

COURT OF APPEAL FOR ONTARIO

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

**FACTUM OF THE DAVID SUZUKI FOUNDATION
(Motion for Leave to Intervene)**

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PART I: OVERVIEW

1. The David Suzuki Foundation (“DSF”) seeks intervener status in this Reference, which will determine whether the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186 (the “GGPPA” or the “Act”) is unconstitutional in whole or in part. DSF intends to argue that the GGPPA is constitutional because it responds to a national emergency: Canada is running out of time to mitigate the health, economic, environmental, and social damage that climate change is causing. DSF’s interest in the Reference stems from its years of scientific and policy analysis on carbon pricing and its conclusion that a coordinated national strategy is essential to successfully fight climate change. It wishes to contribute an argument that the GGPPA can be supported by the “National Emergency” branch of the federal “peace, order, and good government” (“POGG”) power,¹ which Ontario has placed in issue in this Reference.

PART II: FACTS

2. DSF is a federally-registered charity supported by over 35,000 people that has spent the last two decades focused on the matter at the core of this Reference: urgent mitigation of the effects of climate change, particularly through carbon pricing.² DSF produces research on the options and challenges for implementing carbon pricing in Canada at the provincial and federal levels.³ Since at least 1998, it has called for an approach that includes all of the pricing mechanisms – carbon levies and cap and trade systems – that are available under the GGPPA.⁴ DSF is interested in the outcome of this

¹ *The Constitution Act, 1867*, 30 & 31 Vict, c 3, section 91.

² Motion Record, Tab 2, Affidavit of Ian Bruce sworn December 11, 2018 at para 8 [“Bruce Affidavit”].

³ *Ibid* at paras 13-22.

⁴ *Ibid* at para 22.

Reference given its conclusion, based on years of research, that federal action is necessary to effectively mitigate Canada’s greenhouse gas emissions and the damage caused by a warming climate.⁵ Canada and the world have very limited time to bring greenhouse gas emissions under control and the lack of time to reduce emissions is, in DSF’s view, an emergency situation.⁶

PART III: ISSUE

3. Should DSF be granted leave to intervene in this Reference? If so, on what terms?

PART IV: ANALYSIS

4. Under the headings below, DSF addresses the applicable principles on Rule 13.02 motions to intervene, summarized in *Groia v Law Society of Upper Canada*.⁷

A. DSF’s useful contribution to this Reference

5. DSF’s submissions will focus on the test set out in the *Reference Re Anti-Inflation Act*.⁸ Its submissions will show that, since the GGPPA was enacted under emergency circumstances and is of a temporary character, the Act is within the competence of Parliament under the National Emergency branch of POGG. Ontario has placed the National Emergency branch of POGG in issue in this Reference, arguing in its factum that “except in the temporary context of a national emergency, which is not claimed here, the regulation of prices is not within the scope of the POGG power”.⁹ DSF agrees

⁵ *Ibid* at para 28.

⁶ *Ibid* at para 29.

⁷ *Groia v Law Society of Upper Canada*, 2014 ONSC 6026, [2014] OJ No 4844, Book of Authorities [“BOA”], Tab 1 at para 4. See also *Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada*, (1990) 74 OR (2d) 164 (CA), [1990] OJ No 1378, BOA, Tab 2 at paras 6, 8, and 10.

⁸ *Re Anti-Inflation Act*, [1976] 2 SCR 373 [“*Anti-Inflation*”], BOA, Tab 3.

⁹ Factum of the Attorney General of Ontario at para 67.

with Ontario that the GGPPA would be within the scope of the POGG power in the context of a national emergency. It further submits that GGPPA was, in fact, enacted in the context of a national emergency.

6. The National Emergency branch of POGG grants the federal government broad legislative power to address situations of emergency. It is available where there is an “urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces...”¹⁰ It is not necessary for Parliament to explicitly declare an emergency in order to have reference to the National Emergency branch of POGG, nor must the legislation “use any particular form of words in order to disclose [Parliament’s] belief that an emergency existed”.¹¹ It is enough that Parliament was “motivated by a sense of urgent necessity created by highly exceptional circumstances”.¹² While the legislation Parliament chooses to address the emergency must be of a “temporary character”, it need not be explicitly time limited.¹³

7. DSF will submit that the health, economic and social damage climate change is causing to Canadians, the ongoing and increasing damage to the Canadian environment, and the lack of time to reduce emissions in order to mitigate that damage, constitute a national emergency.¹⁴ Parliament contemplated a national emergency in the statutory language of the Act. It noted that the high level of greenhouse gas emissions globally presents “an unprecedented risk to the environment, including its biological diversity, to

¹⁰ *Anti-Inflation* at 436-437, per Ritchie J., BOA, Tab 3.

¹¹ *Ibid* at 438, per Ritchie J.

¹² *Ibid* at 439, per Ritchie J.

¹³ *Ibid* at 427, per Laskin J.

¹⁴ Motion Record, Tab 2, Bruce Affidavit at para 29.

human health and safety and to economic prosperity” and that the detrimental impacts of climate change, including “coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructure and food security” are already being felt throughout Canada.¹⁵ The legislation is intended to achieve specific goals within a set period of time, e.g., an 80% reduction in net GHG emissions by 2050 from the 2005 baseline. If the legislation works as intended, it will only be relevant over a relatively short time span.

B. DSF’s submissions are distinct

8. DSF agrees with Canada that the GGPPA is *intra vires* Parliament, but invokes a different branch of the POGG power. DSF has reviewed the factum of Canada filed in a similar reference case before the Saskatchewan Court of Appeal, and understands Canada’s position to be that the GGPPA is constitutional under the “National Concern” branch. In invoking the “National Emergency” branch as a complimentary or alternative ground of constitutionality, DSF’s position is distinct and not duplicative.

C. DSF’s intervention will not cause injustice to parties

9. DSF’s intervention will not delay the proceedings, for which a hearing date has been set and for which intervener participation is contemplated. It will not widen the *lis* between the parties, which is whether the GGPPA is unconstitutional in whole or in part.

D. This Reference raises issues of broad public importance.

10. Constitutional references concerning the division of powers in Canada are of the

¹⁵ GGPPA, Preamble, paras. 2 and 3.

utmost public importance. The Order in Council initiating this Reference acknowledged as much, stating that “[i]t is in the public interest that the issues raised concerning the constitutional validity of the *Greenhouse Gas Pollution Pricing Act* be settled authoritatively as soon as possible”.¹⁶

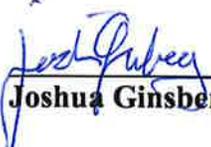
E. DSF’s demonstrated interest in the matters at issue in this Reference

11. DSF is one of the leading, if not the leading, non-governmental voices advocating for solutions to address climate change in Canada – it has decades of experience with the issues at the core of this Reference. The Saskatchewan Court of Appeal has granted DSF leave to intervene in a similar Reference in that court, where it will also submit legal argument concerning the National Emergency branch of POGG.¹⁷

PART V – RELIEF SOUGHT

12. DSF requests an order granting leave to intervene on the following terms:
- (i) DSF shall file a factum in this matter in accordance with the Order of the Honourable Justice J.C. MacPherson dated August 30, 2018, and shall make up to 30 minutes of oral argument at the hearing of the Reference; and
 - (ii) DSF shall not be entitled to, nor subject to, any costs of this Motion or the Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2018.



Joshua Ginsberg
Counsel for the David Suzuki Foundation



For Randy Christensen

¹⁶ Ontario, Order in Council 1014/2018.
¹⁷ Motion Record, Tab 2, Bruce Affidavit at para 31.

SCHEDULE A

LIST OF AUTHORITIES

1. *Joseph Groia v Law Society of Upper Canada*, 2014 ONSC 6026, [2014] OJ No 4844.
2. *Peel (Regional Municipality) v Great Atlantic and Pacific Co. of Canada*, (1990) 74 OR (2d) 164 (CA), [1990] OJ No 1378.
3. *Re Anti-Inflation Act*, [1976] 2 SCR 373.

SCHEDULE B

LEGISLATION

The Constitution Act, 1867, 30 & 31 Vict, c 3, section 91.

POWERS OF THE PARLIAMENT

- 91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
1. Repealed.
 - 1A. The Public Debt and Property.
 2. The Regulation of Trade and Commerce.
 - 2A. Unemployment insurance.
 3. The raising of Money by any Mode or System of Taxation.
 4. The borrowing of Money on the Public Credit.
 5. Postal Service.
 6. The Census and Statistics.
 7. Militia, Military and Naval Service, and Defence.
 8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
 9. Beacons, Buoys, Lighthouses, and Sable Island.
 10. Navigation and Shipping.
 11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
 12. Sea Coast and Inland Fisheries.
 13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
 14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

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Court of Appeal File No.:
C65807

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PROCEEDINGS COMMENCED AT TORONTO

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