at 4-5. See *Gloucester Resources Limited v Minister for Planning,* [2019] NSWLEC 7, at paras 452-454, 485, 488, 498, 515, 518, 523, 533, 638, 669, 688, and 699, CJBA, Vol 1, Tab 20

> 12. Therefore, the excessive intensification of this problem is evident, showing the ineffectiveness of governmental measures adopted to confront this, and, from that perspective, granting the protection for the breach of fundamental guarantees to water, air, a dignified life, health, among others in connection with the environment.
>
> 13. It is clear that despite several international commitments, legislation, and jurisprudence on the subject, the Colombian State has not efficiently tackled the problem of deforestation in the Amazon.[49]

47. In 2019, a decision by the New South Wales Environment Court in *Gloucester Resources Limited v Minister for Planning,*[50] denied the development of a new coal mine. The mine was described as being sought to be built at the "wrong time" because of the following:

> [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."[51]

48. These decisions provide examples of judicial fact finding in relation to climate change that accords with the scientific reality and consensus on the issue.

PART 5 – RELIEF SOUGHT

49. Climate Justice *et al*. seeks the Court's opinion that the entire *Act* is validly enacted under Parliament's power to pass laws for the peace, order, and good government of Canada to address a matter of national concern, namely establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions.

ALL OF WHICH IS RESPECFULLY SUBMITTED

Dated this 4th day of November, 2019.

Jonathan Stockdale
Counsel for Climate Justice *et al.*

[49] *Ibid* at 13, 18, 20, and 21.
[50] [2019] NSWLEC 7 Vol 1 at Tab 20.
[51] *Ibid* at 699. See also, para.452 -454;485;488;498;515;518;523;533;638;669; and 688

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1.	*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40
2.	*Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3
3.	*Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52, 3 SCR 323
4.	*Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35
5.	*Edwards v Canada (Attorney General)* [1930] AC 124, [1930] 1 DLR 98
6.	*Environnement Jeunesse c. Procureur général du Canada*, 2019 QCCS 2885.
7.	*Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84
8.	*Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641
9.	*Juliana v USA et al.*, Case No. 6:15-cv-01517-TC (November 10, 2016)
10.	*Newfoundland and Labrador (Environment and Climate Change) v Atlantic Salmon Federation (Canada),* 2018 NLCA 53
11.	*Operation Dismantle v The Queen*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC)
12.	*R v Hajar,* 2016 ABCA 222
13.	*R v Hape*, [2007] 2007 SCC 26, 2 SCR 292
14.	*R v Hydro-Québec,* 3 SCR 213, 1997 CanLII 318
15.	*Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 SCR 714
16.	*Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544

17.	*Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40
18.	*Saskatchewan Federation of Labour v Saskatchewan,* 2015 SCC 4, 1 SCR 245
19.	*Turp v Canada (Justice)*, 2012 FC 893

International Case Law

20.	*Gloucester Resources Limited v Minister for Planning*, [2019] NSWLEC 7
21.	STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, Bagota D.C, M.P. Luis Armando Tolosa Villabona, April 05, 2018

Legislation

22.	*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
23.	*Federal Sustainable Development Act*, SC 2008, c 33
24.	*Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186

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25.	Annex I of the Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I) (12 August 1992)
26.	General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Human Rights Committee OR, 124th Sess, CCPR/C/GC/36 (2018)
27.	James Hansen, "Declaration of Dr. James E Hanson in Support of Plaintiffs' Complaint for Declaratory and Injunctive Relief", Affidavit for *Kelsey Cascadia Rose Juliana, Xiuhtezcatl Tonatiuh M. et al. v United States, Barack Obama et al.*