File Number: **SCC No. 38663**

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

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA, AND OTHER INTERVENERS[1]

INTERVENERS

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

(pursuant to rule 42 of the *Rules of the Supreme Court of Canada*)

(style of cause continued on the next page **38781**)

File Number: **SCC No. 38781**

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

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:

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RESPONDENT

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FACTUM OF THE INTERVENERS: CLIMATE JUSTICE *ET AL.*
(pursuant to rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

i. Overview of Position

1. Climate change caused by anthropogenic greenhouse gas (GHG) emissions poses an urgent threat to the existence of humanity unless net emissions are reduced in accordance with the natural limits of our ecosystems. Only an all-embracing commitment by every level of government and a comprehensive, multifaceted approach will be successful in maintaining a reasonable possibility of averting the peril of civilization.

2. This predicament is unprecedented. Accordingly, legislation that addresses the climate crisis may be subject to a slightly different approach in a constitutional analysis, including possibly new interpretations of the Constitution.[1] This is not only permissible by Canadian common law, but required, as we have no other choice. Governments must act in the face of a crisis that is no longer impending – it is happening now.

3. In analysing the constitutionality of the *Greenhouse Gas Pollution Pricing Act (GGPPA)* in the wake of our urgent existential crises, the ruling of then Chief Justice Dickson in *Hunter et al. v Southam Inc.*, has never rang truer:

> [The Constitution] must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "***not to read the provisions of the Constitution like a last will and testament lest it become one***."[2]

4. For the reasons outlined in this factum, we respectfully submit that governments are compelled to act in the face of climate change. The purpose of our intervention is to describe

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[1] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 144 [*Saskatchewan Reference*].

[2] [1984] 2 SCR 145 at 155 [emphasis added]. Justice Dickson also cited the 1929 UK JCPC decision, *Edwards v Canada (Attorney General)*, [1930] AC 124, [1930] 1 DLR 98 at 106-107: The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada… Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

several interpretive tools and themes that support an interpretation of the Constitution that empower our governments to accomplish what they may be compelled to do. We fear a finding of unconstitutionality in this reference makes the utility of the constitution for the prospect of existence of future generations futile.

ii) Statement of Facts

5. We agree with the record and evidence filed by the Attorney General of Canada, as well as the evidence filed by interveners aligned with Canada's position.

iii) Findings of Fact in the Saskatchewan and Ontario References

6. The findings of fact in both the Saskatchewan and Ontario are undisputed:

   a. Climate change is an "existential threat to human civilization" and the "planet itself"[3];
   b. We must reduce our CO2 emissions by 45 percent below 2010 levels by 2030 and reach "net zero" by 2050 in order to limit the global average surface warming to 1.5 degrees Celsius and thereby to "avoid the significantly more deleterious impacts of climate change"[4]; and
   c. Pricing greenhouse gas emissions is an "*essential* aspect or element of the global effort to limit GHG emissions"[5].

PART II – STATEMENT OF POSITION ON QUESTION IN ISSUE

7. Considering the constitutional question, namely whether the *GGPPA* is unconstitutional in whole or in part, should be undertaken with reference to the following principles:

   a. the Living Tree Doctrine;
   b. the precautionary principle;
   c. Canada's international obligations; and,
   d. in a manner that reconciles the *Charter*'s s.7 protection of our fundamental human right to life in the context of a climate emergency.

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[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 3 [*Ontario Reference*]; *Saskatchewan Reference*, *supra* note 1 at paras 144 and 236.
[4] *Ontario Reference*, *supra* note 3 at para 16.
[5] *Saskatchewan Reference*, *supra* note 1 at para 147 [emphasis in the original].

8. These interpretive tools lend themselves to a finding that the *GGPPA* is constitutional as a whole in the "establishment of minimum national standards of price stringency for GHG emissions", and that the *GGPPA* is responsive to a grave national and international emergency. [6]

PART III – ARGUMENT

i) The Living Tree Doctrine

9. When writing the Constitution, its framers did not contemplate environmental issues of the magnitude posed by climate change. The interpretation of the Constitution's authority on a subject matter that was unforeseen by its framers is addressed through the Constitution's evolution. The acknowledgement that the Constitution must evolve has come to be known as the Living Tree Doctrine.

10. The Living Tree Doctrine understands that the Constitution must remain responsive to modern issues, as the Constitution was intended to be a guide to legislative authority for addressing both present and future issues. To interpret it in such a way that prevents the Constitution's growth would be contrary to its purpose, as well as the Living Tree Doctrine, and would condemn it to irrelevancy.

11. Specifically, the Living Tree Doctrine supports constitutional interpretations that may be considered new or different from precedent in order to appropriately respond to new issues. The majority in the *Saskatchewan Reference* mentioned the Living Tree Doctrine specifically in the context of climate change, regarding climate change as an emerging reality that the Constitution must be capable of addressing:

> If it is necessary to apply established doctrine in a slightly different way to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem to be entirely appropriate. It is also in keeping with what the Supreme Court has said about the utility of, where possible, allowing both Parliament and the provincial legislatures jurisdictional room to act in relation to the environment.[7]

12. We do not suggest that the Peace, Order, and Good Government (POGG) National Concern analyses as put forth by the courts below or the Emergency Doctrine as suggested by Interveners in those references are novel given the factual record of this case and what is legally permissible

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[6] *Ibid* at para 11.
[7] *Ibid* at para 144.

under the Living Tree Doctrine. A finding of constitutionality with respect to the *GGPPA,* as outlined by the Saskatchewan and Ontario courts of appeal, does not misconstrue or dismantle the Constitution or principles of federalism.

13. We also find the criminal law power persuasive and support due regard to s. 35 of the Constitution in reconciling various constitutional interests on such a perilous matter as climate change.

14. However, even if any interpretations put forth by some of the parties in this reference may be considered as novel, they may nonetheless be permitted under this Doctrine. We are inviting the Court to strongly consider novel interpretations not only because the Living Tree Doctrine simply says it is permissible, but because we are facing an unprecedented, existential crisis and threat to human existence beyond anything contemplated by the framers of Canada's Constitution.

ii) Section 7 of the Charter and International Law

a. Introduction to section 7 in the case at bar

15. Pursuant to s. 7 of the *Charter*: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[8]

16. It is our respectful position that s. 7 of the *Charter* consists of a positive obligation on governments to act in mitigating climate change. The source of this obligation, as discussed below, arises from international norms, international treaties to which Canada is a signatory, and the jurisprudential requirement that Canadians be protected by the *Charter* in accordance with treaties to which Canada is a signatory. Internationally, there is a growing acknowledgment of the right to climatic conditions capable of sustaining humanity. There is nothing in Canadian jurisprudence inconsistent with this trend.

17. The source of this obligation arises equally from Canadian jurisprudence and the broad scope of s.7 to address unforeseen issues, such as those presented in this reference. Canadian jurisprudence contemplates the scope of s.7 evolving in accordance with the Living Tree Doctrine, creating space for protecting the right to life. It also contemplates its evolution to permit the characterization of the right to life as a positive right.

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[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

18. In the normal course, a *Charter* analysis would follow the determination of a division of powers question when its constitutionality is assessed on both *Charter* and division of powers bases.[9] It is our position that the factual context of this reference – the existence of an anthropogenic existential threat – precipitates altering this sequencing by requiring the court to balance division of powers and *Charter* concerns harmoniously.

19. If governments are compelled by s. 7 to act in the face of climate change, a determination of unconstitutionality in relation to the division of powers question in this reference could come in conflict with governments' obligation pursuant s. 7 of the *Charter* to act in reducing GHG emissions. Characterizing the pith and substance of the *GGPPA* narrowly in the way suggested by the majority of the Saskatchewan Court of Appeal under POGG National Concern is the most balanced solution to the above problem.

b. International Trends

20. There is an international trend towards constitutionalizing environmental human rights: one hundred and twenty-five constitutions incorporate environmental norms. Ninety-seven constitutions oblige national governments to prevent environmental harm.[10]

21. In a 2018 decision by Colombia's Supreme Court of Justice, the plaintiffs, consisting of a group of 25 children, youth, and young adults, petitioned the state to protect their right to a healthy environment. The Court acceded to their claim, ordering *inter alia*, the Presidency of the Republic work with stakeholders to "adopt measures aimed at reducing deforestation to zero and greenhouse gas" with "national, regional, and local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation."[11]

22. The decision considered the principle of intergenerational equity, which "compels action without further delay so as not to burden disproportionately young persons and future generations."[12] It is uncontroverted in the record before this Court that delayed action will more

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[9] See e.g. *R v Hydro-Québec*,[1997] 3 SCR 213, 1997 CanLII 318 (SCC).
[10] Klaus Bosselmann, "Global Environmental Constitutionalism: Mapping the Terrain" (2015) 21 Widener L Review 171 at 177.
[11] STC4360-2018 de la Corte Suprema de Justicia, Sala de Casacion Civil, Bagota D.C, M.P. Luis Armando Tolosa Villabona, April 05, 2018 at paras 14 and 45 with excepts translated by Dejusticia available at: <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf>.
[12] *Ibid* at para 14.

significantly burden future generations, and therefore, as in the decision by the Columbian Supreme Court, "violate the rights of future generations more severely."[13]

23. The Columbian Supreme Court offered the following insights concerning the right to life:

> [T]he fundamental rights of life, health, the minimum subsistence … are substantially linked and determined by the environment and the ecosystem. Without a healthy environment, subjects of law and sentient beings in general will not be able to survive, much less protect those rights, for our children or for future generations. Neither can the existence of the family, society or the state itself be guaranteed. [14]

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

> [T]he GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused."[15]

25. On December 20, 2019, the Supreme Court of the Netherlands in *Urgenda Foundation v The State of Netherlands* affirmed their lower court decision that expanded the state's duty of care in relation to climate mitigation by ordering the state to achieve a reduction of greenhouse gas emissions by the end of 2020 by at least 25% compared to 1990 emissions levels.[16]

26. The Netherland's Supreme Court in *Urgenda* found that their constitution mandated the state to reduce GHGs from its territory in proportion to its share of the responsibility in light of its entrenchment of the European Convention on Human, and also "because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands".[17]

27. The court addressed the issue of causation with respect to any country's contribution to climate change, holding that:

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[13] *Ibid*.
[14] *Ibid* at 13.
[15] [2019] NSWLEC 7, at para 699. See also paras 452-454; 485; 488; 498; 515; 518; 523; 533; 638; 669; and 688.
[16] *The State of the Netherlands v Stitchting Urgenda*, [2019] ECLI:NL:HR:2019:2007 at para 8.3.5 (Supreme Court of the Netherlands) [*Urgenda*].
[17] *Ibid*.

> [A] country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale.

28. The extent to which any jurisdiction's emissions contribute to the problem is of vital importance, because the world needs to get to net zero by about mid-century, preferably earlier. No jurisdiction may be considered so much of a special case that it be able to avoid taking responsibility - not Canada, not Alberta, not Saskatchewan, not Ontario, not Beijing, not Denmark, not anyone. Everyone - including all of the provinces - needs to be planning for net zero within a few decades.

c. International law and the right to life

29. In *Saskatchewan Federation*, Justice Abella considered the treatment of similarly worded provisions of the European Court of Human Rights (ECHR) and considered whether other countries had entrenched the matter into its constitution in determining the scope of the *Charter*.[18]

30. While Canada does not have entrenchment of international treaties as part of its Constitution, this Court has affirmed Chief Justice Dickson's enunciation in numerous cases, that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."[19]

31. Canada is a signatory to the *International Covenant on Civil and Political Rights* ("ICCPR"), which includes a healthy environment as part of the right to life.[20] This Court in *Divito v Canada (Public Safety and Emergency Preparedness)*, held that the rights protected by the ICCPR provide a minimum level of protection in interpreting *Charter* rights.[21]

32. The UN Human Rights Committee (UNHRC) describes the right to life in the context of ICCPR as follows:

> a) as a prerequisite for all other human rights;[22]

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[18] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4.
[19] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27 at para 70.
[20] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Human Rights Committee OR, 124th Sess, CCPR/C/GC/36 (2018) [UN General Comment].
[21] *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 [*Divito*].
[22] UN General comment, *supra* note 20 at para 2.

b) as imposing positive obligations on state parties;[23]

c) Recognizes that environmental degradation caused by, *inter alia*, climate change poses some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life;[24] and

d) requires states to pay due regard to the precautionary approach.[25]

33. In *Urgenda* the Supreme Court of the Netherlands reviewed the meaning of the EHRC's "right to life". The case law reviewed by the court held that this right "encompasses a contracting state's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction".[26] The obligation applies regardless of whether the hazardous activity is conducted by the government itself or by others.[27] Much in line with the precautionary principle, that Court found state obligations "to take preventive measures to counter the danger, even if the materialisation of that danger is uncertain".[28]

34. Canadian Courts are encouraged to interpret the *Charter* as providing as much protection as ICCPR.[29] The interpretation and application of the EHCR in the *Urgenda* decision provides a parallel foundation for the interpretation of s.7 as informed by the ICCPR that this Court can adopt.

d. Canadian jurisprudence

35. As a general proposition, this Court "has repeatedly held that the rights enumerated in the *Charter* should be interpreted generously."[30] Further, following the Québec Superior Court decision in *Environnement Jeunesse c. Procureur général du Canada,* Courts are permitted to make orders to stop government action that contributes to climate change and find them liable for not doing enough.[31]

36. The Québec Superior Court in *Environnement Jeunesse* referenced this Court's authority instructing that courts should not decline to adjudicate a subject matter only because of its political

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[23] *Ibid* at para 21.
[24] *Ibid* at para 62.
[25] *Ibid* at para 62.
[26] *Urgenda*, *supra* note 16 at 5.2.2.
[27] *Ibid*.
[28] *Ibid* at 5.3.2.
[29] *Divito*, *supra* note 21.
[30] *Saskatchewan Federation*, *supra* note 18 at para 76.
[31] 2019 QCCS 2885 at paras 60 and 71 [*Environnement Jeunesse*].

context.[32] Rather, all government power must be exercised in accordance with the Constitution, including the *Charter*.[33]

37. Justice Arbour's dissenting decision (although not directly on this point) in *R v Gosslin* held that the positive dimension to s.7 of the *Charter* is evidenced by s. 1's permission of the state to secure that right in the deprivation of another, or in other words, by balancing "competing demands".[34] The majority agreed with this possibility, but disputed that the factual record in that case was sufficient. The life of both present and future generations, if anything, is necessarily the most obvious factual context to find such a right.

38. We do not propose the extension of jurisdictional powers through this interpretation of the *Charter*. Rather, we support the empowerment of all governments in a manner which also respects their shared obligations under the *Charter*. We do not want to interpret the Constitution to allow any one jurisdiction to use their powers to block another from acting in the face of an anthropogenic existential threat to the future of this planet we share.

39. As contemplated in *Gosselin*, it is our view that the existence of a positive right to life does not run afoul with Section 31 of the *Charter* because an existence of a positive climatic right to life compels adherence from all holders of constitutional power. Power is not transferred or increased; the exercise of power by all is compelled, or in the very least, permitted.

40. In alignment with several international decisions, we say that s. 7 includes the right to a climactic system capable of sustaining life. Without a right to life supported by a predictable and stable climatic system, our other rights, privileges, and powers, including those enumerated in 92A of the Constitution, endure little utility.

41. The characterization of the *GGPPA* by the Saskatchewan and Ontario Courts of Appeal majorities is, in our view, a sufficiently narrow description of the *GGPPA*, and their analysis is one that best reconciles the division of powers with our concerns respecting Canadians' right to life as described above.

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[32] *Operation Dismantle v The Queen*, [1985] 1 SCR 441, 1985 CanLII 74 (SCC) at paras 55 – 67.
[33] *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 36 and 37.
[34] *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at paras 355 and 356.

PART IV – COSTS

42. The Interveners request no costs be awarded to or against them in respect of these appeals.

PART V – RELIEF SOUGHT

43. The situation is not under control. We are losing this battle. Either we stop the emissions of greenhouse gases, or we do not continue as a civilization. If we act now, there is time to fix this. If we do not act now, we set off an irreversible chain reaction causing unspoken suffering to all. The factual record supports this. The right to life must be left open. It could be our final hope.

44. A finding that the *GGPPA* is constitutional is consistent with s. 7 of the *Charter* providing protection of both present and future generations. The *GGPPA* addresses the opportunity for existence as described by the Paris Accord. A finding that the *GGPPA* is unconstitutional renders any theoretical possibility of s.7's operation to protect climatic rights relatively meaningless, given that an effective and efficient carbon pricing regime is the only realistic first step in reducing our consumption of greenhouse gas emissions.

ALL OF WHICH IS RESPECFULLY SUBMITTED
Dated this 23rd day of January, 2020.

agent for

Larry Kowalchuk
Jonathan Stockdale
Taylor-Anne Yee

PART VI – TABLE OF AUTHORITIES

Secondary Sources