

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

**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**

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT

(Party Pursuant to Section 4 of
The Constitutional Questions Act, 2012)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT

(Party Pursuant to Section 5(4) of
The Constitutional Questions Act, 2012)

- and -

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC,
ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF
MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA and
ATTORNEY GENERAL OF ALBERTA**

INTERVENERS

FACTUM OF THE INTERVENER, SMART PROSPERITY INSTITUTE
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

SMART PROSPERITY INSTITUTE

1 Stewart Street, 3rd Floor
Ottawa, ON K1N 6N5
Jeremy de Beer
Barrister and Solicitor
Phone: 613-562-5800 1290, ext. 3169
Email: Jeremy.deBeer@uOttawa.ca

Co-Counsel for the Intervener, Smart
Prosperity Institute

GOWLING WLG (CANADA) LLP

2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Guy Régimbald
Phone: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

Co-Counsel for the Intervener, Smart
Prosperity

-and-

**ANISHINABEK NATION AND UNITED CHIEFS AND COUNCILS OF MNIDOO
MNISING, SASKATCHEWAN POWER CORPORATION AND SASKENERGY
INCORPORATED, CANADIAN TAXPAYERS FEDERATION, INTERNATIONAL
EMISSIONS TRADING ASSOCIATION, CANADIAN PUBLIC HEALTH ASSOCIATION,
ATHABASCA CHIPEWYAN FIRST NATION, CANADIAN ENVIRONMENTAL LAW
ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC., AND SISTERS OF
PROVIDENCE OF ST. VINCENT DE PAUL, ASSEMBLY OF FIRST NATIONS, DAVID
SUZUKI FOUNDATION, CANADA'S ECOFISCAL COMMISSION, CLIMATE JUSTICE
SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR
SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL
CORPORATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL
OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF
CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKTOON
CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE AND YOUTH OF THE
EARTH, PROGRESS ALBERTA COMMUNICATIONS LIMITED, CANADIAN LABOUR
CONGRESS, OCEANS NORTH CONSERVATION SOCIETY, AMNESTY
INTERNATIONAL CANADA, NATIONAL ASSOCIATION OF WOMEN AND THE LAW
AND FRIENDS OF THE EARTH, SMART PROSPERITY INSTITUTE, CENTRE
QUEBECOIS DU DROIT DE L'ENVIRONNEMENT ET EQUITERRE, GENERATION
SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA,
SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF
PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS
OF THE CHILD AND YOUTH CLIMATE LAB, ASSEMBLY OF MANITOBA CHIEFS,
CITY OF RICHMOND, CITY OF VICTORIA, CITY OF NELSON, DISTRICT OF
SQUAMISH, CITY OF ROSSLAND AND CITY OF VANCOUVER**

INTERVENERS

SCC File No: 38781

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

**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**

BETWEEN

ATTORNEY GENERAL OF ONTARIO

APELLANT

(style of cause and cover continued on the next page #38663 & 38781)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT

-and-

ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA ANISHINABEK NATION AND UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING, SASKATCHEWAN POWER CORPORATION AND SASKENERGY INCORPORATED, CANADIAN TAXPAYERS FEDERATION, INTERNATIONAL EMISSIONS TRADING ASSOCIATION, CANADIAN PUBLIC HEALTH ASSOCIATION, ATHABASCA CHIPEWYAN FIRST NATION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC., AND SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL, ASSEMBLY OF FIRST NATIONS, DAVID SUZUKI FOUNDATION, CANADA'S ECOFISCAL COMMISSION, CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL CORPORATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKTOON CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE AND YOUTH OF THE EARTH, PROGRESS ALBERTA COMMUNICATIONS LIMITED, CANADIAN LABOUR CONGRESS, OCEANS NORTH CONSERVATION SOCIETY, AMNESTY INTERNATIONAL CANADA, NATIONAL ASSOCIATION OF WOMEN AND THE LAW AND FRIENDS OF THE EARTH, SMART PROSPERITY INSTITUTE, CENTRE QUEBECOIS DU DROIT DE L'ENVIRONNEMENT ET EQUITERRE, GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD AND YOUTH CLIMATE LAB, ASSEMBLY OF MANITOBA CHIEFS, CITY OF RICHMOND, CITY OF VICTORIA, CITY OF NELSON, DISTRICT OF SQUAMISH, CITY OF ROSSLAND AND CITY OF VANCOUVER

INTERVENERS

FACTUM OF THE INTERVENER, SMART PROSPERITY
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

ORIGINAL TO: REGISTRAR

COPIES TO:

**MINISTRY OF JUSTICE AND
ATTORNEY GENERAL OF
SASKATCHEWAN**
820-1874 Scarth Street
Regina, SK S4P 4B3

P. Mitch McAdam, Q.C.

Phone: 306-787-7846

Fax: 306-787-9111

Email: mitch.mcadam@gov.sk.ca

Alan Jacobson

Phone: 306-787-1087

Fax: 306-787-9111

Email: alan.jacobson@gov.sk.ca

MLT AIKINS LLP

1500 - 1874 Scarth Street

Regina, Saskatchewan S4P 4E9

Deron Kuski, Q.C.

Jodi Wildeman

Phone : 306- 347-8404

Fax : 306-352-5250

Email : dkuski@mltaikins.com

jwildeman@mltaikins.com

GOWLING WLG (CANADA) LLP

Barristers & Solicitors

2600 – 160 Elgin Street

Ottawa, ON K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Counsel for the Appellant, Attorney General
of Saskatchewan #38663 & Intervener in
#38781

Agent for Counsel for the Appellant, Attorney
General of Saskatchewan #38663 &
Intervener in #38781

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Region
301 – 310 Broadway
Winnipeg, MB, R3C 0S6

Sharlene Telles-Langdon,

Christine Mohr,

Mary Matthews,

Neil Goodridge,

Brooke Sittler,

Ned Djordjevic

Phone: 204-983-0862

Fax: 204-984-8495

Email: sharlene.telleslangdon@justice.gc.ca

Counsel for the Respondents, Attorney
General of Canada #38663 & 38781

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
50 O'Connor Street, Suite 500
Ottawa, ON, K1A 0H8

Christopher Rupar

Phone: 613-670-6290

Fax: 613-954-1920

Email: christopher.rupar@justice.gc.ca

Agent for Counsel for the Respondents,
Attorney General of Canada #38663 & 38781

ATTORNEY GENERAL OF ONTARIO

Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON, M7A 2S9

Josh Hunter

Padraic Ryan

Aud Ranalli

Phone: 416-326-3840

Fax: 416-326-4015

Email: joshua.hunter@ontario.ca

Counsel for the Appellant, Attorney General
of Ontario #38781 & Intervener #38666

SUPREME ADVOCACY LLP

340 Gilmour Street
Ottawa, ON, K2P 0R3

Marie-France Major

Phone: 613-695-8855

Fax: 613-695-8560

Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Appellant, Attorney
General of Ontario #38781 & Intervener
#38663

**MINISTÈRE DE LA JUSTICE DU
QUÉBEC**

1200, route de l'Église, 4^e étage
Québec, QC, G1V 4M1

Jean-Vincent Lacroix

Laurie Anctil

Phone: 418-643-1477, poste 20779

Email: jean-

vincent.lacroix@justice.gouv.qc.ca

Laurie.anctil@justice.gouv.qc.ca

Avocats de l'Intervenante, la Procureure
générale du Québec #38663 & 38781

**ATTORNEY GENERAL OF NEW
BRUNSWICK**

Legal Services Branch, Constitutional Unit
P.O. Box 6000, Stn. A.

675 King Street, Suite 2018

Fredericton, NB, E3B 5H1

Rachelle Standing

Isabel Lavoie Daigle

Phone: 506-453-2222

Fax: 506-453-3275

Email: william.gould@gnb.ca

Counsel for the Intervener, Attorney General
of New Brunswick #38663 & 38781

NOËL & ASSOCIÉS s.e.n.c.r.l.

111, rue Champlain

Gatineau, QC, J8X 3R1

Pierre Landry

Phone: 819-503-2174

Fax: 819-771-5397

Email: p.landry@noelassociés.com

Correspondant pour les avocats de
l'Intervenante, la Procureure générale du
Québec #38663 & 38781

GOWLING WLG (CANADA) LLP

Barristers & Solicitors

2600 – 160 Elgin Street

Ottawa, ON, K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener,
Attorney General of New Brunswick #38663
& 38781

ATTORNEY GENERAL OF MANITOBA

Constitutional Law
1230 – 405 Broadway Avenue
Winnipeg, MB, R3C 3L6

Michael Conner

Allison Kindle Pejovic

Phone: 204-945-6723

Fax: 204-945-0053

Email: michael.conner@gov.mb.ca
allison.pejovic@gov.mb.ca

Counsel for the Intervener, Attorney
General of Manitoba #38663 & 38781

**ATTORNEY GENERAL OF BRITISH
COLUMBIA**

Legal Services Branch
1001 Douglas Street
Victoria, BC, V8W 2C5

J. Gareth Morley

Phone: 250-952-7644

Fax: 250-356-9154

Email: Gareth.Morley@gov.bc.ca

Counsel for the Intervener, Attorney
General of British Columbia #38663 & 38781

CREASE HARMAN LLP

800-1070 Douglas Street
Victoria, BC V8W 2C4

R. Bruce E. Hallsor

Hana Felix

Phone: 250-388-9124

Fax: 250-388-4294

Email: bhallsor@crease.com

Counsel for the Intervener, Canadian
Taxpayers Federation

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener,
Attorney General of Manitoba #38663 &
38781

MICHAEL SOBKIN

331 Somerset Street, W.
Ottawa, ON, K2P 0J8

Phone: 613-282-1712

Fax: 613-288-2896

Email: msobkin@sympatico.ca

Agent for the Intervener, Attorney General of
British Columbia #38663 & 38781

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Phone: 613-695-8855

Fax: 613-695-8580

Email: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Canadian Taxpayers
Federation

DEMARCO ALLAN LLP

625-333 Bay Street
Toronto, ON M5H 2R2

Elizabeth DeMarco
Jonathan McGillivray

Phone: 647-991-1190

Fax: 888-734-9459

Email: lisa@demarcoallan.com

Counsel for the Intervener, International
Emissions Trading Association

GOWLING WLG (CANADA) LLP

Suite 1600, 1 First Canadian Place
100 King Street West
Toronto, ON M5X 1G5

Jennifer L. King, Michael Finley,
Liane Langstaff

Phone: 416-862-7525

Fax: 416-862-7661

Email: jennifer.king@gowlingwlg.com

Counsel for the Intervener, Canadian Public
Health Association

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Phone: 613-786-0171

Fax: 613-788-3587

Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener, Canadian Public
Health Association

**ECOJUSTICE ENVIRONMENTAL LAW
CLINIC, UNIVERSITY OF OTTAWA**

216-1 Stewart Street
Ottawa, ON K1N 6N5

Amir Attaran

Phone: 613-562-8500 Ext: 3382

Fax: 613-562-5319

Email: aattaran@ecojustice.ca

Counsel for the Intervener, Athabasca
Chipewyan First Nation

**CANADIAN ENVIRONMENTAL LAW
ASSOCIATION**

1500 - 55 University Avenue
Toronto, ON M5J 2H7

**Joseph F. Castrilli, Theresa McClenaghan,
Richard D. Lindgren**

Phone: 416-960-2284 Ext: 7218

Fax: 416-960-9392

Email: castrilli@sympatico.ca

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

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Phone: 613-786-0171

Fax: 613-788-3587

Email: jeff.beedell@gowlingwlg.com

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

ASSEMBLY OF FIRST NATIONS

55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5

**Stuart Wuttke, Julie McGregor,
Adam Williamson, Victor Carter**

Phone: 613-241-5689 Ext: 228
Fax: 613-241-5808
Email: swuttke@afn.ca

Counsel for the Intervener, Assembly of First Nations

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener, Assembly of First Nations

**ECOJUSTICE ENVIRONMENTAL LAW
CLINIC, UNIVERSITY OF OTTAWA**

216-1 Stewart Street
Ottawa, ON K1N 6N5

**Joshua Ginsberg
Randy Christensen**

Phone: 613-562-5800 Ext: 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Counsel for the Intervener, the David Suzuki Foundation

CHAMP AND ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Phone: 613-237-4740
Fax: 613-232-2680
Email: broy@champlaw.ca

Agent for the Intervener, the David Suzuki Foundation

UNIVERSITY OF OTTAWA

Faculty of Law
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Stewart Elgie, LSM
Phone : 613-562-5800 Ext : 1270
Email: stewart.elgie@uottawa.ca

Counsel for the Intervener, Canada's Ecofiscal Commission

CHAMP AND ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Phone: 613-237-4740
Fax: 613-232-2680
Email: broy@champlaw.ca

Agent for the Intervener, Canada's Ecofiscal Commission

KOWALCHUK LAW OFFICE

18 Patton Street
Regina, SK S4R 3N9

**Larry W. Kowalchuk Taylor-Anne Yee,
Jonathan Stockdale**

Phone: 306-529-3001

Email: larry@kowalchuklaw.ca

Counsel for the Interveners, Climate Justice
Saskatoon, National Farmers Union,
Saskatchewan Coalition for Sustainable
Development, Saskatchewan Council for
International Cooperation, Saskatchewan
Environmental Society, SaskEV

KOWALCHUK LAW OFFICE

18 Patton Street
Regina, SK S4R 3N9

Larry W. Kowalchuk

Phone: 306-529-3001

Email: larry@kowalchuklaw.ca

Counsel for the Interveners, Council of
Canadians: Prairie and Northwest Territories
Region, Council of Canadians: Regina
Chapter, Council of Canadians: Saskatoon
Chapter, New-Brunswick Anti-Shale Gas
Alliance and Youth of the Earth

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224

Fax: 613-691-1338

Email: mdillon@supremelawgroup.ca

Agent for the Interveners, Climate Justice
Saskatoon, National Farmers Union,
Saskatchewan Coalition for Sustainable
Development, Saskatchewan Council for
International Cooperation, Saskatchewan
Environmental Society, SaskEV

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224

Fax: 613-691-1338

Email: mdillon@supremelawgroup.ca

Agent for the Interveners, Council of
Canadians: Prairie and Northwest Territories
Region, Council of Canadians: Regina
Chapter, Council of Canadians: Saskatoon
Chapter, New-Brunswick Anti-Shale Gas
Alliance and Youth of the Earth

NANDA & COMPANY

3400 Manulife Place
10180- 101 Street N.W.
Edmonton, AB T5J 4K1

Avnish Nanda

Martin Olszynski

Phone (780) 801-5324

Fax: (587) 318-1391

Email: avnish@nandalaw.ca

Counsel for the Intervener, Progress Alberta
Communications Limited

WESTAWAY LAW GROUP

55 Murray Street
Suite 230
Ottawa, ON K1N 5M3

Cynthia Westaway

Patricia Lawrence

Phone: 613-722-6339

Fax: 613-722-9097

Email: cynthia@westawaylaw.ca

Counsel for the Intervener, Anishinabek
Nation and United Chiefs and Councils of
Mnido Mnisng

GOLDBLATT PARTNERS LLP

20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Steven M. Barrett, Simon Archer,

Mariam Moktar

Phone: 416-977-6070

Fax: 416-591-7333

Email: sbarrett@goldblattpartners.com

Counsel for the Intervener, Canadian Labour
Congress

MCGUINTY LAW OFFICES

1192 Rockingham Avenue
Ottawa, ON K1H 8A7

Dylan Jr. McGuinty

Phone: 613-526-3858

Fax: 613-526-3187

Email: dylanjr@mcguintylaw.ca

Agent for the Intervener, Progress Alberta
Communications Limited

WESTAWAY LAW GROUP

55 Murray Street
Suite 230
Ottawa, ON K1N 5M3

Geneviève Boulay

Phone: 613-702-3042

Fax: 613-722-9097

Email: genevieve@westawaylaw.ca

Agent for the Intervener, Anishinabek Nation
and United Chiefs and Councils of Mnido
Mnisng

GOLDBLATT PARTNERS LLP

500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman

Phone: 613-482-2463

Fax: 613-235-3041

Email: cbauman@goldblattpartners.com

Agent for the Intervener, Canadian Labour
Congress

AARVAY FINLAY LLP

1512-808 Nelson Street
Vancouver, BC V6Z 2H2

David W.L. Wu

Phone: 604-696-9828
Fax: 888-575-3281
Email: dwu@arvayfinlay.ca

Counsel for the Intervener, Oceans North
Conservation Society

SUPREME LAW GROUP

900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon

Phone: 613-691-1224
Fax: 613-691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Intervener, Oceans North
Conservation Society

STOCKWOODS LLP

TD North Tower, suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

Justin Safayeni

Zachary Al-Khatib
Phone: 416-593-7200
Fax: 416-593-9345
Email: justins@stockwoods.ca

Counsel for the Intervener, Amnesty
International Canada

CONWAY BAXTER WILSON LLP

400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor

Phone: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conway.pro

Agent for Counsel for the Intervener,
Amnesty International Canada

UNIVERSITY OF OTTAWA

57 Louis Pasteur St.
Ottawa, ON K1N 6C5

Nathalie Chalifour

Anne Levesque
Phone: 613-562-5800 Ext: 3331
FAX: 613-562-5124
Email: Nathalie.Chalifour@uottawa.ca

Counsel for the Intervener, National
Association of Women and the Law and
Friends of the Earth

CONWAY BAXTER WILSON LLP

400 - 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Marion Sandilands

Phone: 613-288-0149
Fax: 613-688-0271
Email: msandilands@conway.pro

Agent for the Intervener, National
Association of Women and the Law and
Friends of the Earth

RATCLIFF & COMPANY LLP

500-221 West Esplanade
North Vancouver, BC V7M 3J3

**Nathan Hume, Emma Hume,
Cam Brewer**

Phone: 604-988-5201

Fax: 604-988-1452

Email: nhume@ratcliff.com

Counsel for the Interveners, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé

Phone: 613-702-5566

Fax: 613-702-5566

Email: DBosse@juristespower.ca

Agent for the Interveners, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

PUBLIC INTEREST LAW CENTRE

200-393 Portage Avenue
Winnipeg, MB R3B 3H6

**Joëlle Pastora Sala, Byron Williams,
Katrine Dilay**

Phone: 204-985-8540

Fax: 204-985-8544

Email: jopas@pilc.mb.ca

Counsel for the Intervener, Assembly of Manitoba Chiefs

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Phone: 613-702-5566

Fax: 613-702-5566

Email: mvincelette@powerlaw.ca

Agent for the Intervener, Assembly of Manitoba Chiefs

LIDSTONE & COMPANY

Sun Tower, Suite 1300
128 Pender Street West
Vancouver, BC V6B 1R8

Paul A. Hildebrand

Olivia French

Phone: 604-899-2269

Fax: 604-899-2281

Email: hildebrand@lidstone.ca

Counsel for the Interveners, City of
Richmond, City of Victoria, City of Nelson,
District of Squamish, City of Rossland and
City of Vancouver

GALL, LEGGE GRANT ZWACK LLP

1000 – 1199 W. Hastings Street
Vancouver, BC, V6E 3T5

Peter A. Gall, Q.C.

Phone: 604-891-1152

Fax: 604-669-5101

Email: pgall@glgzlaw.com

Counsel for the Intervener, Attorney General
of Alberta #38663 & 38781

MCKERCHER LLP

374 Third Avenue South
Saskatoon, SK S7K 1M5

David M.A. Stack, Q.C.

Phone: 306-664-1277

Fax: 306-653-2669

Email: d.stack@mckercher.ca

Counsel for the Interveners, Saskatchewan
Power Corporation and SaskEnergy
Incorporated

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Phone: 613-702-5566

Fax: 613-702-5566

Email: mvincelette@powerlaw.ca

Agent for the Interveners, City of Richmond,
City of Victoria, City of Nelson, District of
Squamish, City of Rossland and City of
Vancouver

CAZA SAIKALEY LLP

220 Laurier Avenue W. Suite 350
Ottawa, ON, K1P 5Z9

Alyssa Tomkins

Phone: 613-565-2292

Fax : 613-565-2087

Email : atomkins@plaideurs.ca

Agent for the Intervener,
Attorney General of Alberta #38663 & 38781

GOWLING WLG (CANADA) LLP

2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Phone: 613-786-8695

Fax: 613-788-3509

Email: lynne.watt@gowlingwlg.com

Agent the Interveners, Saskatchewan Power
Corporation and SaskEnergy Incorporated

MICHEL BÉLANGER AVOCATS INC.

454 Laurier Avenue East
Montréal, QC H2J 1E7

David Robitaille

Marc Bishai

Phone: 514-991-9005

Fax: 514-844-7009

Email: david.robitaille@uottawa.ca

Counsel for the Intervenors, Centre québécois
du droit de l'environnement and Équiterre

POWER LAW

130 Albert Street
Suite 1103
Ottawa, ONf K1P 5G4

Maxine Vincelette

Phone: 613-702-5566

Fax: 613-702-5566

Email: mvincelette@powerlaw.ca

Agent for the Intervenors, Centre québécois du
droit de l'environnement and Équiterre

INDEX

	PAGE
PART I – OVERVIEW AND FACTS	1
PART II – POSITION ON THE APPELLANT’S QUESTIONS	2
PART III – STATEMENT OF ARGUMENT	3
A. The <i>Act’s</i> pith and substance includes its purpose to pursue Canada’s <i>Paris</i> targets	3
B. The <i>Act</i> fits into Parliament’s POGG power to fill a treaty implementation gap	6
C. The <i>Act</i> fits into Parliament’s POGG power to address a transnational concern	9
PART IV – SUBMISSIONS ON COSTS	10
PART VII – TABLE OF AUTHORITIES	12

PART I – OVERVIEW AND FACTS

1. International treaties are relevant to this appeal, but there is uncertainty about how. The Smart Prosperity Institute submits that the transboundary subject-matter of the *Paris Agreement*¹ and the nature of Canada’s reciprocal commitments to the world support the *Act*’s² validity.
2. There is no treaty implementing power outside of sections 91 and 92 of the *Constitution*.³ Lord Atkin was right about that in *Labour Conventions*.⁴ The ability to fulfil obligations under certain treaties is, however, crucial “for the Peace, Order, and good Government of Canada”.
3. POGG does not give Parliament *carte blanche* to perform any and all treaty obligations. That would unduly encroach into provincial jurisdiction and could risk an end-run around the division of powers. Under POGG, Parliament can fulfil agreements with reciprocal commitments between Canada and other nations to solve true transboundary problems. Parliament’s POGG power cannot be used to merely harmonize provincial standards with rules abroad. Conventions harmonizing standards for local working hours, weekly rest, and wages are perfect examples of treaties Parliament cannot implement for POGG. In contrast, a global agreement exchanging pledges amongst nations to combat an indisputable, existential, transboundary threat to humanity and the planet is a perfect example of one Parliament can fulfil.
4. Recognizing the POGG power to address matters of true transnational concern fills a constitutional gap that has existed for almost 85 years. Section 132 of the *Constitution* explicitly empowers Parliament to perform its own or provincial obligations between the British empire and foreign countries. It was unforeseen in 1867 that Canada would ever have authority over its own international affairs. When in 1926 Canada acquired autonomy to negotiate, sign, and ratify treaties, the power to implement treaties became, literally, a gap.
5. Canada is the only former colony in the Commonwealth facing this problem, and if the *Act* is not upheld, would seem to be the only country on earth that cannot constitutionally implement its *Paris* obligations. But if this Court recognizes a limited treaty implementation power by relying on its own existing precedents, informed by ideas from leading constitutional scholars and our

¹ [Paris Agreement](#), 16 February 2016 (entered into force 4 November 2016).

² The “*Act*” at issue is the [Greenhouse Gas Pollution Pricing Act](#), SC 2018, c 12, s 186.

³ [Constitution Act, 1867 \(UK\)](#), 30 & 31 Victoria, c 3.

⁴ [Canada \(A-G\) v Ontario \(A-G\)](#), [1937] AC 326 [“*Labour Conventions*”].

Commonwealth counterparts, the watertight compartments of *Labour Conventions* need not sink Canada's ship in foreign waters.

6. Alternatively, fulfilling agreements with reciprocal commitments to solve indisputably transboundary problems is, by definition, a national concern. Think of it as a transnational concern. The concern is not implementing a treaty per se, nor just the topic of the particular treaty at issue. The transnational concern arises from an inextricable combination of the transboundary subject-matter and Canada's pledge to the world. A true transnational concern is inherently distinguishable from a provincial concern because the effect of any provincial failure is a national inability to fulfil Canada's commitments on the world stage. A true transnational concern is inherently proportionate in its scale of impact on provincial jurisdiction given the global nature of the problem.

7. These appeals—about this specific *Act* to fulfil this reciprocal *Agreement* addressing this transnational crisis—are the Court's best chance in decades to balance federalism and effective foreign affairs. The transnational dimensions of this matter are inextricably intertwined. Without *Paris*, there are no commitments to meet. Without the *Act*, commitments cannot be met. The pith and substance of the *Act*, therefore, includes its explicit purpose of achieving Canada's treaty commitments to the world. And that is valid legislation under Parliament's POGG power.

8. Fully integrating the *Act*'s transnational dimensions into both the statutory characterization and constitutional classification differentiates Smart Prosperity's submissions from the parties' and other interveners' arguments. But if nothing else, Smart Prosperity agrees with the AG Canada and the lower courts that *Paris* is at least evidence of a national concern in relation to minimum national standards integral to reducing nationwide GHG emissions. Smart Prosperity accepts the facts as framed by the AG Canada.

PART II – POSITION ON THE APPELLANTS' QUESTIONS

9. A central question in these appeals is whether the *Act* constitutes a valid exercise of Parliament's POGG power. Smart Prosperity submits it does. Smart Prosperity would also agree that the *Act* is valid in relation to Parliament's Trade and Commerce and Criminal Law powers and imposes valid regulatory charges or taxation. But to avoid duplication and best assist the Court, this factum addresses only the treaty issue.

PART III – STATEMENT OF ARGUMENT

10. Both the Saskatchewan and Ontario Courts of Appeal considered the links among treaties and the division of powers. But the judges did so differently. The Saskatchewan majority conflated most treaty-related arguments in a segregated discussion of section 132 of the *Constitution* and *Labour Conventions*.⁵ The Saskatchewan dissent considered international aspects of climate change only in respect of the distinctiveness part of the POGG analysis.⁶ The Ontario majority likewise focussed on international issues mainly under the national concern branch of POGG.⁷ The Ontario dissent barely touched on the international dimensions to this matter.⁸

11. Nobody in these appeals argues in favour of a free-standing treaty implementation power of the sort considered and rejected in *Labour Conventions* and by the Saskatchewan majority. The issue is whether and, if so, how the international treaty framework is relevant to Parliament's section 91 powers, including in relation to POGG or specific Classes of Subjects. The proper analytical approach is integrating not segregating the treaty issues in these appeals.

12. Smart Prosperity makes three submissions. **(A)** On characterization: the pith and substance of the *Act* is at least partly if not primarily determined by its purpose to achieve Canada's nationally determined contribution under the *Paris Agreement*. **(B)** On classification: the *Act* fits into Parliament's POGG power to fill a treaty implementation gap or, **(C)** alternatively, the *Act* fits into Parliament's POGG power to address a transnational concern.

A. The *Act*'s pith and substance includes its purpose to pursue Canada's *Paris* targets.

13. The *Act*'s pith and substance depends on its purpose and effects.⁹ Its dominant purpose and effects are not to regulate GHGs locally or in the abstract. The *Act* regulates only a particular aspect of GHGs for a particular purpose. An essential purpose is to pursue Canada's *Paris* targets.

14. The particular aspect of GHGs the *Act* regulates can be narrowed in numerous further ways, any of which support the *Act*'s constitutionality. The AG Canada emphasizes the particular aspect of minimum national standards. The AG British Columbia emphasizes pricing. Canada's Ecofiscal

⁵ [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 SKCA 40 at paras 174-177.

⁶ *Ibid* at paras 426-430.

⁷ [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 ONCA 544 at paras 106, 116, 134-36.

⁸ *Ibid* at para 222.

⁹ See for example [Reference re Securities Act](#), 2011 SCC 66 at paras 63-64.

Commission focusses on transboundary aspects. Smart Prosperity submits these are all accurate and precise ways to describe the *Act*'s essential character.

15. Smart Prosperity adds that these dominant characteristics of the *Act* become even clearer in light of the *Paris Agreement*. At the heart of *Paris* are “nationally determined contributions” to achieve a long-term global average temperature goal.¹⁰ Parties—which besides the supranational European Union are all nation states—are to undertake and communicate ambitious efforts to achieve the global goal.¹¹ Canada and all other Parties “shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”¹²

16. But for *Paris*, there would probably be no *Act*. Canada could not and would not address climate change alone. However, we need not speculate about counterfactuals because we have clear evidence: helping to fulfil Canada’s *Paris* commitments is a reason, if not *the* reason, for the *Act*.

17. Intrinsicly, the *Act*'s Preamble cites Canada’s ratification of the *United Nations Framework Convention on Climate Change (UNFCCC)*,¹³ under which the *Paris Agreement* was created. The Preamble also cites the *Paris Agreement* specifically. Even more specifically the Preamble explains that “the Government of Canada is committed to achieving Canada’s Nationally Determined Contribution – and increasing it over time – under the *Paris Agreement*”.¹⁴ Also, the essence of the *Act*'s operative provisions is minimal impairment; to defer as much as possible to provinces. The backstop approach is aimed at achieving only Canada’s nationwide commitments.

18. Extrinsicly, evidence of the *Act*'s purpose to achieve Canada’s *Paris* commitments includes the history of policymaking leading up to the *Act*. The *Paris Agreement* was on policymakers’ minds from the Vancouver Declaration, to the Final Report of the Working Group on Carbon Pricing Mechanisms, to the Pan-Canadian Approach to Pricing Carbon Pollution document, to the First Ministers’ Pan-Canadian Framework on Clean Growth and Climate

¹⁰ [Paris Agreement](#), *supra* note 1 at Arts 2, 3, 4.

¹¹ *Ibid* at Art 3.

¹² *Ibid* at Art 4(2) [emphasis added].

¹³ [United Nations Framework Convention on Climate Change](#), 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

¹⁴ [Act](#), *supra* note 2 at Preamble.

Change.¹⁵ The sponsoring Minister said about the *Act*: “pricing carbon pollution is making a major contribution to helping Canada meet its climate targets under the *Paris Agreement*.”¹⁶ The *Comprehensive Economic and Trade Agreement* between Canada and the European Union also reaffirms the commitment to implement multilateral agreements including the *Paris Agreement*.¹⁷

19. The AG British Columbia’s characterization of the *Act*’s pith and substance captures its *Paris*-related purpose by reference to “Canada’s overall targets”. Those targets are, more specifically, Canada’s “nationally determined contribution” undertaken, communicated and pursued under Article 4 of the *Paris Agreement*. The AG Canada captures the same purpose less explicitly by reference to “nationwide” emissions. Nationwide emissions are all that really matter because that is what Canada has committed under the *Paris Agreement* to reduce. So, the Attorneys General of both British Columbia and Canada acknowledge the relevance of the *Paris Agreement* in characterizing the *Act*’s pith and substance. Smart Prosperity is just more direct about it.

20. None of this means the pith and substance of the *Act* and the *Paris Agreement* are the same. They are not. The *Act* is more precise than *Paris*. It addresses only one particular aspect of transboundary GHG emissions—minimum price stringency standards—integral to achieve Canada’s nationwide targets. And this aspect pertains to only one part of the *Paris Agreement*: the matter of nationally determined contributions. The *Act* does not address other parts of *Paris*, for example the international emissions trading scheme under Article 6. Moreover, the *Act* is only one part of the broader strategy to achieve Canada’s national commitments. The *Act* is necessary but not sufficient. As the AG Canada notes, there are numerous enacted or planned complementary measures, investments and programs.¹⁸

21. And anyways, the *Act*’s constitutionality depends on its own pith and substance, not characterization of the *Paris Agreement*. *Paris* provides the context, but this Court must more

¹⁵ [Affidavit of John Moffet](#), Vol I of AG Canada Record before ONCA at paras 27, 32, 36, 37, 41, 46-47, 56-59, 61, 65, 67, 72-74, 85.

¹⁶ [House of Commons Debates](#), 42-1, No 289 (1 May 2018) at 18958 (Hon. Catherine McKenna). See also [Factum of the Respondent](#) at p 12, footnote 34.

¹⁷ [Canada-European Union Comprehensive Economic and Trade Agreement](#), September 21, 2017 at Art 24.2. See also [Affidavit of André Francois Giroux](#), Vol IV of AG Canada Record before ONCA at paras 7, 13, 16-17, 20.

¹⁸ [Factum of the Respondent](#) at para 50.

precisely characterize the *Act*. The pith and substance of the *Act* is establishing minimum national pricing standards integral to Canada’s treaty commitment to reduce nationwide GHG emissions.

B. The *Act* fits into Parliament’s POGG power to fill a treaty implementation gap.

22. The constitutional gap that exists in relation to treaty implementation is well known. Section 132 of the *Constitution Act, 1867* explicitly gives Parliament and the federal government all powers necessary or proper for performing obligations of Canada or any Province under Empire treaties, *i.e.* treaties signed on Canada’s behalf between the British Empire and foreign countries. This treaty implementing power went dormant in 1926 when the British stopped making treaties for Canada and Canada started making treaties for itself.¹⁹

23. In the Privy Council’s *Radio Reference* decision, Viscount Dunedin soon recognized the root of the problem: “This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought-of in 1867.”²⁰ Canada’s evolution from colony to fully independent nation state created, quite literally, a constitutional gap. In 1932, *Radio Reference* established that the POGG power can fill the gap for some kinds of treaties.

24. A quite different argument—that section 132 itself could be stretched to cover Canada’s independent treaty obligations—was rejected in the 1937 *Labour Conventions* decision. Lord Atkin said instead that that the power to implement treaties no longer rested with the federal government but with whichever level of government had jurisdiction over the subject-matter at issue.²¹ *Labour Conventions* is the also case where Lord Atkin wrote that Canada’s “ship of state now sails on larger ventures and into foreign waters” but retains “watertight compartments”.²²

25. Hogg concludes that *Labour Conventions* “has impaired Canada’s capacity to play a full role in international affairs”.²³ Reviewing the constitutional literature, Elgie writes: “On the whole, almost all scholars agree that *Labour Conventions* was badly decided, and the large majority

¹⁹ P Hogg, *Constitutional Law of Canada* (Scarborough, ON: Thompson Carswell, 2007) (loose-leaf revision, 5th ed supplement, vol 1) ch 11 at 12.

²⁰ *Quebec (A-G) v Canada (A-G)*, [1932] AC 304 [“*Radio Reference*”] at 3.

²¹ *Labour Conventions*, *supra* note 4 at paras 14-15.

²² *Ibid* at para 15.

²³ Hogg, *supra* note 19 ch 11 at 16.

support departure from its precedent—although not all suggest going so far as to allocate treaty-implementing power to the federal government alone.”²⁴

26. Chief Justice Laskin has made the most explicit call at the Supreme Court of Canada to reconsider *Labour Conventions*. In *MacDonald v Vapor* he cited Chief Justice Kerwin who, writing for himself and future Chief Justices Taschereau and Fauteux, questioned *Labour Conventions*, and he mentioned Justice Rand’s contradiction of the case.²⁵ The treaty issue was ultimately moot in *MacDonald Vapor* because the *Trade Marks Act* did not mention the purpose of implementing an international treaty. In Chief Justice Laskin’s opinion, “assuming Parliament has power to pass legislation implementing a treaty which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference.”²⁶ The *Act* at issue in these appeals has that missing ingredient from *MacDonald v Vapor*—the manifest purpose and effect of implementing the *Paris Agreement*.

27. It is not necessary to overrule *Labour Conventions* in order to uphold the *Act* as being, at least partly in relation to Canada’s commitments under the *Paris Agreement*. But if that case were interpreted strictly, Canada would seem to be the only country in the world whose federal government is constitutionally unable to fulfil its international climate commitments.²⁷ Interpreted pragmatically, *Labour Conventions* leaves room for Parliament to fulfill certain treaty obligations under POGG. Smart Prosperity supports pragmatism. *Labour Conventions* need only be nuanced.

28. “Recent dicta by the Supreme Court of Canada suggest”, explains Hogg, “that the reasoning in the *Radio Reference* could be returning to judicial favour.”²⁸ Régimbald and Newman agree that several Supreme Court cases “seem to confirm that Parliament has the jurisdiction to ... implement international treaties that are not squarely within areas of provincial jurisdiction.”²⁹

²⁴ [S Elgie](#), “Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)” (2008) 13:1 *Rev of Const Studies* 67 at 93.

²⁵ [MacDonald v Vapor Canada Ltd](#), [1977] 2 SCR 134 at 169.

²⁶ *Ibid* at 171.

²⁷ T Strom & P Finkle, “Treaty Implementation: The Canadian Game Needs Australian Rules”, (1993) 25 *Ottawa L Rev* 39 at 60; J Trone, *Federal Constitutions and International Relations* (St Lucia: U of Queensland Press, 2001) at 85-86, 114.

²⁸ Hogg, *supra* note 19 ch 17 at 6.

²⁹ G Régimbald & DG Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at 229 n 13.

29. Insight into the kind of treaty obligations Parliament has the power to fulfil can be gleaned by comparing *Radio Reference* and *Labour Conventions*. Hogg argues that *Labour Conventions* can be read narrowly, and reconciled with *Radio Reference*, by confining its reasoning to treaties about “harmonization of domestic law”, leaving Parliament with power to implement treaties “under which states undertake reciprocal obligations to each other”.³⁰ The real differences between the cases are indeed the topics of the treaties and the nature of Canada’s obligations. *Radio Reference* was about wireless communications that transcend boundaries. *Labour Conventions* was about local working conditions. The subject-matter of the treaties in *Radio Reference* was mentioned nowhere in sections 91 or 92. The subject-matter of the treaties in *Labour Conventions* was squarely within 92(13) Property & Civil Rights. The obligations in *Radio Reference* were reciprocal commitments between Canada and other countries to address transboundary issues. The obligations in *Labour Conventions* were merely to harmonize local standards domestically.

30. Treaty implementation also supported the validity of Parliament’s legislation addressing aeronautics. In *Johannesson*, this Court held that two international treaties on civil aviation (one a 1919 Empire treaty signed by the Britain for Canada; the other signed in 1944 by Canada itself) supported the proposition that aeronautics is inherently not a provincial but a national concern.³¹

31. Looking across the case law on treaty implementation, it is clear that hours of work, weekly rest, and wages are squarely provincial, not inherently transboundary. Broadcasting, aeronautics, and GHG emissions are inherently transboundary, not squarely provincial. These appeals involving the *Act*’s fulfillment of *Paris* commitments are like *Radio Reference* and *Johannesson* not *Labour Conventions*. That alone is enough to uphold the validity of this particular *Act*.

32. The line between the international commitments Parliament can fulfil alone and those it cannot is more generally illustrated by a series of cases from the High Court of Australia culminating in the *Tasmania Dam Case*. Although Australia’s federalist constitution does not allocate a specific power to implement treaties, the Court held that Australia’s federal Parliament may do so within Australia’s “external affairs” power. The judges’ reasons differed on whether the federal power allowed implementation of all treaties or only treaties addressing a sufficient

³⁰ Hogg, *supra* note 19 ch 11 at 17; see also WR Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 358.

³¹ [Johannesson v Municipality of West St Paul](#), [1952] 1 SCR 292.

“international concern” that if not implemented “threatens serious disruption to its international relations”.³² The Parliament of Canada’s power is, Smart Prosperity submits, more like the latter position. Parliament’s treaty related POGG power does not allow it implement treaties involving domestic matters (like the treaties in *Labour Conventions*) but does allow it to fulfil reciprocal national obligations to solve indisputably transboundary problems.

33. While line-drawing is not easy in all cases, it is in these appeals. The *Act* at issue—the purpose and effect of which is to pursue Canada’s nationally determined contributions under the *Paris Agreement*—is the quintessential example of treaty implementing legislation that Parliament has the POGG power to enact. This kind of treaty implementation fills a constitutional gap.

C. The *Act* fits into Parliament’s POGG power to address a transnational concern.

34. Alternatively, once an *Act* has been characterized as fulfilling reciprocal obligations to solve indisputably transboundary problems it can be classified as, by definition, a transnational concern. True transnational concerns are inherently distinguishable from provincial concerns because any one province’s inability to address the issue has national and global repercussions. And true transnational concerns are inherently proportionate in their scale of impact on provincial jurisdiction compared to Canada’s need to engage other countries in important global affairs.

35. Where a treaty deals with a transnational concern, the international treaty and Parliament’s domestic measures combine to establish the singleness, distinctiveness, and indivisibility of the matter. The international convention to prevent marine pollution considered in *Crown Zellerbach* is a good example of a treaty as evidence supporting an indivisible national concern.³³ The *Paris Agreement* could be similarly considered as evidence in these appeals.

36. But Smart Prosperity’s submission goes further. The *Paris Agreement* is not just evidence of a national concern. Fulfilling Canada’s *Paris* commitments is itself a national concern. The transnational concern is about both the agreement and its subject matter simultaneously.

37. The most important thing distinguishing a true transnational concern from a squarely provincial concern is the question of inability, not indivisibility. In *Crown Zellerbach* this Court

³² [Commonwealth v Tasmania](#), [1983] HCA 21, at paras 33 and 41 of the respective judgments of Wilson and Dawson JJ.

³³ [R v Crown Zellerbach Canada Ltd](#), [1988] 1 SCR 401 at para 38.

held “it is relevant to consider” provincial inability in assessing indivisibility. That is an understatement. When considering the constitutional validity of a matter of transnational concern under POGG, inability is at the heart of the analysis.

38. Obviously one province is unable to cause another province to contribute to fulfilling Canada’s commitments under the *Paris Agreement*. But the analysis is not only about *provincial* inability to address the matter of transnational concern. It is also about the *national* inability caused by a provincial failure to deal effectively with intra-provincial aspects of the matter. Here, any one province’s failure to contribute its minimum share to Canada’s overall *Paris* targets creates a national inability to fulfil Canada’s commitments to the rest of the world.

39. The *extra*-provincial effects of a provincial failure are not just inter-provincial. The provincial failure has national and global repercussions. If Ontario fails to limit working hours or set minimum wages, Saskatchewan is not affected at all. But if Alberta fails to reduce GHG emissions, Australia is catastrophically affected. That is the essence of a transnational concern, and the reason Parliament has the POGG power to fulfil reciprocal commitments to solve indisputably transboundary problems.

40. Looking at this matter through the lens of a transnational concern also puts the scale of impact on provincial jurisdiction in perspective. The *Act* is reconcilable with the fundamental distribution of legislative power in Canada in proportion to the scale of the problem the *Act* addresses. Proportionality is established by the indisputable, existential, transboundary threat facing humanity as well as the need for Canada as a nation to fulfil reciprocal commitments to the rest of the world addressing that threat. Both the problem itself and the need for Canada as a nation to respond are relevant to the scale of impact analysis. Federal regulation is only needed if a province’s failure creates a national inability to achieve Canada’s overall commitments undertaken and communicated to the world. Proportionate to the scale of the problem, the *Act* minimally impairs provincial jurisdiction.

41. Upholding this *Act* would not create a new threat to Canadian federalism. Invalidating this *Act* would, however, exacerbate a threat to humanity, the planet, and Canada’s place in the world.

PART IV – SUBMISSIONS ON COSTS

42. Smart Prosperity does not seek costs and asks that it not be liable for costs to any party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of January 2020.

"Jeremy de Beer"

SMART PROSPERITY INSTITUTE

1 Stewart St
3rd Floor
Ottawa, ON, K1N 6N5

Jeremy de Beer

Barrister & Solicitor, LSO #46297P
Tel.: 613-562-5800 1290, ext 3169
Email: Jeremy.deBeer@uOttawa.ca

**Co-counsel for the Intervener,
Smart Prosperity Institute**

GOWLING WLG (CANADA) LLP

Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON, K1P 1C3

Guy Régimbald

Tel.: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

**Co-counsel for the Intervener,
Smart Prosperity Institute**

PART VII – TABLE OF AUTHORITIES

<u>Cases</u>	<u>Para(s)</u>
<i>Canada (AG) v Ontario (AG)</i> , [1937] AC 326 .	2, 24, 25, 26, 27, 29, 31, 33
<i>Commonwealth v Tasmania</i> , [1983] HCA 21 .	32
<i>Johannesson v Municipality of West St. Paul</i> , [1952] 1 SCR 292 .	30
<i>MacDonald v Vapor Canada Ltd</i> , [1977] 2 SCR 134 .	26
<i>Quebec (A-G) v Canada (A-G)</i> , [1932] AC 304 .	23, 28, 29, 31
<i>R v Crown Zellerbach Canada Ltd</i> , [1988] 1 SCR 401 .	10, 35, 37
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 SKCA 40 .	10
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 ONCA 544 .	10
<i>Reference re Securities Act</i> , 2011 SCC 66 .	13
<u>Legislation</u>	
Constitution Act, 1867 (UK) , 30 & 31 Vict, c 3.	2
Greenhouse Gas Pollution Pricing Act , SC 2018, c 12, s 186.	1, 14
<i>Rules of the Supreme Court of Canada</i> , SOR/2002-156, ss 55, 57(2) .	
<u>Treaties</u>	
Comprehensive Economic and Trade Agreement , Canada and European Union, 30 October 2016 (entered into force 21 September 2017).	18
Paris Agreement , 16 February 2016, (entered into force 4 November 2016).	1, 15

<i>United Nations Framework Convention on Climate Change</i> , 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).	17
<u>Secondary Materials</u>	
S Elgie, “Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)” (2008) 13:1 <i>Rev of Const Studies</i> 67.	23
P Hogg, <i>Constitutional Law of Canada</i> (Scarborough, ON: Thompson Carswell, 2007) (loose-leaf revision 5th ed supplement vol 1).	19, 25, 28, 29
WR Lederman, <i>Continuing Canadian Constitutional Dilemmas</i> (Toronto: Butterworths, 1981).	29
G Régimbald & DG Newman, <i>The Law of the Canadian Constitution</i> , second ed (Toronto: LexisNexis Canada, 2017).	28
T Strom & P Finkle, “Treaty Implementation: The Canadian Game Needs Australian Rules”, (1993) 25 <i>Ottawa L Rev</i> 39.	27
J Trone, <i>Federal Constitutions and International Relations</i> ” (St Lucia: U of Queensland Press, 2001).	27