

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12**

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**FACTUM OF THE INTERVENER  
DAVID SUZUKI FOUNDATION**

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Dated: February 25, 2019

Ecojustice Environmental Law Clinic  
at the University of Ottawa  
216-1 Stewart Street  
Ottawa ON K1N 6N5

**Joshua Ginsberg**  
Tel: (613) 562-5800 ext. 3399  
Fax: (613) 562-5319  
Email: [jginsberg@ecojustice.ca](mailto:jginsberg@ecojustice.ca)

**Randy Christensen**  
Tel: (604) 685-5618 ext. 234  
Fax: (604) 685-7813  
Email: [rchristensen@ecojustice.ca](mailto:rchristensen@ecojustice.ca)

**Danielle Gallant**  
Tel: 613-562-5800 ext. 1963  
Fax: 613-562-5319  
Email: [dgallant@ecojustice.ca](mailto:dgallant@ecojustice.ca)

**Counsel for the David Suzuki Foundation**

TO:

**ATTORNEY GENERAL OF ONTARIO**

Constitutional Law Branch  
720 Bay Street, 4<sup>th</sup> Floor  
Toronto, ON M7A 2S9

**Josh Hunter / Pdraic Ryan / Thomas Lipton**

LSO Nos: 49037M / 61687J / 60776V

Tel: 416-326-3840 / 416-326-0131 / 416-326-0296

Fax: 416-326-4015

Email: [joshua.hunter@ontario.ca](mailto:joshua.hunter@ontario.ca)

[pdraic.ryan@ontario.ca](mailto:pdraic.ryan@ontario.ca)

[thomas.lipton@ontario.ca](mailto:thomas.lipton@ontario.ca)

**Counsel for the Attorney General of Ontario**

AND TO:

**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
Prairie Region (Winnipeg)  
301-310 Broadway  
Winnipeg, MB R3C 0S6

**Sharlene Telles-Langdon, Brooke Sittler, Mary  
Matthews, Neil Goodridge, and Ned Djordjevic**

Tel: 204-983-0862

Fax: 204-984-8495

Email: [sharlene.telles-langdon@justice.gc.ca](mailto:sharlene.telles-langdon@justice.gc.ca)

**Counsel for the Attorney General of Canada**

AND TO:

**ATTORNEY GENERAL OF SASKATCHEWAN**

Ministry of Justice (Saskatchewan)  
Constitutional Law Branch  
820-1874 Scarth St  
Regina, SK S4P 4B3

**P. Mitch McAdam, QC and Alan Jacobson**

Tel: 306-787-7846

Fax: 306-787-9111

Email: [mitch.mcadam@gov.sk.ca](mailto:mitch.mcadam@gov.sk.ca)

**Counsel for the Attorney General of Saskatchewan**

AND TO:

**ATTORNEY GENERAL OF NEW BRUNSWICK**

Office of the Attorney General  
Legal Services  
PO Box 6000, 678 King Street, Suite 2078  
Fredericton, NB E3B 5H1  
**William E. Gould, Isabel Lavoie Daigle,  
and Rachelle Standing**  
Tel: 506-453-2222  
Fax: 506-453-3275  
Email: [William.Gould@gnb.ca](mailto:William.Gould@gnb.ca)  
[Isabel.LavoieDaigle@gnb.ca](mailto:Isabel.LavoieDaigle@gnb.ca)  
[Rachelle.Standing@gnb.ca](mailto:Rachelle.Standing@gnb.ca)

**Counsel for the Attorney General of New Brunswick**

AND TO:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

British Columbia Ministry of Attorney General  
Legal Services Branch  
6<sup>th</sup> Floor – 1001 Douglas Street  
Victoria, BC V8W 2C5  
**J. Gareth Morley**  
Tel: 250-952-7644  
Fax: 250-356-9154  
Email: [Gareth.Morley@gov.bc.ca](mailto:Gareth.Morley@gov.bc.ca)

**Counsel for the Attorney General of British Columbia**

AND TO:

**ASSEMBLY OF FIRST NATIONS**

55 Metcalfe Street, Suite 1600  
Ottawa, ON K1P 6L5  
**Stuart Wuttke and Adam Williamson**  
Tel: 613-241-6789  
Fax: 613-241-5808  
Email: [swuttke@afn.ca](mailto:swuttke@afn.ca)  
[awilliamson@afn.ca](mailto:awilliamson@afn.ca)

**Counsel for Assembly of First Nations**

AND TO:

**CANADIAN ENVIRONMENTAL LAW  
ASSOCIATION, ENVIRONMENTAL DEFENCE  
CANADA INC., and the SISTERS OF PROVIDENCE  
OF ST. VINCENT DE PAUL**

Canadian Environmental Law Association  
1500-55 University Avenue  
Toronto, ON M5J 2H7

**Joseph Castrilli and Richard Lindgren**

Tel: 416-960-2284 ext. 7218

Fax: 416-960-9392

Email: [castrillij@sympatico.ca](mailto:castrillij@sympatico.ca)  
[rlindgren@sympatico.ca](mailto:rlindgren@sympatico.ca)

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

AND TO:

**CANADIAN PUBLIC HEALTH ASSOCIATION**

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

**Jennifer King, Michael Finley, and Liane Langstaff**

Tel: 416-862-7525

Fax: 416-862-7661

Email: [jennifer.king@gowlingwlg.com](mailto:jennifer.king@gowlingwlg.com)  
[michael.finley@gowlingwlg.com](mailto:michael.finley@gowlingwlg.com)  
[liane.langstaff@gowlingwlg.com](mailto:liane.langstaff@gowlingwlg.com)

**Counsel for Canadian Public Health Association**

AND TO:

**CANADIAN TAXPAYERS FEDERATION**

Crease Harman LLP  
Barristers and Solicitors  
800-1070 Douglas Street  
Victoria, BC V8W 2C4

**R. Bruce E. Hallsor, Q.C.**

Tel: 250-388-5421

Fax: 250-388-4294

Email: [bhallsor@crease.com](mailto:bhallsor@crease.com)

**Counsel for Canadian Taxpayers Federation**

AND TO:

**CANADA'S ECOFISCAL COMMISSION**

University of Ottawa  
57 Louis Pasteur Street  
Ottawa, ON K1N 6N5  
**Stewart Elgie**  
Tel: 613-562-5800 ext. 1270  
Fax: 613-562-5124  
Email: [selgie@uottawa.ca](mailto:selgie@uottawa.ca)

**Counsel for Canada's Ecofiscal Commission**

AND TO:

**ÉQUITERRE / CENTRE QUÉBÉCOIS DU DROIT DE  
L'ENVIRONNEMENT**

Michel Bélanger Avocats inc.  
454, avenue Laurier Est  
Montréal (Québec) H2J 1E7  
**Marc Bishai and David Robitaille**  
Tel: 514-844-4646  
Fax: 514-844-7009  
Email: [marc.bishai@gmail.com](mailto:marc.bishai@gmail.com)  
[david.robaille@uottawa.ca](mailto:david.robaille@uottawa.ca)

**Counsel for Équiterre / Centre Québécois du droit de  
l'environnement (CQDE)**

AND TO:

**INTERGENERATIONAL CLIMATE COALITION**

Ratcliff & Company LLP  
500-221 West Esplanade  
North Vancouver, BC V7M 3J3  
**Nathan Hume and Emma K. Hume**  
Tel: 604-988-5201  
Fax: 604-988-1352  
Email: [nhume@ratcliff.com](mailto:nhume@ratcliff.com)  
[ehume@ratcliff.com](mailto:ehume@ratcliff.com)

**Counsel for the Intergenerational Climate Coalition**

AND TO:

**INTERNATIONAL EMISSIONS TRADING  
ASSOCIATION**

DeMarco Allan LLP  
333 Bay Street, Suite 625  
Toronto, ON M5H 2R2

**Lisa DeMarco and Jonathan McGillivray**

Tel: 647-991-1190

Fax: 1-888-734-9459

Email: [lisa@demarcoallan.com](mailto:lisa@demarcoallan.com)

[jonathan@demarcoallan.com](mailto:jonathan@demarcoallan.com)

**Counsel for the International Emissions Trading  
Association**

AND TO:

**UNITED CONSERVATIVE ASSOCIATION**

McLennan Ross LLP  
600 McLennan Ross Building  
12220 Stony Plain Road  
Edmonton, AB T5N 3Y4

**Steven Dollansky and Ryan Martin**

Tel: 780-492-9135

Fax: 780-733-9707

Email: [sdollansky@mross.com](mailto:sdollansky@mross.com)

[rmartin@mross.com](mailto:rmartin@mross.com)

**Counsel for United Conservative Association**

AND TO:

**UNITED CHIEFS AND COUNCILS OF MNIDOO  
MNISING**

Faculty of Law, University of Ottawa  
57 Louis Pasteur St.  
Ottawa, ON K1N 6N5

**Nathalie Chalifour**

Tel: 613-562-5800 ext. 3331

Fax: 613-564-5124

Email: [nathalie.chalifour@uottawa.ca](mailto:nathalie.chalifour@uottawa.ca)

Westaway Law Group  
55 Murray Street, Suite 230  
Ottawa, ON K1N 5M3

**Cynthia Westaway**

Tel: 613-722-9091

Fax: 613-722-9097

Email: [cynthia@westawaylaw.ca](mailto:cynthia@westawaylaw.ca)

**Counsel for United Chiefs and Councils of Mniidoo  
Mnising**

AND TO:

**ATHABASCA CHIPEWYAN FIRST NATION**

Ecojustice Environmental Law Clinic

at the University of Ottawa

1 Stewart Street, Suite 216

Ottawa, ON K1N 6N5

**Professor Amir Attaran** Tel: 613-562-5800 ext. 3382

fax: 613-562-5319

Email: [aattaran@ecojustice.ca](mailto:aattaran@ecojustice.ca)

Woodward & Company Lawyers LLP

200-1022 Government Street

Victoria, BC V8W 1X7

**Matt Hulse**

Tel: 250-383-2356

Fax: 250-380-6560

Email: [mhulse@woodwardandcompany.com](mailto:mhulse@woodwardandcompany.com)

**Counsel for the Athabasca Chipewyan First Nation**

**INDEX**

**PART I - OVERVIEW ..... 1**

**PART II - SUMMARY OF FACTS ..... 2**

    A. Parliament apprehends an emergency and proposes a response ..... 2

    B. Climate change is a national emergency..... 5

    C. The emissions performance of Ontario and Canada..... 7

**PART III - POINT IN ISSUE ..... 8**

**PART IV - LAW AND ARGUMENT ..... 8**

    A. The GGPPA is emergency legislation ..... 8

    B. The GGPPA is temporary in character ..... 12

    C. Conclusion ..... 15

**PART V - ORDER SOUGHT ..... 15**

SCHEDULE A – LIST OF AUTHORITIES ..... 16

SCHEDULE B – LEGISLATION ..... 17



## **PART I - 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*.

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

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, 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. Ontario acknowledges Parliament’s ability to legislate, including on matters of provincial jurisdiction, in emergency situations. The 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 future for Canada.

Factum of the Attorney General of Ontario at para 67.

4. In the emergency circumstances in which Canada now finds itself, the GGPPA is a constitutional measure that Parliament has reasonably taken in discharge of its responsibility to protect the country from disaster.

## **PART II - SUMMARY OF 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.

### **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.

*House of Commons Debates*, 42nd Parl, 1st Sess [*Debates*], No [086](#) (3 October 2016) at 1215 (Right Hon Justin Trudeau), Joint Book of Authorities of Canada and Ontario [*JBOA*], Vol IV, Tab 57.

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 putting a price on carbon pollution would help “put Canada on a course to meet our 2030 emission target” under the *Paris Agreement*.

*Debates*, [No 279](#) (16 April 2018) at 1210 (Joël Lightbound), JBOA, Vol IV, Tab 61.

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.”

*Debates*, [No 289](#) (1 May 2018) at 1045 (Hon Catherine McKenna), JBOA, Vol IV, Tab 63.

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”.

*Debates*, [No 146](#) (23 February 2017) at 1515 (Jonathan Wilkinson), JBOA, Vol IV, Tab 58.

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

*Debates*, [No 283](#) (23 April 2018) at 1220 (Hon Bill Morneau), JBOA, Vol IV, Tab 62.

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” – in response to the 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. 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 CO<sub>2</sub> concentrations

House of Commons, *Standing Orders of the House of Commons*, at Standing Order 52(6)(a), Book of Authorities [“BOA”], Tab 7; Record of the Attorney General of Canada [“CR”] Vol 1, Tab 1, Exhibit E, 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”] at 228, 236.

12. The IPCC Special Report further warns that “[t]o limit warming to 1.5°C, mitigation must be large-scale and rapid” (i.e., within the next 11 years). 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”. One such unavoidable impact would be the collapse of the Greenland and Antarctic ice sheets over the course of centuries or millennia.

CR, Vol 1, Tab 1, IPCC Report FAQ, *supra* para 11 at 237-238.

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” and emphasized the need for immediate action:

We need to figure out how we are going to save the planet. We need to figure out how we are going to ensure that our kids are not going to face...things like acute food shortages, devastating storms, climate refugees, a melting Arctic which has consequences for the entire world.

*Debates*, [No 334](#) (15 October 2018) at 1900, 1905 (Hon Catherine McKenna), BOA, Tab 6.

14. Several other MPs echoed the Minister. MP Nathaniel Erskine-Smith said: “[w]e[’re] running out of time,” describing climate change as “the most pressing issue of the day” and “an urgent issue to deal with”. He linked climate impacts to the failure to price GHG emissions, quoting the most recent 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.” MP Mark Gerretsen said that “we have to do something immediately as this is an extremely dire

situation”. 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”.

*Debates*, [No 334](#) (15 October 2018), *supra* para 13 at 1725, 1730, 2150 (Nathaniel Erskine-Smith), BOA, Tab 6; *Ibid* at 2200 (Mark Gerretsen), BOA, Tab 6; *Ibid* at 2250 (Sean Fraser), BOA Tab 6.

## **B. Climate change is a national emergency**

15. According to the World Meteorological Organization, the world is entering a new climate reality with an extreme level of CO<sub>2</sub> 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.

CR, Vol 1, Tab 1, Exhibit A, World Meteorological Organization, [WMO Statement on the State of the Global Climate in 2017](#), WMO-No. 1212, (Geneva: Publications Board World Meteorological Organization, 2018) [*“WMO Statement”*] at 60-61.

16. 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 wildfires in western Canada, floods in Quebec, coastal erosion and thawing of permafrost in Canada’s northern territories and a heat wave that killed dozens of people in Quebec. Such extreme weather events have been longer and harsher than ever before, devastating local economies and leaving thousands of Canadians without homes, 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.

CR, Vol 1, Tab 1, IPCC Report FAQ, *supra* para 11 at 230; CR, Vol 2, Tab 1, Exhibit Q, Government of Canada, “Vancouver Declaration on Clean Growth and Climate Change” 3 March, 2018 at 623; CR, Vol 1, Tab 1, Exhibit A, [WMO Statement](#), *supra* para 15 at 57.

17. Canada is in an unfortunately unique position as our Arctic temperatures are rising even faster than elsewhere. 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.

CR, Vol 1, Tab 1, Exhibit G, Government of Canada, [Canada's 7th National Communication and 3rd Biennial Report](#). (Environment and Climate Change Canada, 2017) [**"National Communication and Biennial Report"**] at 290-292.

18. 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*).

National Communication and Biennial Report, *supra* para 17 at 293.

19. 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. Globally, 2017 – the last year covered in the record, had the highest documented economic losses from severe weather.

Debates, No 146 (23 February 2017) at 1515 (Jonathon Wilkinson), JBOA, Vol IV, Tab 58; CR, Vol 1, Tab 1, Exhibit A, WMO Statement, *supra* para 15 at 57.

20. 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". Indeed, "[t]he impact of climate change on water supplies alone could constitute a global emergency". Emmanuel Macron, President of France and host of the meeting that produced the *Paris Agreement*, called climate change an emergency in a speech to the United Nations: "[i]t is an emergency. So let's comply with the commitments we've made".

CR, Vol 1, Tab 1, Exhibit F, “NATO Parliamentary Assembly (Economics and Security Committee), *Assessing and Mitigating the Cost of Climate Change*”, 167 ESCTER 17 (NATO, 7 October 2017) at 259, para 30; CR, Vol 4, Tab 4, Exhibit B, “Seventy-third United Nations General Assembly – Speech by M. Emmanuel Macron, President of the Republic”, New York, 25 September 2018 at 1068 [“**Seventy-third UN General Assembly**”].

21. Parliament’s constitutional authority to legislate in order to respond to a national emergency is not displaced by the enactment of the *Emergencies Act*, which authorizes the Governor in Council to take special temporary measures in the context of a declared emergency. However, the definition of “national emergency” and the types of emergencies set out by that *Act*, under which climate change clearly falls, remain relevant to discern what Parliament considers to be an emergency. As explained by Professor Monohan:

[w]hile Parliament’s constitutional authority to respond to emergencies cannot be defined by or made to conform to the terms of an ordinary statute, the definitions of emergencies found in the *Emergencies Act* would surely be relevant in any future constitutional litigation involving the use of emergency branch of the POGG power.

*Emergencies Act*, R.S.C., 1985, c. 22 (4th Supp.); Monohan, PJ, *Constitutional Law*, 3<sup>rd</sup> ed, *Essentials of Canadian Law* (Toronto: Irwin Law, 2006) at 257, BOA Tab 8.

### **C. The emissions performance of Ontario and Canada**

22. Even if all current 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.

Record of the Athabasca Chipewyan First Nation, 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 252.

23. The decision by the Ontario Government to cancel its cap and trade program has resulted in the projections that Canadian GHG emissions will be 20 – 30 megatons greater in 2022. In 2018, Ontario also revised its 2030 target to achieving 30 megatons less emissions reductions than previously planned. As commented in a report on Ontario’s most recent environment plan, the “[a]doption of the new target will make it more difficult for Canada to comply with its international commitment under the Paris Agreement”.

CR, Vol 3, Tab 1, Exhibit CC, “Fall 2018 update: Estimated impacts of the federal pollution pricing system”, Government of Canada, at 865; CR, Vol. 4, Tab 5, Exhibit D, “Comments on “Preserving and protecting our environment for future generations: A made-in-Ontario environment plan”, Nic Rivers, 18 December 2018 at 1154.

### **PART III - POINT IN ISSUE**

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

### **PART IV - LAW AND ARGUMENT**

25. The leading case on the National Emergency power, *Re: Anti-Inflation Act* (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.

[1976] 2 SCR 373 [“*Re Anti-Inflation Act*”], BOA, Tab 3.

#### **A. The GGPPA is emergency legislation**

26. 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”. 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 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”.

*R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 57, JBOA, Vol III, Tab 40; *Re Anti-Inflation Act*, *supra* para 25 at 436-437, per Ritchie J, BOA, Tab 3.

27. 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. 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.

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, BOA, Tab 4.

28. 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”. 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. Chief Justice Laskin noted that it is not necessary to prove the crisis as a matter of fact, as one would in civil litigation, since such matters concern “social and economic policy and hence governmental and legislative judgment”. Rather, “it may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it”.

*Re Anti-Inflation Act*, *supra* para 25 at 391, 419-420 and 422-423, per Laskin CJC, BOA, Tab 3.

29. 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.

30. 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”. The material in this case (canvassed in Part II, 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.

*Re Anti-Inflation Act, supra* para 25, BOA, Tab 3.

31. 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.” 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”. The Court held that legislation need not “use any particular form of words in order to disclose [Parliament’s] belief that an emergency existed”.

*Re Anti-Inflation Act, supra* para 25 at 422, 438-439, BOA, Tab 3.

32. 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:

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;

33. The preamble for the GGPPA is far more indicative of the emergency circumstances apprehended by Parliament 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

*Re Anti-Inflation Act, supra* para 25 at 381, BOA, Tab 3.

34. The rational basis for apprehending an emergency or crisis is further supported by the statements (summarized in Part II, above) of Members of Parliament in the debates on the GGPPA, and in an emergency debate 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”.

*Debates, No 334* (15 October 2018) at 1850 (Hon Catherine McKenna), BOA, Tab 6.

35. 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”.

*Re Anti-Inflation Act, supra* para 25 at 397, per Laskin CJC, BOA, Tab 3.

36. Ontario must refute a rational basis for the GGPPA, as well as meet the general burden of overcoming the presumption of constitutionality. 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:

[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.

*Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at paras 81-83, JBOA, Vol IV, Tab 52; *Re Anti-Inflation Act*, *supra* para 25 at 439, per Ritchie J, BOA, Tab 3; 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.

37. In this case, there is no evidence, and certainly not “clear” evidence, that an emergency has not arisen. The 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 Court should equally avoid being drawn into a debate about the effectiveness of carbon pricing – although there is ample evidence before it that it is extremely effective. 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.

### **B. The GGPPA is temporary in character**

38. 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.

39. 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.

40. 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.

*Re Anti-Inflation Act*, *supra* para 25 at 427, per Laskin CJC, BOA, Tab 3.

41. 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 legislation and orders-in-council that lacked explicit termination clauses. 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”.

*Fort Frances*, *supra* para 27 at paras 8-10, 20 and 24, BOA, Tab 2; Hogg, PW, *Constitutional Law of Canada*, 4<sup>th</sup> ed (Toronto: Carswell, 1997) at 469, BOA Tab 5; *Re Anti-Inflation Act*, *supra* para 25 at 427, per Laskin CJC, BOA Tab 3.

42. 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.

43. 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.”

*Re Anti-Inflation Act*, *supra* para 25 at 405, 408-409 per Laskin CJC, BOA, Tab 3; citing Viscount Haldane in *Fort Frances*, *supra* para 27 at para 20, BOA, Tab 2.

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

45. Canada’s NDC created a 12-year timeline (now 11 years) to achieve the purpose of the Act: Canada must reduce its GHG emissions by 30 per cent below 2005 levels by 2030. The IPCC Special Report underlines the urgency of meeting the 11-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. To fail is to suffer irreversible effects of climate change.

CR, Vol 1, Tab 1, Affidavit of John Moffet at paras 42-45; CR, Vol 1, Tab 1, IPCC Report FAQ, *supra* para 11 at 232.

46. 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.<sup>1</sup>

47. 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 Ontario would find even more objectionable – will perforce become necessary.

### **C. Conclusion**

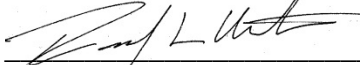
48. With atmospheric CO<sub>2</sub> already at a level not seen in the last several million years and the planet in climatological state never before experienced in human history, Canada and its people – especially future generations – are in peril. The unprecedented climate crisis Canada faces is an emergency requiring an extraordinary response. It justifies and requires the use of all federal power, including National Emergency powers under POGG.

### **PART V - ORDER SOUGHT**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of February, 2019

  
\_\_\_\_\_  
**Joshua Ginsberg**

  
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**Randy Christensen**

  
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**Danielle Gallant**

**Counsel for the David Suzuki Foundation**

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<sup>1</sup> 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 para 26 at para 24, BOA, Tab 2.

## **SCHEDULE A – LIST 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, [1923] AC 695, 3 DLR 629
3. Reference re Anti-Inflation Act, [1976] 2 SCR 373
4. Reference re Wartime Leasehold Regulations, [1950] SCR 124, [1950] 2 DLR 1

### **Secondary Sources**

5. Hogg, PW, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 1997), excerpted
6. House of Commons Debates, 42nd Parl, 1st Sess, No 334 (15 October 2018), excerpted
7. House of Commons, *Standing Orders of the House of Commons*, at Standing Order 52(6)(a), excerpted
8. Monohan, PJ, *Constitutional Law*, 3<sup>rd</sup> ed, *Essentials of Canadian Law* (Toronto: Irwin Law, 2006), excerpted



## SCHEDULE B – LEGISLATION

### *Emergencies Act, R.S.C., 1985, c. 22 (4th Supp.)*

#### **Preamble**

WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;

AND WHEREAS the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;

AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency;

NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### **National emergency**

**3** For the purposes of this Act, a *national emergency* is an urgent and critical situation of a temporary nature that

(a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or

(b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

## **PART I Public Welfare Emergency**

### Interpretation

#### **Definitions**

**5** In this Part,

*declaration of a public welfare emergency* means a proclamation issued pursuant to subsection 6(1);

*public welfare emergency* means an emergency that is caused by a real or imminent

- (a) fire, flood, drought, storm, earthquake or other natural phenomenon,
- (b) disease in human beings, animals or plants, or
- (c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

## **PART II Public Order Emergency**

Interpretation

### **Definitions**

**16** In this Part,

*declaration of a public order emergency* means a proclamation issued pursuant to subsection 17(1);

*public order emergency* means an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency;

*threats to the security of Canada* has the meaning assigned by section 2 of the [Canadian Security Intelligence Service Act](#).

## **PART III International Emergency**

Interpretation

### **Definitions**

**27** In this Part,

*declaration of an international emergency* means a proclamation issued pursuant to subsection 28(1);

*international emergency* means an emergency involving Canada and one or more other countries that arises from acts of intimidation or coercion or the real or imminent use of serious force or violence and that is so serious as to be a national emergency.

## **PART IV War Emergency**

### Interpretation

#### **Definitions**

**37** In this Part,

*declaration of a war emergency* means a proclamation issued pursuant to subsection 38(1);

*war emergency* means war or other armed conflict, real or imminent, involving Canada or any of its allies that is so serious as to be a national emergency.

**IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the  
*Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the  
constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation  
Act, 2018, No. 1*, SC 2018, c. 12**

**Court of Appeal File No.:  
C65807**

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**COURT OF APPEAL FOR ONTARIO  
PROCEEDINGS COMMENCED AT TORONTO**

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**FACTUM OF THE INTERVENER  
DAVID SUZUKI FOUNDATION**

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Ecojustice Environmental Law Clinic  
at the University of Ottawa  
216-1 Stewart Street  
Ottawa ON K1N 6N5  
Fax: (613) 562-5319

**Joshua Ginsberg**  
Tel: (613) 562-5800 ext. 3399  
Email: [jginsberg@ecojustice.ca](mailto:jginsberg@ecojustice.ca)

**Randy Christensen**  
Tel: (604) 685-5618 ext. 234  
Email: [rchristensen@ecojustice.ca](mailto:rchristensen@ecojustice.ca)

**Danielle Gallant**  
Tel: 613-562-5800 ext. 1963  
Email: [dgallant@ecojustice.ca](mailto:dgallant@ecojustice.ca)

**Counsel for the David Suzuki Foundation**