

Court File Nos. 38663/38781

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

BETWEEN:

ATTORNEY GENERAL FOR SASKATCHEWAN APPELLANT

-and-

ATTORNEY GENERAL OF CANADA RESPONDENT

-and-

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

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**MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER
NATIONAL ASSOCIATION OF WOMEN AND THE LAW & FRIENDS OF THE
EARTH**

(Pursuant to Rules 47 and 55 to 59 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

1. Climate change is a global and national emergency that disproportionately impacts women and girls, especially those who are Indigenous, racialized, and living in poverty.¹ In the climate emergency, we are all in perilous waters, but not all in the same boat. The National Association of Women and the Law (“NAWL”) and Friends of the Earth (“FOE”) jointly seek leave to intervene in the present case to argue that questions related to the division of powers must be interpreted in a manner that allows for effective, national climate regulation to advance substantive equality and environmental justice for women and girls.²

2. The core of NAWL and FOE’s argument is that the climate emergency requires an “all hands on deck” response where every level of government is empowered to take the steps needed to reduce greenhouse gas (“GHG”) emissions. Our Constitution not only allows this, but in fact requires it, since the division of powers must be interpreted in a way that is equality-affirming and thereby aligned with foundational constitutional and *Charter* values.³ In particular, NAWL and FOE propose to advance two arguments, which are different from those of the Parties and based on their combined expertise in the areas of gender equality and climate justice :

(a) The cooperative approach to federalism reflected in the majority decisions of the Court of Appeal for Ontario and the Court of Appeal for Saskatchewan reinforces the

¹ Affidavit of Mary Suzanne Beavers affirmed on November 4, 2019 at para 22 [Beavers Affidavit]; Lewis Williams et al, “Women and Climate Change Impacts and Action in Canada: Feminist, Indigenous, and Intersectional Perspectives”, Canadian Research Institute for the Advancement of Women (February 2018); and Nathalie Chalifour, “How a gendered understanding of climate change can help shape Canadian climate policy” in Marjorie Griffin Cohen, ed, *Climate Change and Gender in Rich Countries: Work, Public Policy and Action* (New York: Routledge, 2017).

² Beavers Affidavit at para 23 and Affidavit of Beatrice Olivastri affirmed on November 4, 2019 at paras 16 - 18 [Olivastri Affidavit].

³ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 185 and *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 (L’Heureux-Dubé, J., concurring) at para 112; *M(A) v Ryan*, [1997] 1 SCR 157 at 172-175; *R. v Oakes*, 1986 [1986] 1 SCR 103 at 136; *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 592-93; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 876-77; and *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 121. See also Claire L’Heureux-Dubé, “It Takes a Vision: The Constitutionalization of Equality in Canada” (2002) 14 Yale J L & Feminism 363 at 371.

fundamental constitutional principle of substantive equality.⁴ A cooperative approach allows the multi-faceted and collaborative government actions required to meaningfully address issues impacting women and girls, such as climate change.⁵ This interpretation of the Peace, Order, and Good Government (“POGG”) power recognizes that Parliament is jurisdictionally competent to ensure that the nation’s total GHG emissions are reduced, while the provinces remain empowered to regulate provincial activities that generate GHG emissions. The Appellants propose a rigid and compartmentalized approach to the division of powers, under which recognition of federal jurisdiction relating to GHG emissions necessarily diminishes provincial powers aimed at the same objective.⁶ This zero-sum approach fails to account for the emergence of cooperative federalism,⁷ including the role of the double aspect doctrine.⁸ It is at odds with substantive equality and environmental justice.

(b) The *Crown Zellerbach* test should be adapted to account for the long-lasting emergency of climate change, which creates systemic risks at a national and global scale with grave implications for environmental security and equality rights.⁹ This adaptation would ensure a modern and gender-inclusive approach to POGG that accounts for the unique circumstances of a complex existential crisis like climate change.¹⁰ Drawing upon both the

⁴ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [Ontario Reference] at paras 135 – 138 and *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [Saskatchewan Reference] at paras 64 - 68.

⁵ Canada, Parliament, House of Commons, Motion on National Climate Change Emergency, Vote No 1366, 42nd Parliament, 1st session, Sitting No 435, Monday, June 17, 2019 As of October 29, 1174 jurisdictions in 23 countries have declared a climate emergency. See Climate Emergency Declaration, “Climate Emergency Declarations in 1,177 jurisdictions and local governments cover 290 million citizens” (1 November 2019).

⁶ Factum of the Appellant, Attorney General of Saskatchewan dated October 16, 2019 at paras 49-53; Factum of the Appellant, Attorney General of Ontario dated October 16, 2019 at paras 41, 46, 62-67.

⁷ *Rogers Communication Inc v Châteauguay (City)*, [2016] 1 SCR 467 at para 38; *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at paras 54-75; 114957 *Canada Ltée (Spraytech, Société d’arossage) v Hudson (Town)*, [2001] 2 SCR 241 paras 34, 35; *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783 at paras 17-21; *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 669-70; *Marine Services International Ltd v Ryan Estate*, [2013] 3 SCR 53 at para 50.

⁸ See *infra* at note 29.

⁹ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401. Olivastri Affidavit at para 16.

¹⁰ Beavers Affidavit at paras 22-23 and Olivastri Affidavit at para 16.

current emergency and national concern doctrines, the adapted approach would introduce a proportionality analysis that recognizes jurisdiction for sustained federal action to ensure nation-wide GHG emissions reductions without displacing provincial jurisdiction.

3. In sum, NAWL and FOE will invite this Court to apply a purposive, flexible and expansive interpretation of POGG, and to adapt the POGG test to account for the long-lasting national emergency of climate change. Doing so will enable the “all hands on deck” response to climate change needed to support the equality rights of women and girls and the environmental security of all vulnerable Canadians, and that acknowledges and supports the important role of both the federal and provincial governments in responding to climate change.

PART II – STATEMENT OF QUESTION IN ISSUE

4. Should this Court grant NAWL and FOE leave to intervene, file a factum and participate in oral argument in these appeals?

PART III – ARGUMENTS

5. The test for determining whether to grant leave to intervene requires the proposed intervener to show that it: (A) has an interest in the appeal, and; (B) will provide a unique perspective and make submissions that are useful and different from those of the other parties.¹¹ NAWL and FOE have a clear and genuine interest in the subject matter and outcome of these appeals, will provide a useful and different perspective, and as such meet the test.

A. NAWL and FOE have an interest in the appeals

6. NAWL and FOE have a long-standing interest in advocating for substantive equality and environmental justice. NAWL is an incorporated not-for-profit feminist organization that promotes the equality rights of women in Canada through legal education, research and law reform advocacy. NAWL has helped achieve important milestones in women's equality in

¹¹ Rules of the Supreme Court of Canada, SOR/2002-156, Rule 57; *R v. Finta*, [1993] 1 SCR 1138.

Canada such as the inclusion of Sections 15 and 28 in the *Charter*; amendments to sexual assault laws; rape shield legislation; and criminal harassment laws. NAWL was granted intervener status before this Court in *Canada v Mossop*¹² and *Gosselin v. Québec*.¹³

7. NAWL has actively participated in constitutional reform discussions regarding the division of powers under the *Constitution Act*, 1982, the Meech Lake Accord, and the Charlottetown Accord. NAWL has consistently advanced the position that Canadian federalism must be interpreted in a manner that promotes gender equality.¹⁴ This means advancing an interpretation of federalism that enables all levels of government to work collaboratively to address issues impacting women and girls. NAWL regularly appears before parliamentary committees to provide its expertise in substantive equality for women and girls, including in the federalism context.¹⁵

8. FOE has a long history of working to advance environmental and climate justice in Canada. It has worked to decrease emissions of harmful air pollutants, including GHGs, and to increase the use of renewable energy and cleaner liquid fuels in Canada. Beginning in the 1980s, FOE created the Stop Global Warming campaign, one of the first efforts by an environmental group in Canada to promote awareness and action on climate change caused by human emissions of GHGs. FOE developed and delivered initiatives to reduce carbon emissions, participated in multi-stakeholder processes and created technical analyses on reducing GHGs.¹⁶

9. FOE has extensive litigation experience before various levels of courts in Canada. FOE has been granted intervener status in several appeals before this Court, including *Newfoundland*

¹² [1993] 1 SCR 554.

¹³ [2002] 4 SCR 429.

¹⁴ Beavers Affidavit at paras 7 - 9.

¹⁵ Beavers Affidavit at para 11.

¹⁶ Olivastri Affidavit at paras 10 – 12.

*and Labrador v. AbitibiBowater Inc*¹⁷; *MiningWatch Canada v Canada*¹⁸, *St. Lawrence Cement Inc. v. Barrette*,¹⁹ *Imperial Oil Ltd. v. Quebec*²⁰; and *Friends of the Oldman River Society v Canada*.²¹ FOE was also the applicant in *Friends of the Earth v Canada*²², a case before the Federal Court regarding Canada's implementation of the *Kyoto Protocol Implementation Act*.²³

10. NAWL and FOE have a substantial interest in the appeals because the issues on appeal have great significance for equality rights and environmental justice. Climate change disproportionately impacts women and girls, especially those who are Indigenous, racialized, and/or living in poverty.²⁴ Women and girls are more vulnerable to both extreme weather events linked to climate change and slow onset changes, because they have, on average, lower incomes, continue to shoulder a greater proportion of unpaid work, and experience disproportionate levels of poverty. They are thus less able to adapt their circumstances to protect themselves from the effects of climate change. This is true in Canada and all over the world. Moreover, women and girls will shoulder a greater burden of an inadequate, incomplete, or slow response to climate change. Climate change does and will continue to exacerbate gender inequalities.²⁵

11. In light of the gendered implication of climate change, NAWL and FOE have an interest in ensuring that the division of powers is interpreted in a way that enhances equality. Canada's

¹⁷ [2012] 3 SCR 443.

¹⁸ [2010] 1 SCR 6.

¹⁹ [2008] 3 SCR 392.

²⁰ [2003] 2 SCR 624.

²¹ [1992] 1 SCR 3. Other cases include: *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, [2005] 1 SCR 3; *Hollick v. Toronto (City)*, [2001] 3 SCR 158; and *Quebec (Attorney General) v Canada (National Energy Board)*. FOE was also granted intervener status before the Court of Appeal for Ontario in *Berendsen v Ontario*, 2009 ONCA 845 and *Pearson v Inco Ltd et al*, (2006) 78 OR (3d) 641. See Olivastri Affidavit at para 7.

²² [2009] 3 FCR 201.

²³ Olivastri Affidavit at paras 7-8.

²⁴ Beavers Affidavit at para 22.

²⁵ Government of Canada, "Women and Climate Change" (10 April 2019); United Nations, Differentiated impacts of climate change on women and men; the integration of gender considerations in climate policies, plans and actions; and progress in enhancing gender balance in national climate delegations, Framework Convention on Climate Change, 50th session, FCCC/SBI/2019/INF.8 (2019); Williams *supra* note 3; and Chalifour *supra* note 3.

ability to rapidly and progressively reduce its nation-wide GHG emissions will be significantly undermined if the *Act* is determined to be unconstitutional. Even if Parliament chose to enact new but different laws aimed at nation-wide GHG emissions reductions under other federal powers, such as taxation or criminal law, progress on GHG emissions reductions would be needlessly delayed. Any impairment or delay in taking meaningful action to reduce GHG emissions at this stage of the climate crisis will exacerbate gender inequality in Canada.²⁶

B. NAWL and FOE will make useful submissions

12. ***Bringing an Equality Lens to Federalism:*** NAWL and FOE’s core argument is that the division of legislative powers in Canada must be interpreted in a way that is compatible with, and supportive of, substantive equality rights and environmental justice for women and girls. Substantive equality is a core value of Canadian society and a fundamental norm underpinning the Constitution and reflected in the *Charter*.²⁷ As this Court affirmed in the *Secession Reference*, “(t)he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.”²⁸

13. ***Cooperative Federalism Promotes Substantive Equality:*** Climate change is a time-sensitive, collective action problem that can only be resolved through the immediate, coordinated and concerted efforts of all levels of government. In order to maximize the jurisdictional space for both levels of government to take meaningful action on climate change, the division of powers must be interpreted in a flexible, purposive way that embraces collaboration. In this case, this means upholding federal jurisdiction to enact national minimum standards of GHG

²⁶ Beavers Affidavit at para 22 and Olivastri Affidavit at para 9.

²⁷ *Oakes* *supra* note 3 at p 136; *G(J)* *supra* note 3 at 112; and L’Heureux Dubé (It Takes A Vision) *supra* note 3.

²⁸ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 50. See also page 801 of *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, where this Court stated that “the *Constitution Act*, 1982, directly affects federal provincial relationships.”

emissions reductions as a matter of national concern, while recognizing that doing so does not confine provincial jurisdiction to enact legislation that furthers this objective.

14. For example, the determination of whether a matter of national concern has a “scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative powers under the Constitution”²⁹ must be made in the context of an approach to federalism that accounts for the concurrent operation of provincial and federal laws aimed at the shared objective of reducing GHG emissions. In this matter, the double aspect doctrine³⁰ and the narrow approach to the paramountcy doctrine endorsed by this Court³¹ support the harmonious operation of laws aimed at reducing GHG emissions at both levels of government.

15. The Appellants argue in favor of an interpretation of POGG that views jurisdiction as siloed, watertight compartments that are exclusive and jealously guarded, suggesting that POGG benefits from a kind of “super” exclusivity.³² But jurisdiction under POGG is no more exclusive than it is for enumerated powers – once a “matter” or “sub-class” is recognized as a matter of national concern, the relevant doctrines (eg. pith and substance, double aspect, paramountcy) apply as they would for other powers.³³ The interpretation advanced by the Appellants could result piecemeal provincial action (and inaction) without national accountability to ensure the country’s total GHG levels decrease. It could even prevent different levels of governmental from enacting concurrent and even complementary climate policies even in the absence of conflict or incompatibility. This narrow and dated approach to POGG threatens women’s rights.

²⁹ *Crown Zellerbach supra* note 9 at para 33.

³⁰ See *Reference re Pan-Canadian Securities Regulation*, [2018] 3 SCR 189 at para 114; *Reference re Securities Act*, [2011] 3 SCR 837 at para 66, *Law Society of British Columbia v Mangat*, [2001] 3 SCR 113 at paras 23, 49; *Western Bank supra* note 7 at paras 26, 28-30, 36, 42; *Munro v. National Capital Commission*, [1996] 663.

³¹ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 4 at para 66 and *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 16 at page 191.

³² See SKAG factum at paras 49-53.

³³ Nathalie Chalifour, “Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament’s Greenhouse Gas Pollution Pricing Act” (2019) 50:2 OLR 197 at 228-236.

16. *Adapting POGG to Account for the Long-Lasting Climate Emergency*: Climate change is an emergency³⁴ requiring “rapid, far-reaching and unprecedented changes in all aspects of society”.³⁵ Given the scale and scope of the issue, combined with the urgency that grows with every year GHG emissions are not reduced, there would be a rational basis for Parliament to enact legislation to reduce GHG emissions under the emergency branch of POGG. The emergency is driven by the rapidly diminishing window of time within which to make the GHG emissions reductions needed to avoid dangerous levels of climate change.³⁶ There is a valid argument to advance that the *Act* under appeal satisfies the temporal limits of emergency jurisdiction, taking into account the geological context of climate change and the fact that reducing GHG emissions to safe levels is a time-bound undertaking (once the economy is decarbonized, the mitigation emergency is over). This Court could clarify that recognizing jurisdiction under the emergency branch for the duration needed to “turn the ship” (for eg., the 10 year window identified by the IPCC) would not constrain provincial jurisdiction to address the emergency without direct conflict or frustration that would trigger paramountcy.³⁷ This would be an equality-affirming application of POGG.

17. Alternatively, this Court could recognize an additional category of jurisdiction under POGG that accounts for the long-lasting nature of the climate emergency. This would involve viewing the emergency and national concern branches of the *Crown Zellerbach* test as two ends of a continuum that juxtaposes the duration of jurisdiction (permanent versus temporary) with the breadth of Parliament’s jurisdiction (distinct versus sweeping jurisdiction). At one end of the

³⁴ Saskatchewan Reference at para 202.

³⁵ Affidavit of John Moffet, affirmed January 29, 2019, Record of the Attorney General of Canada, Tab 14. See also IPCC, “Summary for Policymakers” in *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Valerie Masson-Delmotte et al, eds, (Geneva: World Meteorological Organization, 2018).

³⁶ IPCC *ibid*.

³⁷ *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 16 at page 191.

continuum sits the emergency branch (with its short-term, sweeping powers), and at the other sits the national concern branch (with its permanent, narrow, and discrete powers). This Court could then exceptionally recognize jurisdiction along this continuum that accounts for the unique circumstances of the long-lasting climate emergency that threatens human rights and environmental security. The extent to which the Courts would tolerate a broadly scoped power, and the length of time for which jurisdiction would be recognized, would be proportionate to the degree and nature of the crisis. The stringency of the criteria used to determine whether a matter is sufficiently distinct and reconcilable with the scale of impact on provincial jurisdiction would be attenuated in light of the emergency and the length of time needed to address it.

18. Whether under the national concern, emergency, or a hybrid along the continuum, the courts would at all times give full effect to the double aspect doctrine to recognize the potential for concurrent operation of legislation directed to the same objective, and would apply the paramountcy doctrine in the strictest sense (that is, the most restrained) to maximize the constitutional space for legislation by both provincial legislatures related to provincial matters and the federal Parliament related to the POGG matter.

19. To summarize, NAWL and FOE seek to argue that a purposive, flexible and expansive interpretation of the division of powers, and specifically the power to enact laws to address the long-lasting national climate emergency under POGG, will enable the “all hands on deck” response to climate change needed support gender equality rights and environmental security for all vulnerable Canadians. These are useful submissions because they are directly relevant to the determination of the POGG subject matter and will highlight how an equality-affirming and environmentally just interpretation of federalism is possible in this case.

C. NAWL and FOE's Submissions are different from the Other Parties

20. NAWL and FOE's submissions would not duplicate those of the Parties or other Interveners in these appeals. They are aware of no other Parties or Interveners in these appeals that will bring a gender equality and environmental justice perspective to the matters before the Court. This lens will assist the Court in considering the equality implications of its approach to the division of powers, and specifically its interpretation of legislative authority under POGG for these interests. It will also provide the Court with an interpretation of the division of powers that best promotes substantive equality and environmental justice, in particular of women and girls.

PART IV – ARGUMENT ON COSTS

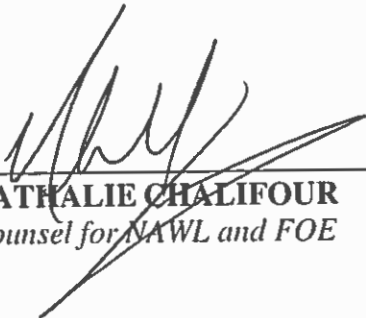
21. NAWL and FOE do not seek costs and ask not to be required to pay costs.


PART V – ORDER SOUGHT

22. NAWL and FOE ask this Court grant them leave to intervene in this matter, and that:

- i. They be granted leave to file a joint ten (10) page factum;
- ii. They be granted leave to jointly argue orally for ten (10) minutes at the hearing.

All of which is respectfully submitted in Ottawa, Ontario, this 6th day of November 2019.



NATHALIE CHALIFOUR
Counsel for NAWL and FOE

ANNE LEVESQUE
Counsel for NAWL and FOE

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