

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 the Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, No. 1*, SC 2018 c. 12

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FACTUM OF THE  
INTERGENERATIONAL CLIMATE COALITION  
(GENERATION SQUEEZE, ET AL)  
(Motion for Leave to Intervene)

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## PART 1 - OVERVIEW

1. This reference questions the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (the “Act”) and engages fundamental constitutional principles. The Attorney General of Ontario has invoked both federalism and “no taxation without representation.” However, those principles do not exist in isolation. To interpret and apply them, this Court must consider other constitutional principles, including the protection of minorities.
2. The applicants are a national coalition of six non-profit organizations committed to addressing the unequal economic, environmental, and health impacts of climate change on Canadian youth and future generations (the “Applicants” or the “Coalition”). They represent the perspective of millions of children and youth.
3. They are interested in this reference because climate change is the greatest threat to the health and environmental well-being of youth and future generations. This group will bear the heaviest impacts and burdens from climate change. A price for greenhouse gas (“GHG”) emissions is a key part of effective climate change policy, and the Act establishes a national backstop price. If granted leave, the Coalition will take the position that the Act is within Parliament’s authority under s. 91 of the *Constitution Act*.
4. They will argue that the constitutional principle of protection of minorities encompasses youth and future generations, at least in the context of an urgent threat like climate change. That principle, in light of constitutional text, history, and fundamental values, supports a broad interpretation of Parliament’s authority, confirms the Act’s constitutionality, and tempers the constitutional principles raised by the AG of Ontario.
5. Their arguments will make a unique contribution to this reference, provide a distinct and relevant perspective on this inter-generational problem, and ultimately help this Court consider the full range of constitutional principles presented by this reference.

## PART 2 – FACTS

6. Human activities have already caused global warming of 1° C. Across Canada, people are dying, ecosystems are deteriorating, and property is being destroyed, from wildfires in British Columbia to deadly heatwaves in Quebec.<sup>1</sup>
7. Climate change and its impacts will only get worse as more GHGs are released into the atmosphere. Global warming is likely to reach 1.5° C as early as 2030 and will cause increasing harm, including extreme temperatures, rising sea levels, droughts, and higher rates of heat-related deaths and cardiovascular, respiratory and infectious diseases.<sup>2</sup>
8. The consequences of our action, or inaction, today will be felt decades and even centuries from now. If the climate warms by 2° C or more, we risk a “cascade of feedbacks” with more extreme and less predictable effects.<sup>3</sup>
9. For Canadian children – and their children and grandchildren – the impacts of climate change will accumulate throughout their lives. Due entirely to decisions made before they were born or able to vote, they will grow up and live their entire lives under the environmental, economic, mental, and other stresses of extreme climate conditions.<sup>4</sup>
10. The financial costs of mitigating and adapting to increasingly severe climate change will be massive, and economic opportunities will be lost as ecosystems become less reliable. To avoid the most severe impacts, young people will have to reduce their ecological impacts three times faster than Canadians did during the past four decades.<sup>5</sup>

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<sup>1</sup> Affidavit of Paul Kershaw, affirmed December 18, 2018 [Kershaw Affidavit], para 11; Ex. T, pp 250, 257.

<sup>2</sup> Kershaw Affidavit, paras 11 to 13; Ex D, p 30; Ex E, pp 92-96.

<sup>3</sup> Kershaw Affidavit, para 13; Ex F, pp 99-103.

<sup>4</sup> Kershaw Affidavit, paras 9-14, 33, 34; Ex S, pp 223-229.

<sup>5</sup> Kershaw Affidavit, paras 9-11; Ex C, p 21; Ex D, p 62; Ex S, pp 239-241.

11. Serious action is required to combat this fundamental threat. Pricing GHGs is widely recognized as a critical part of any comprehensive climate change strategy.<sup>6</sup>

### **PART 3 – ARGUMENT**

12. The Applicants seek leave to intervene as a friend of the court, pursuant to Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

#### **A. The Applicants Have a Serious Interest, a Unique Perspective, and Experience Relevant to this Public Interest Case**

13. In constitutional cases, such as this reference, it is important for a court to receive a diversity of submissions reflecting the potential wide-ranging impact of its decision.<sup>7</sup>

The Applicants satisfy this initial consideration and have received leave to intervene in the reference case on the constitutionality of the Act in the Saskatchewan Court of Appeal. The Applicants also meet all three criteria for leave to intervene in this case.<sup>8</sup>

14. First, the Coalition has a real, substantial, and identifiable interest in the subject matter of the proceedings. It is a national coalition with a broad base of experience and a common interest: climate change is the greatest environmental and health threat to Canadian youth and future generations, and every level of government must have all powers necessary to address that threat, including the power to price GHG emissions.

15. Second, the Applicants' perspective is distinct from the Parties.<sup>9</sup> The Applicants are focused on the disproportionate impacts of GHG emissions on Canadian youth and future generations, and the constitutional principles and doctrines that protect them.

16. Third, the Coalition consists of six non-profit organizations with relevant experience and broadly identifiable membership bases.<sup>10</sup> Three of the members –

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<sup>6</sup> Kershaw Affidavit, paras 16 to 19, 21; Ex D, p 74; Ex G, pp 121-123.

<sup>7</sup> *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164, at p 167, 2 C.R.R. (2d) 327 (CA) [“Peel”].

<sup>8</sup> *Bedford v. Canada (Attorney General)*, 98 O.R. (3d) 792, at para 2 [“Bedford”].

<sup>9</sup> *Ibid.*

Generation Squeeze, Youth Climate Lab, and the Canadian Coalition for the Rights of Children – advocate for young Canadians and promote policy changes in the best interests of this under-represented group. The three other members – the Saskatchewan Public Health Association, the Public Health Association of BC, and Canadian Association of Physicians for the Environment – have promoted public health for decades and have special concern for the impacts of climate change on children and future generations.<sup>11</sup>

**B. The Inter-Generational Nature and Issues of this Case**

17. Together, the broad reference question and Ontario’s factum put the principles and the structure of the Constitution in dispute.<sup>12</sup> For the Applicants, the key dimension of this case is generational. Their experience enables them to address the unequal inter-generational impacts from GHG emissions<sup>13</sup> and their perspective is relevant to the characterization and classification of the Act when analyzing whether it is *intra vires*.

18. As detailed in the Applicants’ draft Factum, which is found at Tab 4 of the Motion Record and is subject to revision upon receipt of Canada’s factum, the Supreme Court of Canada has recognized the constitutional principle of “protection of minorities.” Along with federalism, democracy, and others, this constitutional principle has been used to interpret and adapt the Constitution to modern realities,<sup>14</sup> such as climate change.

19. The Coalition will argue the constitutional principle of protection of minorities encompasses youth and future generations. That principle, properly understood, supports a broad interpretation of Parliament’s authority, confirms the constitutionality of the Act, and tempers the application of other constitutional principles, including federalism.

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<sup>10</sup> *Ibid.*

<sup>11</sup> Kershaw Affidavit, paras 4-9, 23, 25-28, 32; Ex K; Ex. L; Ex M; Ex N; Ex R.

<sup>12</sup> AG Ontario Factum, paras 82, 86, 88, 89, 107.

<sup>13</sup> Kershaw Affidavit, paras 27, 29-31, 32-33.

<sup>14</sup> *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, para 22; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704, paras 25-26.

**C. A Useful and Distinct Contribution Without Causing Prejudice**

20. The Coalition will contribute its distinct perspective on the inter-generational nature of the harms from GHG emissions and the relevant constitutional principles.<sup>15</sup> This is not a “me too” intervention but an important viewpoint not represented by the Parties. The Coalition is the only intervenor providing this perspective in the parallel Saskatchewan reference. The Applicants will not delay the proceedings or prejudice the parties, as this Court’s order anticipated interventions and set dates for argument.

21. The Applicants also seek to add to the record limited affidavit evidence that would not otherwise be available to the Court. This request is limited to materials that explain the unequal burdens climate change imposes on children and future generations, legislative debates regarding the forward-looking nature of the Constitution, and reports on the application of the UN Convention on the Rights of the Child.<sup>16</sup>

**PART 4 – ORDERS SOUGHT**

22. For the reasons set out above, the following order is requested:

- a) The Applicants be granted leave to intervene as friend of the Court, file a factum in accordance with the Court’s August 30, 2018 Order, and make 15 minutes of oral submissions at the hearing of the reference;
- b) The Affidavit of Dr. Paul Kershaw, filed with this motion, be included in the record for the hearing of the reference; and
- c) No costs be awarded for or against the Applicants in this reference.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this December 20<sup>th</sup>, 2018.

  
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Nathan Hume

  
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Emma K. Hume

<sup>15</sup> *Peel*, at p 167.

<sup>16</sup> *Bhajan v. Ontario (Children's Lawyer)*, 2010 ONCA 560, paras. 10 and 13.



## SCHEDULE A: LIST OF AUTHORITIES

TAB	CASE LAW
1.	<i>Bedford v Canada (Attorney General)</i> , 2009 ONCA 669
2.	<i>Bhajan v Ontario (Children's Lawyer)</i> , 2010 ONCA 560
3.	<i>Peel (Regional Municipality) v Great Atlantic &amp; Pacific Co. of Canada</i> (1990), 74 OR (2d) 164, 2 CRR (2d) 327 (CA)
4.	<i>Reference re Same-Sex Marriage</i> , 2004 SCC 79
5.	<i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217
6.	<i>Reference re Senate Reform</i> , 2014 SCC 32

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

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PROCEEDING COMMENCED AT TORONTO

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**FACTUM OF THE PROPOSED INTERVENOR,  
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