Revue générale de droit

Paroles d'expert.e.s autour de l'affaire *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre*

Nathalie Chalifour, David Robitaille, Stewart Elgie, Amir Attaran, Justine Bouquier, Sarah Nolasque, Elie Klee and Thomas Burelli

Volume 53, Number 2, 2023

URI: https://id.erudit.org/iderudit/1111266ar
DOI: https://doi.org/10.7202/1111266ar

See table of contents

Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Chalifour, N., Robitaille, D., Elgie, S., Attaran, A., Bouquier, J., Nolasque, S., Klee, E. & Burelli, T. (2023). Paroles d'expert.e.s autour de l'affaire *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre*. *Revue générale de droit*, *53*(2), 455–488. https://doi.org/10.7202/1111266ar

Article abstract

This text looks back at a case brought before the Supreme Court of Canada in 2021 in which several Canadian provinces challenged the federal Greenhouse Gas Pollution Pricing Act. *This law establishes a minimum standard for greenhouse gas pricing at the federal level, with the aim of reducing the country's emissions and contributing to achieving the objectives of the* Paris Agreement. *The provinces argued before the Court that greenhouse gas pricing did not fall under federal jurisdiction, as the regulation of natural resources is a provincial area of competence. On May 25, 2021, the Supreme Court of Canada ruled against the three provinces, validating federal jurisdiction in the matter.*

Through interviews with stakeholders in the dispute, this text gives the floor to Amir Attaran, Nathalie Chalifour, Stewart Elgie and David Robitaille, four Professors who are members of the Centre for Environmental Law and Global Sustainability (CELGS) at the University of Ottawa, who participated in the defence of this historic case. They convey in simple words their experience before the Supreme Court and the arguments they put forward to lead to the Court's decision in favour of federal greenhouse gas pricing. This approach provides interesting insights and first-hand information on a decision that represents another step towards the successful outcome of climate litigation in Canada. This article also provides a highly instructive perspective on the workings of the Supreme Court and the organization of the oral arguments of the experts interviewed.

Paroles d'expert.e.s autour de l'affaire *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre*

Nathalie Chalifour, David Robitaille, Stewart Elgie, Amir Attaran, Justine Bouquier, Sarah Nolasque, Elie Klee et Thomas Burelli*

RÉSUMÉ

Ce texte revient sur une affaire portée devant la Cour suprême du Canada au cours de l'année 2021 dans laquelle plusieurs provinces canadiennes ont contesté la Loi sur la tarification de la pollution par les gaz à effet de serre*, adoptée par le fédéral. Cette loi établit à l'échelle fédérale une norme minimale sur la tarification des gaz à effet de serre dans le but de réduire les émissions du pays et contribuer à l'atteinte des objectifs de l'*Accord de Paris*. Les provinces ont argué devant la Cour que la tarification des gaz à effet de serre ne relève pas de la compétence fédérale en ce que la réglementation des ressources naturelles est une compétence provinciale. Le 25 mai 2021, la Cour suprême du Canada a débouté les trois provinces en validant la compétence fédérale en la matière.*

À l'aide d'entrevues réalisées avec des intervenant.e.s dans ce litige, le présent texte donne la parole à Amir Attaran, Nathalie Chalifour, Stewart Elgie et David Robitaille, quatre professeurs qui sont membres du Centre du droit de l'environnement et de la durabilité mondiale (CDEDM) de l'Université d'Ottawa, ayant participé à la défense dans cette affaire historique. Ceux-ci transmettent de manière vulgarisée leur

* Nathalie Chalifour, Stewart Elgie et Amir Attaran sont professeurs au sein de la Section de common law de l'Université d'Ottawa. David Robitaille et Thomas Burelli sont professeurs au sein de la Section de droit civil de l'Université d'Ottawa. Justine Bouquier et Elie Klee sont doctorant.e.s en droit à l'Université d'Ottawa. Sarah Nolasque est étudiante au premier cycle en droit à l'Université d'Ottawa. Les entrevues ont été réalisées par Sarah Nolasque et Justine Bouquier. Les entrevues ont été retranscrites par Justine Bouquier, Elie Klee et Thomas Burelli.
Nathalie Chalifour, Stewart Elgie and Amir Attaran are professors in the Common Law Section at the University of Ottawa. David Robitaille and Thomas Burelli are professors in the Civil Law Section at the University of Ottawa. Justine Bouquier and Elie Klee are doctoral students in law at the University of Ottawa. Sarah Nolasque is an undergraduate law student at the University of Ottawa. Interviews were conducted by Sarah Nolasque and Justine Bouquier. Interviews were edited by Justine Bouquier, Elie Klee and Thomas Burelli.

(2023) 53 R.G.D. 455-488

expérience devant la Cour suprême et les arguments qu'ils ont fait valoir pour mener à une décision de la Cour en faveur de la tarification fédérale des gaz à effet de serre. Cette démarche apporte un éclairage intéressant et des informations de première main sur une décision qui constitue un pas de plus vers l'aboutissement de contentieux climatiques au Canada. L'article donne également une perspective très instructive sur le fonctionnement de la Cour suprême et l'organisation des plaidoiries des experts interrogés.

MOTS-CLÉS :

Tarification carbone, Cour suprême du Canada, contentieux, climat, gaz à effet de serre, environnement, développement durable.

ABSTRACT

This text looks back at a case brought before the Supreme Court of Canada in 2021 in which several Canadian provinces challenged the federal Greenhouse Gas Pollution Pricing Act. *This law establishes a minimum standard for greenhouse gas pricing at the federal level, with the aim of reducing the country's emissions and contributing to achieving the objectives of the* Paris Agreement. *The provinces argued before the Court that greenhouse gas pricing did not fall under federal jurisdiction, as the regulation of natural resources is a provincial area of competence. On May 25, 2021, the Supreme Court of Canada ruled against the three provinces, validating federal jurisdiction in the matter.*

Through interviews with stakeholders in the dispute, this text gives the floor to Amir Attaran, Nathalie Chalifour, Stewart Elgie and David Robitaille, four Professors who are members of the Centre for Environmental Law and Global Sustainability (CELGS) at the University of Ottawa, who participated in the defence of this historic case. They convey in simple words their experience before the Supreme Court and the arguments they put forward to lead to the Court's decision in favour of federal greenhouse gas pricing. This approach provides interesting insights and first-hand information on a decision that represents another step towards the successful outcome of climate litigation in Canada. This article also provides a highly instructive perspective on the workings of the Supreme Court and the organization of the oral arguments of the experts interviewed.

KEYWORDS:

Carbon pricing, Supreme Court of Canada, litigation, climate, greenhouse gas, environment, sustainable development.

SOMMAIRE

INTRODUCTION

Le 25 mai 2021, la Cour suprême du Canada a rendu une décision historique relativement à la *Loi sur la tarification du carbone*[1], adoptée par le Parlement fédéral. Cette loi, conçue par le gouvernement fédéral pour réduire les émissions de gaz à effet de serre (GES) du pays et tendre vers les objectifs auxquels il s'est engagé sur la scène

1. *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre*, 2021 CSC 11; Cour suprême du Canada, « La cause en bref, *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre* » (dernière modification le 25 mars 2021), en ligne : *Cour suprême du Canada* <www.scc-csc.ca/case-dossier/cb/2021/38663-38781-39116-fra.aspx>.

internationale[2], avait été contestée par trois provinces (la Saskatchewan, l'Ontario, et l'Alberta), au motif qu'elle ne relève pas de sa compétence. Ces provinces estimaient qu'une telle loi est inconstitutionnelle en ce qu'il ne serait pas du ressort du gouvernement fédéral d'imposer une norme nationale sur les émissions de GES, celles-ci provenant de la combustion d'énergies fossiles, qui sont une ressource naturelle, alors que la réglementation des ressources naturelles relève, selon la Constitution, de la compétence des provinces.

La Cour suprême, dans sa décision du 25 mai 2021, a considéré que cette loi relève bien de la compétence fédérale. La Cour a estimé que le changement climatique et, en l'espèce, les gaz à effet de serre constituent une menace de portée extraprovinciale, nationale et internationale pour la vie humaine. La Cour a soulevé que les provinces n'ont pas la possibilité d'établir des normes nationales minimales en la matière et qu'une telle loi n'a pas un effet disproportionné sur l'autonomie provinciale, jugeant qu'elle relève valablement d'une compétence fédérale.

Cette affaire s'inscrit dans un débat politique spécifiquement canadien, attisé par l'urgence de la lutte contre le réchauffement climatique mondial. Bien que ce litige ait principalement opposé le gouvernement fédéral aux provinces précitées, la Cour suprême a autorisé l'intervention de plusieurs acteurs de la société civile dans cette affaire. Six de ces organisations étaient représentées par des membres du Centre du droit de l'environnement et de la durabilité mondiale de la Faculté de droit de l'Université d'Ottawa[3] : le professeur Attaran, la professeure Chalifour, le professeur De Beer, le professeur Elgie, le professeur Ginsberg, et le professeur Robitaille. Quatre d'entre eux — Amir Attaran, ayant défendu l'Athabasca Chipewyan First Nation[4], Nathalie Chalifour, ayant représenté, avec la professeure Anne Levesque, les Ami(e)s de la Terre[5] et l'Association nationale de la Femme et Droit (ANFD)[6],

2. Voir par ex *Accord de Paris*, 12 décembre 2015, 3156 RTNU 79 (entrée en vigueur le 4 novembre 2016).

3. Faculté de droit de l'Université d'Ottawa, « Droit de l'environnement », en ligne : <www.uottawa.ca/faculte-droit/common-law/centre-droit-environnement-durabilite-mondiale>.

4. Athabasca Chipewyan First Nation, « ACFN – K'ai Tailé Denesųłiné », en ligne : <www.acfn.com>.

5. Les Ami(e)s de la Terre, « Climate Change and Energy », en ligne : <www.foecanada.org/climate-change-and-energy/>.

6. L'Association nationale Femmes et Droit (ANFD), « La Cour suprême du Canada juge constitutionnelle la loi fédérale sur la tarification du carbone : des intervenantes pour les droits des femmes et des filles se réjouissent de cette décision » (25 mars 2021), en ligne : <www.nawl.ca/fr/la-cour-supreme-du-canada-juge-constitutionnelle-la-loi-federale-sur-la-

Stewart Elgie, ayant représenté la Commission de l'écofiscalité du Canada[7] et David Robitaille qui représentait le Centre québécois du droit de l'environnement (CQDE)[8] et Équiterre[9] — répondent ici aux questions posées dans le cadre d'entretiens dont les questions ont été formulées par Sarah Nolasque, Justine Bouquier et Thomas Burelli. Les entrevues ont été réalisées par Sarah Nolasque et Justine Bouquier, puis transcrites et enfin révisées par les auteurs.

L'objectif du présent article est de donner la parole aux professeurs Attaran (**AA**), Chalifour (**NC**), Elgie (**SE**) et Robitaille (**DR**) pour rendre compte de leur expérience devant la Cour suprême du Canada et de l'argumentaire qu'ils ont avancé pour défendre leur client. Cet article vulgarisant leur intervention est destiné aux étudiant.e.s, aux professionnel.le.s du droit ou aux chercheur.e.s voulant étudier cette affaire du point de vue interne des défendeurs. Cette démarche a également mené à la publication de quatre vidéos donnant également la parole à Nathalie Chalifour, Stewart Elgie et David Robitaille, ainsi qu'au directeur de la clinique Écojustice[10], Joshua Ginsberg. Ces vidéos rapportant les arguments qu'ils ont fait valoir dans cette affaire historique peuvent être visionnées sur le site Jurivision[11].

Les entretiens ont été effectués en français ou en anglais selon les intervenant.e.s et sont retranscrits dans le présent texte dans la langue dans laquelle ils ont été réalisés. Les entretiens ont comporté 15 questions qui constituent la structure de ce texte. Les intervenants ont ainsi eu à préciser qui ils représentaient et quels étaient leurs arguments juridiques, à revenir sur leur expérience le jour de leur plaidoirie, à raconter dans quelle mesure ils ont collaboré avec d'autres parties à cette affaire, à revenir sur leur préparation à cette intervention devant la Cour, à expliquer l'argumentaire du gouvernement fédéral en relation avec leur plaidoirie ainsi que la réaction que la Cour a pu avoir à

---

tarification-du-carbone-des-intervenantes-pour-les-droits-des-femmes-et-des-filles-se-rejouissent-de-cette-decision/>.

7. Commission de l'écofiscalité du Canada, « Écofiscalité [ekofiskalite] nf », en ligne : <www.ecofiscal.ca/fr/>.

8. Centre québécois du droit de l'environnement, « Tarification sur le carbone », en ligne : <www.cqde.org/fr/nos-actions/tarification-carbone/>.

9. Équiterre, « Mission accomplie pour le CQDE et Équiterre : la Cour suprême du Canada tranche en faveur de la tarification carbone » (25 mars 2021), en ligne : <www.equiterre.org/fr/articles/victoire_coursupreme_tarificationcarbone>.

10. Jurivision, « La tarification du carbone, une vision d'urgence nationale » (26 octobre 2022), en ligne : <https://jurivision.ca/la-tarification-du-carbone-une-vision-durgence-nationale/>.

11. *Ibid*.

leur argumentaire. Ils ont également pu émettre leur avis, exposer leur analyse de la décision de la Cour, exprimer leur réaction à celle-ci et préciser leur rôle d'expert en ce qui concerne la compréhension dont la Cour a pu faire preuve quant aux données scientifiques touchant le changement climatique, l'utilisation qu'elle a pu en faire et l'importance des intervenant.e.s pour faire évoluer la position de la Cour. Ils ont enfin été interrogés sur l'importance de l'affaire, ses liens avec d'autres dossiers et son influence potentielle au Canada ou ailleurs, ainsi que sur les suites qui pourraient y être données.

QUESTION 1

Qui représentiez-vous et quels étaient vos arguments juridiques? Who did you represent, and what were your legal arguments?

AA – In the beginning, a colleague of mine and I were the first interveners out of all of them. We were supposed to represent the David Suzuki Foundation[12] in Saskatchewan. However, when the opportunity to represent a First Nation presented itself, my colleague and I made the decision to step off the David Suzuki Foundation file. I resigned from this file to represent the Athabasca Chipewyan First Nation in northern Alberta. For me, it was an honour to be representing Indigenous People in this case, and very much a high point of my career, for several reasons. First, they are in the centre of the monster, their territory is where the tar sands are located, so they live extremely close to the source of the problem. Second, they are extremely well organized; Athabasca Chipewyan First Nation is one of the highest functioning First Nations in Canada. They are very well managed, they know what they want, and they have an extremely competent chief and Council. Third, First Nations have a different story than environmental groups. Unlike environmental groups who have only been around for 10 to 30 years, my client has lived in northern Alberta, before it was Alberta, for 7,000 years at least. Therefore, their ability to speak about the land and to speak about the transformation of climate change is very deep-rooted, having a personal connection to the land that no other intervener has. I had a very interesting job as the intervener representing them. I was made to sit with the elders in the community, listen to their perspective on climate change, their perspective

12. David Suzuki Foundation, online: <www.davidsuzuki.org>.

on their land, and their 7,000 years of history. What a privilege! They trusted me with 7,000 years of their people's history, and told me to win this case, without telling me much how to run this case. I felt such a moral responsibility to them, and I hope I said it often enough to them. Because if you're trusting me to defend something that your fathers and your mothers and their fathers and mothers and the ones before them created, well okay, then I have to work harder and I really have to do my best, yeah? It was emotionally very powerful. There were times I was in tears during the case, thinking about the great trust and responsibility that had been given to me.

Most of my arguments were focused on section 35 of the *Constitution Act, 1982*.[13] The arguments were quite straightforward. Under peace order and good government (POGG), we have the national concern test, meaning that the concern is one that affects the nation, which raises the question: "which nation?" Is it the nation of Canada? Is it the First Nation? Part of the national concern test is that if something a province does has international or interprovincial effect, it should be treated as a national concern problem. Hence, if we take the literal meaning of the word "international," affecting a First Nation is international, because it is between different nations, the First Nation and Canada being both nations.

NC – I was co-representing Friends of the Earth and the National Association of Women in the Law[14] with Professor Anne Levesque. We brought a unique, feminist and climate justice argument to the case, essentially advocating for an equality-affirming interpretation of the division of powers. We argued that the division of powers should be interpreted in a way that enables each level of government, within its respective sphere of authority, to act on climate change. In this case, it meant confirming the federal government's authority to implement a national carbon price floor. Where there are issues that transcend provinces—and especially when the actions of one province can negatively impact upon the rights of those in other provinces—there is justification for the federal government to act. If one province does not play ball, and allows emissions to rise, that could offset the efforts

13. S35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

14. Friends of the Earth, "Climate Change and Energy", online: <www.foecanada.org/climate-change-and-energy/>; National Association of Women and the Law, "Supreme Court of Canada Rules Carbon Pricing Law Constitutional: Intervenors for Rights of Women and Girls Welcome the Decision" (25 March 2021), online: <www.nawl.ca/supreme-court-of-canada-rules-carbon-pricing-law-constitutional-intervenors-for-rights-of-women-and-girls-welcome-the-decision/>.

of other provinces to reduce their emissions. Having a national price floor protects against this happening. We also underlined for the Court that climate change will not impact everybody the same way, and that it risks worsening existing inequalities. We focused on bringing a feminist and climate justice approach since this offered a unique and important contribution among the interveners. We ensured the Court understood that climate change impacts individuals and communities differently and exacerbates systemic inequalities. In our written submissions, we offered specific examples of how climate change can worsen the inequalities experienced by women, especially racialized, poor, and/or Indigenous women. In other words, climate change can be a form of environmental discrimination. We argued that climate change is the kind of problem for which we need all jurisdictions working together, collaboratively and cooperatively, each within their own spheres of jurisdiction, and that there was ample jurisdictional space for the federal government to implement a national carbon price to ensure Canada's emissions as a whole are reduced. We argued that the Court needed to consider the importance of addressing the climate emergency at a nationwide level when weighing the potential for intrusion on provincial autonomy if the national carbon price was upheld under the POGG national concern power.

SE – My client's expertise was in economics and public policy. The Ecofiscal Commission[15] is a group of prominent economic experts that had published years of reports on why pollution pricing is the most effective way to deal with environmental problems. Explaining that economic reality was one of the arguments we made in the lower courts. But we cut that from our Supreme Court argument because we believed the Court already understood that carbon pricing was the most cost-effective way to address climate change, and we wanted to use our limited time to have maximum impact.

In this case, I think the real issue was how to put boundaries on the federal power to regulate climate change. Climate change is a global problem—one that requires concerted action by the nations of the world to address—but the solutions will have significant impacts on provincial economies. The challenge for the Court was how to give the federal government broad enough authority to ensure that Canada

15. Ecofiscal Commission, "Clearing the Air: How Carbon Pricing Helps Canada Fight Climate Change", online: <www.ecofiscal.ca/reports/clearing-air-carbon-pricing-helps-canada-fight-climate-change/>.

meets the mitigation commitment it has communicated under the *Paris Agreement*,[16] but not so broad that it can erode critical areas of provincial authority under the Constitution. That is the main issue in any division of powers environment case: how to reconcile the laws of nature—that most environmental problems do not respect borders—with Canada's constitutional law, which requires that environmental authority be divided between Ottawa and the provinces.

So the central question for the Court was to define the scope of federal power over the regulation of green house gas (GHG), interpreting a Constitution that does not explicitly address that matter (because it was drafted in 1867). The federal lawyers' position on this key issue had evolved over each case, but at the Supreme Court of Canada they were arguing the position of the Ontario Court of Appeal:[17] that Ottawa had the constitutional power to set national minimum standards for carbon pricing. My client, the Ecofiscal Commission, had recommended that approach in a report five years earlier. It is the way most federations around the world deal with environmental standard setting, through national minimum standards. But the Supreme Court of Canada had never before defined the federal National Concern power in terms of setting minimum standards. As an intervener, we wanted to offer an alternative way to frame the division of powers—to give the Court another option in case it did not like the national minimum standards approach. We argued that the federal government had constitutional authority to regulate transboundary environmental problems, such as climate change.

The Court ended up deciding that the federal government had the power to set minimum national standards for carbon pricing. We were happy with that. But I was also pleased that the Court picked up a lot of our argument and put it into its judgment. It was the transboundary aspect of the pollution that helped the Court explain why national minimum standards are needed.

DR – Je défendais deux organismes du Québec : le Centre québécois du droit de l'environnement (CQDE), puis Équiterre. Selon notre argument, la *Loi* (fédérale) *sur la tarification de la pollution causée par les gaz à effet de serre* est une loi valide en vertu de la compétence fédérale

16. 12 December 2015, UNTS 3156 CN63.2016 (entered into force 4 November 2016).

17. *Reference re Greenhouse Gas Pollution Pricing Act (Canada)*, 2019 ONCA 544 [*Greenhouse ONCA*]. Stewart Elgie was also defending the Canada's Ecofiscal Commission in front of the Ontario Court of Appeal.

d'adopter des lois pour assurer la paix, l'ordre et le bon gouvernement du Canada et, plus spécifiquement, en vertu de la doctrine de l'intérêt national. Nous voyions aussi un risque pour l'équilibre du partage des compétences si cette doctrine était utilisée sans balise claire. Pour cette raison, nous considérions qu'il fallait faire attention au domaine exact devant relever de l'intérêt national. Ainsi, nous avons plaidé, devant la Cour suprême, que la matière qui est d'intérêt national dans ce dossier ne consistait pas dans les gaz à effets de serre en général, mais plutôt dans la tarification pancanadienne de la pollution. Aucune province ne peut imposer un prix pour la pollution à la province voisine en raison du principe de la territorialité limitée de sa compétence au territoire provincial. Seul le palier fédéral a donc, selon nous, le pouvoir de mettre en œuvre un tel régime, dans l'intérêt national.

QUESTION 2

Quelle a été votre expérience le jour de votre intervention devant la Cour suprême dans cette affaire? What was your experience on the day of your intervention in front of the Supreme Court in this case?

AA – It felt anticlimactic. It was not the climax at all. According to me, it was obvious what was going to happen, we were going to win at the Supreme Court. The more interesting case for me was what happened in Saskatchewan[18] and Ontario.[19] I remember we had to argue this same case four times, at four different places. Since Saskatchewan started the reference first, we had to go to Saskatchewan. Following Ontario that copied, we had to go to Ontario and then Alberta, doing the same thing there as well. Alberta never would have had a chance to do so, however, since COVID-19 postponed the Supreme Court case, Alberta had its opportunity. Then, finally, we went to the Supreme Court. By the time I went to the Supreme Court, I think it was almost boring. There was really nothing special at this point, for me, because we had already established everything we needed in the previous cases, to win.

18. *Reference re Greenhouse Gas Pollution Pricing Act (Canada)*, 2019 SKCA 40 [*Greenhouse SKCA*].
19. *Greenhouse ONCA*, *supra* note 17.

NC – It was such a great experience. It was my first time appearing before the Supreme Court, so I was a little nervous but mostly excited by the opportunity. It felt like such an enormous privilege to be able to make these arguments before the Supreme Court of Canada on behalf of Friends of the Earth Canada and the National Association of Women and the Law. Since we only had five minutes, we had to be extremely thoughtful about what we wanted to say, in addition to being prepared for questions. It was an amazing experience and I hope I'll have another opportunity to appear before them again, especially in the context of climate litigation.

SE – Arguing at the Supreme Court is challenging and enjoyable. This was my fifth time there, and it was a very different experience because of COVID-19. We had to watch the hearing in a separate room by video, until it was our turn to argue, which made it a lot harder to read the judges. It's important to see what they write down—what points they are following—and try to tailor your arguments to get at the issues that seem to be really raising the Court's interest. In particular, you want to identify which of the nine judges you think you can influence—who seems to be leaning your way or on the fence. But it's harder to figure that out when you can only see what the video shows; you can't choose who to focus on. The other big challenge is time management and understanding where you can best add value in the Supreme Court, because we only have five minutes. Time goes quickly, especially with the judges' questions. We need to figure out what we can say in five minutes that will have maximum impact.

DR – Étant donné que c'était la première fois que je plaidais devant la Cour suprême, j'étais très content, et excité; c'était un moment unique dans ma vie. Je voulais savourer chaque seconde, chaque minute de l'intervention, puisqu'en tant qu'intervenant.e.s, nous n'en avions que cinq. J'ai bien aimé que la juge Côté m'ait posé une question; je me suis considéré chanceux d'en avoir une, parce qu'en cinq minutes, on ne s'attend pas vraiment à beaucoup de questions. J'étais aussi honoré de représenter le CQDE et Équiterre. Je me suis considéré privilégié de pouvoir parler en leur nom devant les juges de la Cour suprême.

QUESTION 3

Dans quelle mesure avez-vous collaboré avec d'autres parties à cette affaire? To what extent did you, as an intervener, collaborate with the other participants?

AA – I have been litigating since the 1990s. I can say, in this case, we had a constructive, positive working relationship with the federal government, which is rare. From the very beginning of this case, there was a willingness in federal government to work with people on the outside, who would support. At the time, I was seconded from the Faculty of Law to Ecojustice, and I phoned the director of Ecojustice to inform him that I had arranged a collaborative situation with the federal government, and he seemed surprised. Most of us are trapped in the mindset that the federal government must be our enemy because most of the time they are, especially for First Nations. This time, I just decided to cold call the Department of Justice and propose collaborating, and it worked. I am sure other interveners involved from an early stage would agree with me when I say the relationship with the federal government was extraordinary and singular.

NC – There is already a lot of collaboration among environmental non-governmental organizations (NGOs) in Canada, so some of us know each other as individuals and institutionally. There were also several members of the legal team for different interveners that happened to be faculty members at the University of Ottawa. These prior connections made it easier to share knowledge and resources, which likely contributed to stronger arguments and hopefully ultimately provided more assistance to the Court. However, every lawyer was first and foremost acting in service of his/her client and had his/her own set of arguments and unique contribution to make to the case. Any collaborations were done with the authorization of the clients and with professional responsibility to ensure the interventions were serving the interests of the courts. Fundamentally, I think justice is about making sure that we are presenting the best possible arguments in a way that assists courts. To the extent that collaborating with Parties and other interveners can further that cause, it is worthwhile. One of the most important aspects of the collaboration among interveners in this case was that we avoided duplication, which is synergistic and uses resources wisely. The Court benefits from this collaboration, in that interveners can each focus on a specific point rather than repeating each other's arguments.

SE – There are different ways one can try to intervene. One way is to try to set the context for the Court's judgment. In this case, for example, Professor Attaran presented from the perspective of an Indigenous community, and Professor Chalifour presented from an equity perspective. Even if those types of framing interventions do not end up having a visible impact on the Court's reasoning, they help create the context for the decision. Consequently, they contribute to the Court's understanding of how the constitutional jurisprudence must evolve, to deal with evolving challenges in a society. For us, the secondary goal of our argument was to present the economic frame, my client being economic experts. We explained that carbon pricing is the most economically effective way to address climate change. All the other approaches, like conventional regulations, would cost more money and have a more significant impact on provincial regulatory authority.

DR – J'ai eu plusieurs discussions avec les gens du CQDE et d'Équiterre, en particulier la directrice générale du CQDE, Geneviève Paul, et l'avocat au CQDE, Marc Bishai. Ces discussions sont toujours super inspirantes et intéressantes. Je suis privilégié d'avoir des échanges avec des personnes engagées comme elles, puis de faire partie d'une équipe, pour essayer d'aller un peu plus loin sur le plan de la justice climatique et de la protection de l'environnement, en utilisant le droit. J'ai l'impression de contribuer un peu, dans une certaine mesure, à une cause importante et d'apprendre en même temps. Pour moi, ce dossier-là c'était *pro bono*. J'y ai travaillé gratuitement, puis plaider devant la Cour suprême, ça n'a pas de prix.

QUESTION 4

Comment vous êtes-vous préparé.e à cette intervention devant la Cour suprême? How did you prepare for this Supreme Court case?

AA – Honestly, I did not prepare much to intervene before the Supreme Court. I typed out some notes the morning of the argument, but I did not prepare before. At this point, I had done it three times already, so there was not much preparation needed for me. That may not be the case for some of the other interveners because some were only involved close to the end.

NC – I spent a lot of time preparing for those brief five minutes with the help of my brilliant co-counsel, Professor Anne Levesque. Even

though the argument was already presented in the factum, the oral component is the opportunity to highlight the points that are most helpful to the judges. Also, since the case involved two days of oral arguments, and I was scheduled on the second day, I had the opportunity to listen carefully to the first day's proceedings and update my submissions based on the questions that some of the members of the bench were asking. I referenced several points individual judges had raised in questions the day before in an effort to speak to the points they were grappling with and, hopefully, persuade them. It was fortunate that several of the questions were relevant to what I had already planned to argue, so I was able to hone in on specific, on-the-fence, aspects that some of the members of the bench had asked. I think it worked out quite well. It helps to connect directly to what each judge is concerned about, to the extent one can.

SE – In the provincial courts, with more time, you could make two or three points effectively. In Supreme Court, you are probably only going to make one point effectively. You need to identify the key issue where you think you can really add value, among the dozens of interveners. For the oral argument, the hard part is having a strategy but being ready to adapt on the spot—to react to the judges' questions, but then pivot back to your argument. While I was waiting for my turn, I was watching the hearing and trying to determine the real questions in the Court's mind, and tweaking my argument to try to get at those issues.

DR – J'ai d'abord plaidé devant la Cour d'appel de l'Ontario[20] dans ce dossier et ensuite devant la Cour suprême. Par conséquent, le travail avait déjà commencé en 2018 avec la rédaction du mémoire de dix pages, pour la Cour d'appel de l'Ontario. Pour la Cour suprême, nous avons repris l'essentiel de ce premier mémoire, avec de petits raffinements. Le défi de préparation pour la Cour suprême était de choisir quoi présenter à la Cour. En Cour d'appel, nous avons dix minutes pour plaider tandis qu'en Cour suprême, nous avons seulement cinq minutes. Il nous a donc fallu cibler notre message, nous concentrer sur ce qui constituait une plus-value par rapport à tous les autres intervenant.e.s. Puisqu'il y avait plusieurs intervenant.e.s dans ce dossier, il s'agissait de choisir la meilleure utilisation du temps possible. Il était important que notre message soit un peu différent de celui des autres, pour que tout le monde ait une approche complémentaire et utile. Les intervenant.e.s

20. *Ibid.*

ont d'ailleurs tenu quelques réunions préparatoires avant l'audience afin d'assurer cette complémentarité, couvrir plusieurs angles et utiliser de manière efficace le temps de la Cour. Je dirais aussi que la préparation, au niveau de la Cour suprême, consiste à écouter l'audition et à prendre note de toutes les questions que les juges posent. J'aime aussi commencer mes plaidoiries par des propositions de réponses aux questions posées par les juges aux autres plaideurs parce que cela attire leur attention dès le départ. J'ai changé mon plan de plaidoirie environ quatre ou cinq fois et, le jour même, c'est pendant l'audition que j'ai établi mon plan final avec l'ordre de présentation de mes points.

QUESTION 5

Lorsqu'on intervient devant la Cour, on doit présenter des arguments uniques. Avez-vous trouvé des similitudes entre votre intervention et ce que le gouvernement fédéral a argumenté? In order to intervene in front of the Court, you need to bring unique arguments. Was your specific intervention echoed in any way by the federal government?

NC – While our argument supported the federal position, it did so in a way that was quite distinct from what the federal government was arguing. While we were arguing in favour of upholding the law under the national concern branch of POGG, we emphasized that this was an equality-affirming interpretation of the Constitution. We also argued that federalism needs to be interpreted in a way that does not detract from equality rights. There were other interveners that established a link between division of powers and Charter rights, but nobody characterized their arguments in the way we did—specifically tying into equality.

SE – No, not at all. And that was deliberate. We wanted to present an alternative constitution basis for upholding federal power over the regulation of GHG, in case the federal government's argument—that it had the power to set national minimum standards—was not successful. As mentioned in the previous question, we argued that climate change is fundamentally a cross-border problem, and requires national leadership. This approach also shored up the weakest part of the federal argument, by showing *why* national minimum standards are needed to address climate change. Several other interveners also

advanced arguments that supplemented and bolstered the federal position. I think that was one of the effective things about this case, and contributed to our success.

DR – Le CQDE et Équiterre étaient les seuls organismes intervenants du Québec, mis à part le gouvernement québécois. Nous avons donc tenté de formuler un point de vue qui soutenait la validité de la loi, tout en étant soucieux de l'autonomie des provinces en matière de lutte contre les émissions de GES. En définitive, nous soutenions, comme le gouvernement fédéral, la validité de la loi.

QUESTION 6

Comment la Cour a-t-elle réagi à vos arguments? How did the Court react to your arguments?

AA – In Ontario, I thought that the Court absolutely believed in the Indigenous argument, and it is mentioned in the Ontario judgment.[21] We received very friendly questions from the Court about this. Justice McPherson had asked a very assertive question to the Ontario lawyers, asking them: does this mean Ontarians can pollute as much as we want and destroy the lives of Indigenous people in the North without any consequences? So, we had some engagement from the Ontario Court of Appeal. In Alberta,[22] however, something very strange happened to me. In Alberta, interveners were normally given 10 or 15 minutes to speak, but the Chief Justice kept me there for 45 minutes, asking question after question, which did not happen to any other intervener but me. I think she did so, not because she was interested by the Indigenous argument, but because she felt threatened. I feel like some of the judges were attempting to reject what I was saying about the constitutional place of First Nations, obviously in a polite way. At one point, I said that if the Court did not agree that there was some constitutional limit to the damage my client should sustain to its treaty rights, then my client would use this same argument to oppose investment in resource projects in Alberta. It was a very heated discussion with the Chief Justice in Alberta who saw that as a threat, and I was very nervous, though the submission was entirely true. At the Supreme Court, we got only few questions.

21. *Ibid.*

22. *Reference re Greenhouse Gas Pollution Pricing Act (Canada)*, 2020 ABCA 7 [*Greenhouse ABCA*].

NC – Throughout the whole process, there were some judges who were quiet and there were others who asked lots of questions. When I spoke, I was not asked any questions, but when the federal government was making its arguments and the provinces were making their arguments, there were quite a lot of questions and debate from the bench. From the questions, I felt like there was an understanding on the part of several judges that GHG emissions cause harm at a planetary scale, and that the actions of one jurisdiction are going to have implications outside their own borders.

SE – In the two courts of appeal, we had a lot of questions from the Courts, they seemed really interested in our argument. In the Supreme Court, most of the interveners did not get any questions. At that level, your factum probably has more influence than your brief arguments. In oral argument, you mostly want them to register that your points are relevant, so that they and their clerks read your factum carefully. Their judgment picked up a lot of our factum, so I think that meant our argument registered with them. To be honest, as someone who has argued a lot these cases over 30 years, the current approach to intervention in the Court could be improved. I hope they go back to the old approach, where they only allowed a smaller number of interveners but typically gave them a 20-page factum and 30 minutes of argument. With that approach, an intervener could really add value to the case.

DR – Ça, c'est difficile à dire, on ne sait jamais. L'impression que j'ai eue, personnellement, c'est que la Cour était très attentive aux arguments des parties et des intervenant.e.s. Comme plaideur, je me suis senti écouté par la Cour et les juges. Madame la juge Côté m'a posé une question. J'étais très content et cette question m'a donné l'occasion de préciser un certain point qui n'était pas clair pour elle. Je ne suis pas sûr que la Cour ait fait allusion à nos arguments précis dans son jugement. Mais je pense que l'ensemble des parties et des intervenant.e.s ont fourni à la Cour un point de vue global et complet des arguments et du dossier, ce qui lui a permis, à mon avis, de rendre un jugement exhaustif et nuancé.

QUESTION 7

Que pensez-vous de la décision rendue par la Cour suprême? Cela fait-il d'une certaine manière écho à votre intervention? What do you think about the Supreme Court's decision? Does it echo your intervention in any way?

AA – In my opinion, the Supreme Court decision is not well written. There is a line in it that essentially states: climate change is an existential threat to humanity. For me, once they wrote that line as the majority, that this is an existential threat and that this can be the end of humanity, of course, we know what the outcome is going to be. Supreme Court judges aren't going to say, "here's an existential threat to everything but sorry we can do nothing." What disappoints me is that rather than being detailed about the nature of climate change and the obvious cross-national concerns it brings, the decision rehashed the already confusing language from *R v Crown Zellerbach Canada Ltd*[23] and attempted to clarify it, in my opinion, without success. The problem is that "peace, order and good government" (POGG) in the constitution is interpreted by the Supreme Court every 20 or 30 years only. Therefore, 99.9% of lawyers will never have argued it, and most judges will never have decided it. Every time the question is approached, it is done so with a sense of naiveté of what it means. According to me, this case was an opportunity to clarify what the POGG power is, and to clarify both doctrines under this power: the national concern doctrine and the emergency doctrine. Instead, rather than clarifying, I feel that the Supreme Court took the confused language from *Crown Zellerbach* and explained it in a new, even more convoluted way. Even though the outcome is wonderful, 20 years from now, there will be some lawyers that will have to argue a POGG case, like myself, and asking themselves, "What does this case mean?"

NC – The Supreme Court's majority judgment is well aligned with what we argued, even though they did not cite to our factum. The Court recognized the gravity and the urgency of climate change, which is an important finding from the country's highest court. Importantly, the Court noted that climate change will have disproportionate impacts on vulnerable people and regions, and specifically cited Indigenous communities and the North. This was a core piece of our argument. The Court also modified the third leg of the national concern test,

23. [1988] 1 SCR 401 [*Crown Zellerbach*].

where the impacts of upholding a law under POGG must be balanced with potential impacts on provincial autonomy, to include climate justice considerations. This was something we specifically advocated for, and even though we were not credited with the argument, it is a major victory to have this included in the test. The Court also recognized that climate change was a collective action problem that required, "all hands-on deck," something else that we emphasized in our arguments. It rejected the individualistic argument that had been made by the provinces that it was acceptable to cause adverse effects to other provinces. The Supreme Court supported the idea that all provinces—whether small or large GHG emitters—must do their part, because this is a collective action problem. While the Court did not cite our factum in coming to these conclusions, they did cite two of my articles, including one co-authored with Professor Peter Oliver and Taylor Wormington, related to the interpretation of the POGG clause.[24]

QUESTION 8

Quelle a été votre réaction à la décision? Était-ce une surprise? What was your reaction to the decision? Was it a surprise?

AA – I knew we won at the Supreme Court before we walked into the Supreme Court. I was not surprised at all. I think we truly won when we won the first case in Saskatchewan.[25] Winning in Saskatchewan was unpredictable; I was just hoping we succeeded there. For Alberta,[26] it was political, and I figured we would lose because of their political dependence on oil and gas. Winning in Ontario[27] was very nice because in a sense, it confirmed that Saskatchewan was not an anomaly. Therefore, by the time we got to the Supreme Court, I had no doubt we would win.

NC – I was not surprised, in that I felt really strongly that it was the correct decision legally and morally. I have been writing about this issue for years before the litigation started, since it was untested legal

24. Nathalie J 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 Ottawa L Rev 197; Nathalie J Chalifour, Peter Oliver & Taylor Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Pricing Act Appeals*" (2020) 40:2 NJCL 153.

25. *Greenhouse SKCA*, *supra* note 18.

26. *Greenhouse ABCA*, *supra* note 22.

27. *Greenhouse ONCA*, *supra* note 17.

territory and there were clear signs that climate laws, including carbon pricing, would be opposed politically. Even if the Court had been reluctant to uphold the law under POGG, I felt that they could have relied upon other federal powers to justify this law, such as the criminal law power. In fact, in the very first challenge from Saskatchewan,[28] I almost fell out of my chair reading the provincial Attorney General's factum, as the province did not contest that the federal government has the constitutional authority to implement a national carbon tax, in the traditional sense of a tax. What they did not like was the way the federal government had chosen to enact the law (as a national backstop), justified under POGG, even though that is more deferential to provinces, including returning the revenue to provinces. While the concern for provincial autonomy is understandable from a federalism perspective, the legislation had been drafted in such a deferential way that this suggested the resistance was largely political. So, it was a relief to see the Supreme Court uphold the legislation under POGG, as it meant that the country could finally get on with the hard work of dealing with climate change and enacting policies to deal with the crisis rather than wasting time and resources on litigation. So much time, money, and other resources were devoted to this litigation versus actually working towards developing and implementing effective policies that deal with the climate crisis. It's sad, and it's our youth and future generations that will pay the biggest price for this delay.

SE – I was not that surprised. Most legal experts thought that it was likely that the Court would uphold the law. We had won two out of three at provincial level, and that was probably a reasonable estimate of our chance of success. Even though we thought we had a decent chance of winning, the stakes were high and the consequences of losing would have been catastrophic—it would have really set back Canada's efforts to tackle climate change and meet its global treaty commitments, just as Canada was finally starting to get momentum on climate action. So I was worried because we could not afford to lose this case.

Intellectually, I was a little bit surprised by the reasoning. The Court upheld the federal power to set national minimum standards, but it did not really get into why this new approach to defining federal authority under the National Concern power was justified. I think the result was a good result, but it did not fully explain the constitutional

28. *Greenhouse SKCA*, *supra* note 18 (Factum, Appellant).

rationale for this national minimum standard approach, in a way that would help guide future legislation. It upheld this law, but it left open many questions about what the federal government can do, both in other areas of climate policy, and in environmental policy more broadly. For instance, could it use this national minimum standard approach to deal with endangered species? Or air pollution? The ambit of this national minimum standards power will need to be clarified in future cases.

DR – Même si le résultat est toujours imprévisible, je n'étais pas particulièrement surpris, j'avais l'impression que la Cour validerait la loi, mais qu'il y aurait une dissidence. Je pense que c'était assez clair avec l'audition : nous pouvions voir qu'il y avait au moins un ou deux juges qui étaient assez sceptiques. Je me disais cela parce que si la Cour jugeait la loi invalide au complet, quel aurait été le message envoyé aux Canadiennes et aux Canadiens? Et je trouvais surtout, personnellement, que la loi fédérale est quand même bien balisée. La loi est bien rédigée et assez précise, ce n'est pas un envahissement dans les champs de compétence des provinces. Une majorité de six juges contre trois a jugé la loi fédérale valide, ce qui est une bonne majorité. Parmi les trois juges dissidents, deux ont reconnu que le Parlement doit jouer un rôle en ce qui concerne la lutte contre les émissions de GES. Au total, huit juges sur neuf ont donc reconnu que le Parlement a le pouvoir d'intervenir pour lutter contre la crise climatique.

QUESTION 9

Comment qualifieriez-vous la compréhension de la Cour quant aux données scientifiques qui concernent le changement climatique et même l'utilisation qu'elle en a fait? How would you qualify the way the Supreme Court understood and used scientific data or conclusions about climate change in the decision?

AA – I would say, the judges did not necessarily appreciate the provided data like data scientists. Rather, they used the scientific conclusions originating from that data. In the Supreme Court, Canada attached all its documents to an affidavit so the other side could cross-examine it. I found this good but surprising, because stupidly reference cases are usually decided based on a documentary, "record" of unsworn and therefore unexamined evidence—which is a crazy way

to decide an abstract constitutional question of lasting importance to Canada. Why the Supreme Court allows that way of doing things is perverse and inexplicable. But Canada did actually provide sworn affidavits, and some of the affiants were cross-examined by Alberta. More specifically, Canada provided copies of the International Panel on Climate Change (IPCC)[29] reports or other reports. Canada also helpfully included evidence that the interveners wanted to use, which is one of the elements of collaboration between us and the federal government.

NC – This was the first time that the Supreme Court talked about climate change. That is significant because we do not have much case law in Canada on climate change. To have the highest Court of the land talk about climate change in the way it did is very powerful. There was a very strong evidentiary record based on climate science and the Supreme Court did a good job reflecting it in the decision. For instance, it declared unequivocally that climate change is real, that it is caused by humans producing GHG emissions, and that it poses a grave and existential threat to humanity's future. This is well accepted in the scientific literature, but it is meaningful to have it stated so clearly by the Court. In addition, the decision was important from a global perspective because it recognizes the relevance of carbon pricing as an essential tool in the fight against climate change. We now have a pronouncement from our highest court to say that carbon pricing is effective based on the evidence before it.[30] And, as already mentioned, the Court's recognition that climate change can worsen systemic inequalities is very significant, especially in the context of the surge of climate litigation around the world. To sum up, it recognized the gravity of the climate crisis, its disproportionate impacts, and the urgent need for rapid reductions in GHG emissions, which is a helpful and significant precedent for climate change in Canada.

SE –This was not the first time the Supreme Court used environmental science to inform its decision. *Friends of the Oldman River Society v Canada (Minister of Transport)*[31] was about environmental assessment;

---

29. Intergovernmental Panel on Climate Change (IPCC), "Reports", online: <www.ipcc.ch/reports/>.

30. It should be noted on that matter that carbon pricing systems must be thoughtfully designed to ensure they do not exacerbate inequalities. See eg Nathalie J Chalifour, "A Feminist Perspective on Carbon Taxes" (2010) 22:1 CJWL 169.

31. [1992] 1 SCR 3, 88 DRL (4th) [*Oldman River*].

R v Hydro-Québec[32] was about toxics. I think in each of those cases, the Court showed a fairly good understanding of the nature of environmental problems and how division of powers needs to be framed to address their reality. I think it really started with the dissent in *Crown Zellerbach* in 1988, by Justice La Forest. That case was about ocean water pollution, and really talks about the nature of environmental problems: how most pollution has cross-border impacts, and how to allow the federal government authority to deal with the national and international dimensions without undermining the provinces' authority to address the local aspects. Justice La Forest had a real understanding of environmental problems, with his experience as a natural resources law professor. We see the same thing in the *Oldman River* case, where the judges mention the nature of environmental problems, and in *Hydro-Québec*, where the judges address how different toxins bioaccumulate across borders. The courts are not ecological experts; it is the job of lawyers, and particularly interveners, to help educate them. But I think in this case, the Court did a good job of understanding climate science. In fact, I think the work of the Intergovernmental Panel on Climate Change (IPCC)[33] has really helped to eliminate—or at least minimize—any controversy about climate science globally. The Court took the facts and the science as settled: that climate change is real, that it is mostly human caused, that it crosses borders, and it is likely to have devastating impacts if we do not deal with it effectively. I think it was important and helpful for the Court to reflect the global scientific consensus about climate change in the decision. It reinforced it from a neutral, respected body like the Supreme Court.

DR – C'est le jugement dans lequel la Cour suprême se prononce le plus en profondeur en ce qui concerne la crise climatique et l'importance de la lutte contre les émissions de GES, et c'est même, à ma connaissance, la première fois que la Cour reconnaît explicitement les changements climatiques. Le jugement accorde une place importante à la science environnementale et à l'expertise scientifique, ce qui en soi est très bien. La Cour montre qu'elle est consciente des défis majeurs auxquels notre société et nos collectivités font face.

---

32. [1997] 3 RCS 213, 151 DRL (4th) 32 [*Hydro-Québec*].

33. Intergovernmental Panel on Climate Change, "Climate Change 2013: The Physical Science Basis", online: <www.ipcc.ch/report/ar5/wg1/>.

QUESTION 10

Comment expliqueriez-vous cette évolution dans la compréhension et dans l'utilisation des données relatives aux changements climatiques par la Cour suprême? How do you explain this evolution in the Supreme Court's use and understanding of climate change-related data?

AA – I would not categorize it as "understanding." Obviously all nine of the justices in the Supreme Court are intelligent, well-educated humans. However, I do not think they are knowledgeable about the scientific intricacies of climate change. I think they are as knowledgeable as any intelligent person who reads the newspaper would be, to be honest, which explains why they deemed it a threat for humanity. The scientific literacy level in Canada, and I say this as a bioscientist with years of lab work and a Ph. D., is not the highest. In Europe, the Court can appoint somebody who is both a scientist and a lawyer as an advocate general, to provide a bit of help in understanding scientific issues. But not Canada, where we rely on a purely adversarial system of lawyers, and science is misstated by them to inexpert judges. It is one of the reasons that Canada's society is very scientifically backwards.

NC – This was primarily a division of powers case interpreting the national concern test. That is what the Court was the most interested in, so we had to make sure we were speaking to those issues in the arguments. However, the judges also had to understand the climate science presented to them, since that was central to the legislation in question. There is such a strong consensus in climate science, and the evidentiary record presented at the courts of appeal was so thorough, that the task of understanding the science was made relatively easy for the judges, thanks largely to the excellent work of the federal government's legal team led by Sharlene Telles-Langdon. The science of climate change is described in a way that will be very helpful for future climate litigation cases.

SE – I think it is part of the growing public understanding and acceptance of climate science. At least in Canada, being a climate change denier is no longer acceptable. One cannot be a credible public figure in Canada anymore and deny climate science. So it was not a hard job to educate the judges on this point; even those challenging the law agreed that climate change is a real and serious problem. The debate in Canada has moved from climate denial to

solution denial; "it's a problem, but we can't afford to do anything about it," the argument goes. I think the main debate now is whether we can address climate change without hurting the economy. That was why my client was created. The Ecofiscal Commission is a group of the country's foremost economic experts, arguing for cost-effective action on climate change.

DR – Selon ma perception, la Cour suprême est à l'écoute de la société, des collectivités canadiennes, du public et des institutions. Je pense que les juges sont conscient.e.s de la réalité canadienne, du contexte dans lequel on évolue comme collectivité et du contexte socioéconomique, culturel, et politique de la société. Dans les dossiers majeurs où il y a souvent plusieurs intervenant.e.s, cela permet d'avoir un point de vue très global sur un litige, parce que les plaideurs et plaideuses représentent des groupes, des organisations variées.

QUESTION 11

Les intervenant.e.s sont-ils important.e.s pour faire évoluer de temps en temps la position de la Cour? Are the interveners important in changing the Court's position from time to time?

DR – Je pense que oui, ils et elles sont extrêmement important.e.s. Je pense que les intervenant.e.s ont un rôle essentiel dans plusieurs dossiers parce qu'ils et elles amènent des perspectives différentes. Les intervenant.e.s ont souvent un point de vue qui est un petit peu externe au dossier parce que les parties sont dans une relation antagoniste. Les intervenant.e.s peuvent alors présenter ce qu'ils et elles perçoivent du dossier, comme l'impact sur certains groupes de personnes.

QUESTION 12

Pourquoi cette affaire est-elle importante selon vous? Why do you think this case was important?

AA – The outcome is extremely important. We now have clear authority for the federal government to impose national minimum standards of environmental protection, not just for GHG, but for anything. The absence of a national standard would have a tremendous negative impact on other provinces or other nations. In a legal sense,

there is nothing special about the case. According to me, the written judgment doctrinally did not move one inch beyond *Crown Zellerbach*'s, but in a political sense I think it is incredibly important. Remember that Saskatchewan very stupidly brought its reference case[34] even before the *Greenhouse Gas Pollution Pricing Act*[35] became law; it was only a bill at the time. Not only did that help us rethink the bill and make amendments before Parliament passed it, but it forced Saskatchewan to accept a defeat in Court as a political setback.

NC – First of all, this case is important from a division of powers perspective because it clarified jurisdictional authority to make laws in relation to climate change in Canada, especially with respect to carbon pricing. This case was a reference question which asked whether the federal government has jurisdiction to enact a national carbon price floor in order to reduce nationwide emissions, and the Court decided that it did have such jurisdiction. The outcome is significant politically because it ends a three-year partisan battle where provinces argued the federal government does not have this jurisdiction. Another reason the case is significant is that it shed light on interpretation of the national concern branch of the POGG, and there has not been very much jurisprudence on POGG. There has always been a fear that if it is interpreted too broadly, it could upset the balance of powers, so the courts have always been cautious about it. The national concern test interpreting POGG was first elaborated in 1988, in the *Crown Zellerbach* decision. In the present case, the Court had to look at this test and saw how it applies to the unique, complex, multifaceted issue of climate change. The Court found that there is an appropriate role for the federal government to set a national price floor for carbon pricing that applies nationwide. It is a key tool in making sure that our emissions are going to go down in accordance with our national and global targets. What's also key, though, is the Court's interpretation of the double aspect doctrine, which essentially means jurisdiction over GHG emissions reductions is not an either/or proposition, and that the federal law (which acts as a backstop) does not preclude the provinces from enacting laws that also lower GHG emissions, as long as they do so under provincial jurisdictional authority. Indeed, provinces are free to exceed the benchmark set by the federal government. The federal government enacted a national carbon price floor that operates as a

34. *Greenhouse SKCA*, *supra* note 18.

35. SC 2018, c 12, s 186.

backstop in the sense that it only applies in provinces if they do not put in place their own carbon pricing that meets the benchmark. It is a very deferential, carefully drafted legislation that was designed to allow provinces to take the lead in pricing carbon using their own systems. Any future federal legislation related to climate change would have to meet the thoughtful test elaborated in *Crown Zellerbach* and fine-tuned in this case that ensures any federal legislation is respectful of federalism and provincial authority.

SE – Climate change is arguably the greatest economic and environmental challenge of our time, and Canada is finally beginning to take it seriously. After more than 20 years of little action, the federal government had finally decided to take real action on climate change, and this law was the principal policy tool it was using. The case was obviously very important from a constitutional perspective, but it also was part of a larger climate and political battle, as the Conservatives worked to demonize and polarize carbon pricing. If this case had been lost, this paralyzing national battle about carbon pricing would have been reignited just at a time when we were close to moving beyond it as a nation. The decision allowed us to move on to the many other things we must do to tackle climate change, and build a low carbon economy for the future.

DR – Elle est importante parce que les enjeux sont importants. Imaginez si la loi avait été jugée invalide, il aurait fallu que le Parlement et le gouvernement canadien reprennent la plume et redéfinissent son régime alors que la crise climatique sévit déjà. La Cour suprême vient de juger valide un volet très important de la stratégie fédérale de lutte contre les changements climatiques. Donc, le jugement est important. Les enjeux sont cruciaux parce que le jugement est un premier pas vers une plus grande justice climatique à long terme, vers une prise de conscience de nos institutions, de leurs obligations en matière de changement climatique. Le droit n'évolue peut-être pas au rythme que les scientifiques souhaiteraient, mais parfois il est nécessaire d'avoir des recours juridiques justement pour éclaircir certains points. Ce jugement est donc majeur parce qu'il vient valider une loi fédérale qui est importante dans la stratégie de lutte contre les changements climatiques.

QUESTION 13

Est-ce que vous pouvez voir des liens entre cette affaire, et peut- être même plus particulièrement votre intervention, et d'autres affaires climatiques qui ont eu lieu soit au Canada, soit ailleurs dans le monde? Are there any connections that you could make between this case and other climate lawsuits?

AA – In this case, none of the arguments and precedent cases we used had anything to do with climate change. In my argument, I did not cite a single climate change decision from elsewhere, because Canada is not particularly connected to any other legal system in the world except maybe Britain. I do not think there are connections between this case and other climate lawsuits. The notion that there is a dialogue between the courts of different nations on peculiar constitutional matters is comforting and cute, but rarely true. It did not matter in the least to this case that there had been climate change lawsuits elsewhere.

NC – There are many great cases that have come out in other jurisdictions which were sources of inspiration. The federal government mentioned some of the international decisions (from the Netherlands, Pakistan, France, Germany, etc.) to reassure the Court that courts around the world are increasingly taking climate change seriously. The tide of climate litigation is turning, with more decisions favouring an outcome that empowers action to rapidly reduce emissions. We know this is a crisis, and we have to act fast, so whether it is a division of powers case, a constitutional rights case, a tort duty or responsibility, as we have seen in other cases, there is a movement. We are seeing it in the youth climate litigation cases as well. There are a few cases in Canada where litigants are seeking to have the courts recognize a constitutional obligation to do more and act faster on climate change. Some of these decisions are final, whereas others are under appeal. The Supreme Court's pronouncement about the gravity of the situation and the urgency to act, and the fact that it is going to have a disproportionate impact, will undoubtedly be referenced in those cases. There are a lot of complexities and specifics to each individual case, but it certainly will add some wind into the sails of those cases.

SE – In the courts below, we also argued that the law could be upheld under the treaty implementing power. Our basic argument was that every other federation in the world allows its federal government

to implement its climate treaty commitments. I researched federations such as Germany, Switzerland, the US and Australia, and how their constitutions had been interpreted. We thought it was unlikely that the Court would decide the case under the treaty power, which has a long and complex history, but at least it would provide important context—showing that federal climate leadership is the global constitutional norm. Given our tight time limit at the Supreme Court, we left it to my colleague Professor Jeremy De Beer to advance that argument, on behalf of another intervener.

DR – Oui, absolument. Il peut y avoir des liens, mais en même temps ce sont des dossiers différents. Ici, c'est vraiment un dossier de partage de compétences. La question, c'était de savoir si le Parlement a le pouvoir constitutionnel d'adopter cette loi, tandis que dans les autres dossiers climatiques, dont celui d'*Environnement jeunesse c Canada (PG)*[36], entre autres au Québec, contre le gouvernement fédéral, ce sont des dossiers qui touchent principalement aux droits et libertés fondamentaux (le droit à l'intégrité physique et psychologique, donc, le droit à la sécurité individuelle, etc.). Ce sont des questions juridiques différentes. Par contre, quand la Cour reconnaît que les peuples autochtones sont disproportionnellement touchés par les changements climatiques, ça peut avoir un certain poids devant les tribunaux dans d'autres dossiers, entre autres, des dossiers de droits et libertés. Ce jugement peut aussi aider le gouvernement dans des litiges de droit public. Le fait que la Cour suprême a validé la loi fédérale sur la tarification du carbone, qui est un volet important de la stratégie gouvernementale, pourrait aider le gouvernement dans ces dossiers. Le gouvernement va alors pouvoir affirmer qu'il agit. Nous n'avons donc pas repris les arguments émis dans d'autres affaires climatiques, parce que notre intervention était assez spécifique. Elle était vraiment sur des points de droit constitutionnel du partage des compétences.

36. 2021 QCCA 1871.

QUESTION 14

Quelle influence cette décision pourrait-elle avoir ou a déjà selon vous, que ce soit au Canada ou ailleurs? What could this decision's influence be, whether it is here, in Canada, or elsewhere?

AA – Self-aggrandizing environmentalists love to exaggerate their movement politics. We're not making a global treaty here; we're just winning a Canadian Court case through an abstruse and rarely used alleyway of constitutional law. In Canada itself, there are two important influences that one can attribute to this decision. One, if a future government wants to have national minimum standards for some other environmental problem that has impact outside of a province, the Constitution will allow that government to do so. Two, by winning this case, no political party in any election will find it easy to oppose the carbon tax, since it has now been reinforced by the Constitution.

NC – I think it will definitely have an impact. I actually think it is already having an impact in Canada, because the federal government can now be confident in its ability to legislate and continue using this national carbon price to continue lowering GHG emissions in the country.

DR – Le jugement a un impact direct et immédiat dans les provinces canadiennes où il n'y avait pas de régime. Dans les provinces où le système de tarification du carbone prévu par la loi s'applique, les gouvernements ont un choix à faire : accepter la tarification fédérale ou élaborer leur propre régime interne soumis à l'évaluation fédérale. Ce sont par la suite les expert.e.s du gouvernement canadien qui détermineront si le régime élaboré par ces provinces est satisfaisant. En ce qui concerne le partage des compétences, il est certain que cette décision-là va avoir un impact à long terme. Ce renvoi va être repris dans plusieurs autres jugements de la Cour suprême parce que cela aura été la première fois, depuis 1988, que la Cour a appliqué la doctrine de l'intérêt national. Au cœur de ce renvoi se trouvent aussi les principes d'équilibre du fédéralisme canadien, qui sont toujours très importants dans toute cause en matière de partage des compétences.

QUESTION 15

Quelle est la suite? What's next?

AA – The Supreme Court will definitively have to deal with more environmental constitutional cases, for instance in relation to the plastics case, the *Canadian Environmental Protection Act*[37] constitutional challenge.[38] If I had a client, I would probably join in that case because at this point, I know that field so well. If the Trudeau government ever gets around to legislating the grand environmental promises it has made, such as to ban gas cars, then that is likely to spur litigation too. But not all those promises are sincere, obviously.

NC – There seems to be some sense of urgency within many governments that we need to act quickly on climate change. We have record levels of heat-related deaths in British Columbia, wildfires burning out of control, flooding events, destructive storms, droughts—the climate crisis is unfolding as we watch. We are seeing more rapid policy development, but it is still very insufficient, we are still not doing nearly enough. I hope we will see more collaboration, even within governments that do not agree with each other. Climate change should not be a partisan issue. I am very interested in seeing more climate litigation cases filed, and hopefully start to see some positive decisions. We also need to focus on adaptation, such as investing in infrastructure resilience. Mitigation and adaptation policies need to be designed carefully to ensure they are equality-supporting, and not inadvertently adding yet another burden to disadvantaged groups. We need to invest in safeguarding ecosystems as they help make us more resilient. We need to talk about the loss and damage from climate change. How we are going to deal with that in terms of accountability and responsibility is going to be more and more difficult as the years go on. We must think about all of this—climate mitigation, adaptation, and loss and damage—through a lens of equality and climate justice.

DR – Il y a peut-être d'autres litiges qui vont venir au CQDE. Nous sommes assez actifs et actives, étant plusieurs avocat.e.s membres du comité juridique de l'organisme. Il va probablement y avoir d'autres dossiers en environnement en raison de la jonction particulière entre

37. SC 1999, c 33.

38. *Responsible Plastic Use Coalition v Canada (Minister of the Environment and Climate Change)*, 2023 FC 1511.

le droit constitutionnel et le droit de l'environnement, c'est certain. Je vais continuer à collaborer avec le CQDE. Nous verrons ce qu'il résultera des poursuites de groupes de jeunes Canadiens devant les tribunaux. La réponse que les tribunaux leur donneront va aider à structurer les prochaines étapes.

CONCLUSION

Cette affaire, dont la défense était assurée en partie par certain.e.s membres du Centre du droit de l'environnement et de la durabilité mondiale de la Faculté de droit de l'Université d'Ottawa, est un pas en avant historique. Toutefois, elle reste une étape parmi d'autres pour permettre au Canada de respecter ses objectifs en matière climatique. Le pays fait partie des dix plus gros émetteurs historiques de CO_2 et est touché de plein fouet par les effets des changements climatiques, ainsi qu'en témoignent, pour ne prendre que l'exemple le plus récent, les terribles incendies qui ont touché, en mai 2023, l'Est du Canada après avoir ravagé l'Ouest le mois précédent. Cette décision de la Cour suprême s'inscrit dans un contexte social et politique particulièrement actif sur les questions environnementales. Les décisions gouvernementales sont de plus en plus scrutées par la société civile, dans un sentiment d'urgence grandissant et une attente croissante de la population envers les des décideurs politiques.

Cette décision est un pas de plus vers l'aboutissement d'un nombre grandissant d'affaires portées devant les juridictions provinciales et fédérales pour influer sur l'action politique en matière climatique. À titre d'exemple, le 14 avril 2023, la Cour supérieure de l'Ontario a rendu sa décision dans l'affaire *Mathur v R*[39], dans laquelle un collectif de jeunes a contesté devant la justice canadienne la décision du gouvernement provincial de l'Ontario de baisser ses objectifs de réduction des émissions de gaz à effet de serre. Si la Cour a rejeté la requête, son chemin judiciaire n'est pas terminé et le fait que cette demande a été déclarée recevable est une avancée en elle-même.

Cette décision est également le reflet d'une volonté de contrôle juridictionnel de l'action politique en matière climatique. Le présent article tente de rendre compte du processus de décision de la Cour suprême, de la large palette des raisonnements de la défense pour amener la Cour à rendre cette décision historique et des répercussions

39. 2023 ONSC 2316.

immédiates et futures de cet arrêt, tant en ce qui concerne la lutte contre le réchauffement climatique qu'en matière constitutionnelle ou la défense des intérêts particuliers de certaines catégories de population (les Premières Nations, les femmes). En clarifiant le partage des compétences entre le gouvernement fédéral et les provinces en matière de tarification de la pollution par les GES, la Cour suprême a bâti un socle jurisprudentiel sur lequel d'autres décisions pourront venir s'appuyer concernant le droit de l'environnement et la lutte contre le réchauffement climatique. C'est en cela que cette décision de la Cour suprême est historique. Les membres du Centre du droit de l'environnement et de la durabilité mondiale de la Faculté de droit de l'Université d'Ottawa qui ont participé à la défense des parties civiles dans cette affaire sont fier.ère.s et honoré.e.s d'avoir pu ainsi apporter leur pierre à cet édifice. Le présent article permet de mettre en avant le rôle fondamental que jouent les expert.e.s, notamment dans le cadre du contentieux climatique, marqué par une grande technicité, l'organisation de leurs plaidoiries et les relations des expert.e.s entre eux et elles tout au long de l'affaire. En donnant directement la parole aux expert.e.s qui sont intervenu.e.s dans l'affaire des *Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre*, cet article permet d'explorer la perspective d'intervenant.e.s-clés dans cette affaire. Ces entretiens sont en cela particulièrement instructifs sur le rôle de ces intervenant.e.s, leurs stratégies, l'organisation de la Cour et plus généralement, sur la place et l'importance de cette affaire dans le contentieux climatique au Canada et dans le monde.