SCC Court File Nos. 38663 & 38781

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER *THE CONSTITUTIONAL QUESTIONS ACT*, 2012, SS 2012, c C-29.01.

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Appellant

- and -

THE ATTORNEY GENERAL FOR CANADA

Respondent

- and -

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Interveners

(Style of cause continued on next pages)

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

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IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c 12, s 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c C.34, s 8

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PART I – OVERVIEW

1. Global climate change poses a catastrophic threat to the health, safety and wellbeing of all Canadians. Major natural disasters, famine and life threatening disease are only some of the consequences that flow from climate change, and Canadians are already feeling their effects today.[1] All of the parties agree that climate change demands responses from all levels of government,[2] and recognize that decades of persistent inaction have brought humanity to a crisis point that demands urgent action. There can be no dispute that climate change presents an emergency unlike any we have seen before.

2. The decisions of this Court and the Privy Council under the emergency branch of the Peace, Order and Good Government (POGG) power have not previously dealt with emergencies like the one posed by climate change. The Canadian Labour Congress (CLC) intervenes to assist the Court in understanding how Parliament's response to the climate emergency – the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*) – is valid law under the emergency branch.

PART II – POSITION ON QUESTIONS IN ISSUE

3. The CLC submits that the *GGPPA* should be upheld as constitutionally valid under the emergency branch of Parliament's POGG jurisdiction.

PART III – STATEMENT OF ARGUMENT

4. The CLC agrees with the submissions of the David Suzuki Foundation (DSF) that Parliament enacted the *GGPPA* in response to a reasonable apprehension of an emergency; indeed, as detailed in the factums of the federal government and many supporting interveners, the evidence of an emergency climate crisis is overwhelming on any legal standard. The CLC is also in substantial agreement with the DSF that the temporariness requirement under the emergency branch of POGG does not require a specific or fixed end-date embedded in a statute, and that the *Paris Agreement*'s timelines provide adequate indicia of temporariness in this case.

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[1] Reasons of the Court of Appeal for Ontario [*Ontario Reasons*] at para 11, **Ontario Record [ORec], Vol. I, Tab 1, pp. 5-6** (citing effects including spread of life threatening disease, famine and major natural disasters).

[2] Factum of the Attorney General of Ontario at para 1, fn 1; Factum of the Attorney General of Saskatchewan at para 2.

But in the CLC's submission, even if the *GGPPA* were to continue in force beyond 2030, it would still meet any temporariness requirement under the POGG emergency power.

5. The CLC's submissions focus on the reality that the climate emergency is fundamentally different than the kinds of emergencies that existed when Parliament previously exercised its emergency powers, and that the nature of these differences are relevant in assessing whether the temporariness requirement has been met.

6. The crux of the current climate emergency is that of a collective action problem – a structural failure to take steps in the collective interest that is difficult to solve. The *GGPPA* is a backstop that is designed to address the existing failure of collective action, one that will fall away once the structural barriers to collective action are overcome. The timelines for this may be longer than in previous emergencies, and the end point uncertain, but contrary to the views of some of the justices in the courts below,[3] this does not mean that the *GGPPA* is not temporary.

7. An approach to temporariness that is flexible enough to account for different kinds of emergencies, and the measures necessary to combat them, is not an invitation to accept permanent states of exceptionalism. The reality that modern democracies face new and evolving kinds of crises reinforces the fact that emergency responses must still be subject to the rule of law. Courts play a critical role in ensuring compliance with the limited and exceptional scope of the emergency branch of POGG.

A. DIFFERENT EMERGENCIES REQUIRE DIFFERENT EMERGENCY RESPONSES

8. The emergency branch of POGG largely developed out of Canada's response to the two world wars.[4] This war-time context naturally informed how this Court and the Privy Council shaped the doctrine, including the requirement of temporariness.

9. While war and insurrection are the archetypical emergencies that have confronted states, they are not the *only* emergencies that a state may have to confront.[5] Modern states face a range

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[3] Reasons of the Court of Appeal for Saskatchewan at para 202, **Saskatchewan Record, Vol I, Tab 1, p 61**; *Ontario Reasons, supra* note 1 at para 215 (Huscroft JA, dissenting), **ORec, Vol I, Tab 1, p 83**.

[4] *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, [1923] 3 DLR 629 (PC); *Co-operative Committee on Japanese Canadians v Attorney General of Canada*, [1947] 1 DLR 577 (PC); *Reference re Wartime Leasehold Regulations*, [1950] SCR 124.

of emergencies that are qualitatively different form the classic example of war, but are equally as threatening to the life, health and future existence of the state and its citizens as war. These new crises may well demand that states adopt new kinds of emergency responses that are properly tailored to the dynamics of the underlying emergency.[6]

10. This reality has posed a challenge in developing the emergency branch of POGG. This Court's first (and, until now, only) case to present a non-war emergency situation was the *Anti-Inflation Reference*. Facing an invocation of the emergency branch unconnected to war, this Court became heavily divided, expressing divergent views on basic aspects of the doctrine.[7]

11. While difficult to apply to novel kinds of threats, the emergency branch must nevertheless evolve and be applied in a manner that permits Parliament to take effective action to protect the continued existence and wellbeing of the Canadian people. In applying the tests that underpin the emergency branch of POGG, courts must be sensitive to the particular character of the emergency being confronted. This does not mean that the basic structure of the emergency branch requires wholesale revision. Rather, it means that when applying that doctrine, courts must be sensitive to the reality that emergency responses to war, inflation or climate change are necessarily going to be different. But, in all cases, Parliament must have the authority to act.

B. THE CLIMATE CHANGE EMERGENCY: A COLLECTIVE ACTION PROBLEM

12. Understanding the *GGPPA* as an emergency response to climate change requires a clear understanding of the nature of the climate change emergency itself. Clearly the *consequences* of climate change are sufficiently serious to satisfy any rational definition of what constitutes an "emergency". However, it is also important to understand what the *causes* of the emergency are, not in the sense of the mechanics of atmospheric greenhouse gasses (GHGs), but in the sense of why the planet has reached such a crisis point notwithstanding the clear and foreseeable dangers that have laid ahead. In this sense, understanding the cause of the climate crisis helps to explain the basic architecture of the *GGPPA*, and reveals how it is a fundamentally temporary law.

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[5] See e.g. *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 (inflation recognized as national emergency).

[6] John Ferejohn & Pasquale Pasquino, "The law of the Exception: A Typology of Emergency Powers" (2004) 2 Intl J Const L 210.

[7] See e.g. Edward P Belobaba, "Disputed "Emergencies" and the Scope of Judicial Review: Yet Another Implication of the Anti-Inflation Act Reference" (1977) 15 OHLJ 406, and the literature cited therein.

13. Reducing GHG emissions and fighting global climate change has been a difficult endeavour because it represents a massive collective action problem. Collective action problems arise in situations where the collective interests of a group are best served by coordinated efforts between its members, but where each individual member of the group lacks the incentives to engage in such coordinated conduct. Individual members have strong incentives not to act, and the failure to act results in harms to the group as a whole.

14. Collective action problems are most common in the production of public goods. A public good is one that is non-excludible, meaning that once produced it is effectively impossible to prevent others from enjoying its benefits. A classic example is a lighthouse: once built, there is no way to prevent anyone from benefiting from it, even if they did not contribute to its creation.[8]

15. The non-excludability of public goods results in the "free riding". Members of a group have an individual incentive to not contribute to the production of public goods when they can benefit from them whether or not they assume the costs of producing them.[9] This may result in no members of the group having sufficient incentive to produce a good alone; ultimately it is not produced and no one benefits.[10] This is the situation described by the "prisoner's dilemma": incentives that apply to each individual member of a group may result in a poor outcome for everyone. Everyone would be better off if they engaged in coordinated action, but there is no strong incentive for any individual member to do so.[11]

16. Global climate change represents a classic but particularly acute free rider problem.[12] Sustainable levels of GHGs in the atmosphere is a public good. There is no way to exclude anyone from the benefits of a livable atmosphere, and the benefits of any one group's GHG

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[8] Richard E Levy, "The Tie that Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle" (2008) 56 U Kan L Rev 901 at 906.

[9] *Ibid* at 906; Lisa Schenck, "Climate Change Crisis - Struggling for Worldwide Collective Action" (2008) 19 Colo J of Intl Envl L & Pol'y 319 at 335; Sonia E Rolland, Amy Pimentel & Auroop Ganguly, "Taking Climate Change by Storm: Theorizing Global and Local Policy-Making in Response to Extreme Weather Events" (2014) 62 Buff L Rev 933 at 937.

[10] Paul G Harris, "Collective Action on Climate Change: The Logic of Regime Failure" (2007) 47 Nat Resources J 195 at 201.

[11] Christopher Napoli, "A Decentralised Approach to Emissions Reductions" (2013) 7 Carbon & Climate L Rev 24 at 27.

[12] Harris, *supra* note 10 at 196; Napoli, *supra* note 11 at 27-28.

reductions are diffuse and enjoyed mostly by others.[13] The costs of "producing" low GHG levels are high, not only in economic, but also in human and political terms. The CLC is acutely aware that transitioning to a low carbon economy carries the real risk of economic harms to vulnerable working people and communities. Governments have substantial interests in mitigating or avoiding these costs. These high costs coupled with limited individual benefits give both governmental and private actors every reason to engage in free riding.

17. In terms of reducing climate change, these problems are compounded by the phenomenon of "carbon leakage", the process by which attempts in one jurisdiction to reduce GHG emissions through regulation results in pressures on firms and investors to move into or allocate capital to other jurisdictions with less stringent standards.[14] The result is economic losses for those who take real steps to combat climate change, short-term gains to those who engage in jurisdiction-shopping, and little change in aggregate GHG emissions overall.

C. THE *GGPPA* IS A RESPONSE TO THE COLLECTIVE ACTION PROBLEM

18. Collective action problems are inherently difficult to solve. This is why climate change has evolved into a true existential threat. Modern societies are inflicting profound harms on themselves, but struggle to engage in the coordinated action necessary to stop it.

19. Solving collective action problems normally requires some outside influence that can alter the structural incentives and disincentives that lead individuals to free ride on one another.[15] At the global level, such outside influences are difficult to locate. Absent a hegemonic power, or possibly a hierarchical institution like the EU, states are largely left with imperfect – but important – consent-based mechanisms like the *Paris Agreement*.[16] The collective action problem has been so strong, however, that repeated attempts to devise consent-based mechanisms have failed, and brought the planet to the tipping point.

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[13] Napoli, *supra* note 11 at 27-28.
[14] *Working Group on Carbon Pricing Mechanisms – Final Report* at 34, Exhibit R to the Affidavit of John Moffet, dated January 29, 2019, **Canada Record (Ontario Ref) [CanRec], Vol II, p. 667**.
[15] Harris, *supra* note 10 at 200.
[16] See *ibid* at 217; Rolland, *supra* note 9 at 971; *Paris Agreement*, Exhibit I to the Affidavit of John Moffet, dated January 29, 2019, **CanRec, Vol II, p. 344**.

20. The situation within Canada is in some ways like the international situation, but in other ways quite different. It is the same in the sense that the carbon-based economy creates a power structure that disincentivizes collective action. Each jurisdiction, while recognizing in good faith the importance of combating climate change, may have strong reasons to free ride off the efforts of other jurisdictions (both within and outside of Canada). These incentives may be so strong in practice that they make free riding effectively unavoidable, and largely explain the perplexingly slow, uncoordinated, and patchwork approach to reducing GHG emissions across Canada.[17]

21. However, the Federal Parliament's ability to legislate for the whole of Canada represents an important difference compared to the international sphere. The structure of the Canadian constitution provides a central national authority that can remove the ability of provinces and individual actors to engage in free riding. This is what the *GGPPA* does. It provides strong incentives for all members of the Canadian community to contribute to the production of the public good of lower GHG emissions resulting in fundamental and necessary structural change through a coordinated, pan-Canadian effort to confront the climate emergency.

22. The situation is conceptually analogous to the "provincial inability" test under the national concern branch of POGG. Provincial inability is a means of recognizing when a new and discrete matter has a national dimension, is beyond the power of the provinces to deal with, and failure by one province to address the matter will endanger the interests of another province.[18] The provincial inability and barriers to provincial cooperation justifies the federal government's involvement in addressing the matter. Indeed, given the close relationship between the national concern and emergency branches of POGG, the fact that the provincial inability test closely mirrors the collective action problem underpinning the climate emergency provides substantial constitutional support for Parliament's choice to legislate in this manner under either head.

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[17] Nathalie J Chalifour "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50 Ottawa L Rev 201 at 207.

[18] Dale Gibson, "Measuring "National Dimensions"" (1976) 7 Man LJ 15 at 33; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 433-434; *Schneider v The Queen*, [1982] 2 SCR 112 at 131; *R v Hydro-Québec*, [1997] 3 SCR 213 at 263-264.

D. THE *GGPPA* AS A BACKSTOP AGAINST THE FAILURE OF COLLECTIVE ACTION

23. The *GGPPA* can best be understood as a response to the collective action problem that has produced the current climate emergency. Effective responses to the climate crisis require a coordinated, comprehensive set of carbon pricing responses across each of Canada's provinces and territories. Such collective action is necessary to avoid free riding and ensure adequate production of the public good that is a livable, sustainable environment. This is an inherently difficult task to accomplish, as it requires profound structural change to the Canadian economy. But once such change has been accomplished, both locally and globally, the climate crisis will be addressed. The *GGPPA* is designed to serve as a mechanism that accounts for the inherent difficulty in taking collective against climate change. It is structured to encourage provinces and territories to act within their own constitutional competence to reduce GHG production, while removing the ability for anyone to engage in free riding of those efforts.

24. The *GGPPA* does not apply in all provinces. Parts 1 and 2 operate only within those jurisdictions listed in Schedule 1 to the *Act.* The Governor in Council has the authority to amend the schedules,[19] and the legislation directs her to do so primarily on the basis of "the stringency of provincial pricing mechanisms for GHG emissions."[20] Rather than lock in certain jurisdictions at the time of enactment, this de-scheduling power ensures that the *GGPPA* operates flexibly, only imposing its charges for so long as a jurisdiction fails to take its own action to price carbon. Where a province elects to take adequate action within its own heads of constitutional power, the Governor in Council would be required to take action to de-list that province from Schedule 1.

25. This means that, once the collective action problem is overcome, there would be no further constitutional justification for the *GGPPA* to continue to operate, at least under the emergency branch of POGG. And that is exactly how the *GGPPA* is designed to operate. If Canadian jurisdictions were to engage in the collective action required to solve the climate emergency, then no jurisdiction could justifiably be listed in Schedule 1 any longer. The charges imposed under Parts 1 and 2 of the *Act* would cease to have any further effect, and there would be no federal trenching on any provincial jurisdiction.

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[19] *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186, ss 166(2), 189(1) [*GGPPA*].
[20] *GGPPA*, *supra*, ss. 166(3), 189(2).

26. To some extent this model is similar to (admittedly temporary) *War Measures Act*.[21] During the inter-war period, the *War Measures Act* remained on the statute book, but stayed dormant as no regulations had been promulgated under it. When the Second World War began, it sprang back to life, following which it again became dormant until the October Crisis. The fact that it remained on the statute book did not render it permanent legislation.

27. The *GGPPA* backstop performs an analogous function. Canada can have no more certainty about our ability to overcome the collective action problem today than we had about our ability to defeat the Triple Alliance in 1915. But if and when the collective action problem is solved, the *GGPPA* will no longer produce any effects because no jurisdiction will be subject to the charges under Parts 1 and 2. If a province or territory chose to once again engage in free riding of the efforts of others, the *GGPPA* would be available to spring back into life, just as the *War Measures Act* was available to be invoked in response to aggression by the Axis powers.

28. Climate change, like all collective action problems, is a challenging problem to solve, and it will require time to achieve necessary structural changes. Despite honest, good faith efforts of all Canadian jurisdictions, the *Paris Agreement* targets might not be met, and further efforts may be required. But this does not mean the *GGPPA* is not, at its core and in substance, in both intent and effect, a temporary measure responding to a profound climate emergency.

E. NO PERMANENT STATES OF EMERGENCY

29. One objection to a flexible approach to the temporariness requirement under the emergency branch is that it risks inviting abuse and permitting permanent states of emergency. Absent hard cut-offs, there is a risk that ostensibly temporary laws would continue in force beyond what the emergency branch could otherwise justify.

30. There are two responses to this concern. The first is that traditional indicia of temporariness offer no greater protection against permanent emergencies. As Professor Hogg notes, "an ostensibly temporary measure can always be continued in force by Parliament".[22] Indeed, the issue in both *Fort Frances* and *Co-operative Committee on Japanese Canadians*

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[21] *War Measures Act, 1914*, 5 Geo V, c 2 (Can), s 5.
[22] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (looseleaf revision 2019-1), §17.4(e).

were laws enacted by Parliament that extended temporary war-time measures beyond the temporal limits that had originally attached to them.[23]

31. The second response to the concern rests with the judiciary. There is a need for courts to play a meaningful role in ensuring that the exercise of emergency power by Parliament stays within constitutional bounds. One the most significant insights into democratic responses to contemporary emergencies is that there is a need to create legal boundaries around the exercise of exceptional emergency power. While democratic states may need to resort to emergency power to respond to existential threats, they must do so in ways that remain regulated by law.[24]

32. The contemporary practice of democracies dealing with emergencies demonstrates that there is a critical role for the courts to play in ensuring that such powers are not abused. Even in the war on terror, in which several democratic states have resorted to exceptional legislation, national courts have demonstrated a willingness to scrutinize claims that states of emergency exist. In *Hamdi* the US Supreme Court upheld the exceptional authority of the President to detain 'enemy combatants' without charge under the post-9/11 *Authorization for the Use of Military Force*. However, the Court also cautioned the government that it would remain vigilant, and that if factual circumstances in Afghanistan changed, such exceptional power "may unravel".[25]

33. In *A & Others*, another war on terror case, the House of Lords rejected the Attorney General's claim that it was for Parliament and the Secretary of State alone to decide if an emergency existed, reaffirming the Court's important review function.[26] Lord Hoffmann went further and in fact found that the claimed post-9/11 emergency did not in fact exist such that the United Kingdom could enact an emergency derogation from its obligations under the ECHR.[27]

34. The precise contours of the Court's role in assessing existence of an emergency, or whether such an emergency has ended, remains unresolved by the *Anti-Inflation Reference*. But

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[23] See *An Act to Provide for the completion after the declaration of peace of work begun and the final determination of matters pending before the Commissioner and Controller of Paper and the Paper Control Tribunal, or either of them, at the date of such declaration*, 9-10 Geo V, c 63 (Can) (World War I); *National Emergency Transitional Powers Act, 1945*, 9-10 Geo V, c 25 (Can) (World War II).
[24] Ferejohn & Pasquino, *supra* note 6 at 228-229.
[25] *Hamdi v Rumsfield*, 542 US 507 at 521 (2004) (*per* O'Connor plurality opinion).
[26] *A & Others v Secretary of State for the Home Department; X & Another v Secretary of State for the Home Department*, [2004] UHKL 56 at paras 25-29 (*per* Lord Bingham).
[27] *Ibid* at paras 95-97 (*per* Lord Hoffmann).

that judicial role must be sufficiently meaningful and robust as to ensure that the architecture of the constitution remains respected.[28] In this respect, when the European Court of Human Rights reviews member states' claims of states of emergency under Art 15 of the ECHR, it applies a varying level of scrutiny that is sensitive to, *inter alia* the duration of the alleged state of emergency.[29] Canadian courts must also be sensitive to such considerations.

35. In the context of the *GGPPA*, at a minimum courts have the jurisdiction not only to ensure that there is sufficient evidence of a climate emergency, but also to review decisions of the Governor in Council respecting which jurisdictions are contained in the Schedule to the Act.[30] Beyond this, as the WWI and II cases make clear, there would also be some role for the Court to review whether a climate crisis continued to exist. However, because no party takes issue with the facts underlying the current climate emergency, the specific contours of this form of judicial review need not be addressed here.

PARTS IV & V – SUBMISSIONS RESPECTING COSTS & ORDER SOUGHT

36. Pursuant to the order granting it leave to intervene, the CLC does not seek costs and asks that no costs be ordered against it. The CLC requests that this Court dismiss these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DONE at Ottawa, this 27th day of January, 2020.

Simon Archer
Mariam Moktar
Daniel Sheppard

Counsel for the Intervener,
The Canadian Labour Congress

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[28] Belobaba, *supra* note 7 at 416-417.
[29] *Brannigan and McBride v The United Kingdom*, Eur Ct HR (Plen), Apps No 14553/89 & 14554/89 (25 May 1993) at para 43.
[30] Refusals to take action by the Federal Executive are amenable to judicial review: See e.g. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 (judicial review of Prime Minister's refusal to request repatriation from foreign detention); *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 (judicial review of failure of Minister to issue a statutory exemption).

PART VI – TABLE OF AUTHORITIES

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