

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)**

**IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
SC 2018, c. 12, s. 186
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT
GOVERNOR IN COUNCIL TO THE COURT OF APPEAL FOR ALBERTA
UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S.26**

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA,

Appellant

- and -

ATTORNEY GENERAL OF ALBERTA,

Respondent

- and -

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PART I – OVERVIEW

1. On January 27, 2020, the Attorney General of New Brunswick (“AGNB”) filed its factum in the matter of the *Attorney General of Saskatchewan v Attorney General of Canada* (Court File No 38663) and *Attorney General of Ontario v Attorney General of Canada* (Court File No 38781), wherein the AGNB argues the *Greenhouse Gas Pollution Pricing Act*¹ (“the Act”) is unconstitutional as it infringes on matters of provincial competence.
2. On February 24, 2020, the Alberta Court of Appeal (“ABCA”) issued a decision in *Reference re Greenhouse Gas Pollution Pricing Act*,² declaring the Act unconstitutional.
3. On March 25, 2020, the Attorney General of British Columbia referred the ABCA decision to this honorable Court.
4. The AGNB offers the following submission in respect of the ABCA’s decision.

PART II – ISSUES

5. Did the ABCA correctly decide that Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act* are unconstitutional in their entirety?

PART III – ARGUMENT

A. Introduction

6. In an effort to determine the proper characterization of the Act, the ABCA carefully reviewed the Act’s purpose and effects. In so doing, the ABCA came to the same conclusion as argued by the AGNB, the Act’s matter is the “regulation of GHG emissions.”³

¹ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

² 2020 ABCA 74 [*ABCA Decision*].

³ *ABCA Decision*, *supra* note 2 at para 256.

7. Without generalizing or restricting the true character of the *Act* through a fixation on outcomes, the ABCA analyzed the authority the *Act* confers on the executive branch of government and determined that it provides for vast discretion “*to take whatever other steps the Executive decides should be taken to mitigate climate change.*”⁴ It is the AGNB’s position, in keeping with the ABCA’s reasons, that such broad sweeping powers fail to respect the balance of powers envisioned in our Constitution.⁵

8. The AGNB wishes to emphasize two conclusions of the ABCA: 1) policy preference does not equate to provincial inability; and 2) a matter classified as a national concern must only fall into the province’s residuary power under s 92(16).⁶

B. Provincial Inability, not Policy Preference

9. Federalism requires respect for regional differences and not the imposition of preferred policy under the pretence of a “national concern.”

10. As articulated by Le Dain J in *R v Crown Zellerbach*, the final criterion for a matter to be classified as a national concern “*would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.*”⁷ This mandatory criterion for stripping a province of its constitutional competence is not met in the present case. The ABCA considered the various provincial approaches to mitigating the risks of climate change and determined that Canada had failed to provide sufficient evidence that the actions or inactions of one province with respect to greenhouse gases (“GHG”) emissions regulation will cause “measurable harm” to another province.⁸

11. Canada’s zealotness to combat the unquestioned effects of GHG emissions resulted in classifying as a national concern that which can and properly should be addressed by both the

⁴ *ABCA Decision*, *supra* note 2 at para 221.

⁵ *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 (UK) [*Constitution Act*].

⁶ *Constitution Act*, *supra* note 5.

⁷ [1988] 1 SCR 401; 49 DLR (4th) [*Crown Zellerbach*], para 33.

⁸ *ABCA Decision*, *supra* note 2 at para 324.

federal and provincial governments, within their own sphere of constitutional competence.⁹ The federal government's preferred course of action, with its Nobel accolades, cannot trump a province's exclusive jurisdiction over property and civil rights, the development and management of its natural resources, and its local works and undertakings.¹⁰

12. In *Reference re Genetic Non-Discrimination Act*, Kasirer J noted that the proponents of a particular "sound policy" should lobby at the appropriate government level in keeping with the spheres of constitutional jurisdiction.¹¹

13. As outlined by the ABCA and the AGNB's earlier factum, there are countless issues that are of national concern, including for example, public health. The current global pandemic has impacted all provinces and territories, as it has the whole world. COVID-19 has demonstrated that it does not respect borders. However, the federal government has not attempted to usurp provincial jurisdiction over hospitals, business operations or interprovincial borders. Admittedly, a global pandemic may more accurately fall under the "emergency" doctrine, rather than the national concern doctrine. But what will inevitably result, presuming good governance, will be public health/pandemic planning for future coronavirus outbreaks. Is this another matter wherein the federal government will dominate, setting national standards for the stockpiling of N-95 masks and ventilators, imposing conditions on the education system with respect to minimum time in a classroom, or mandating immunizations? Each of these decisions have downstream consequences: economic, ethical, social, legal and regional, which is why they are properly matters for provincial jurisdiction.

14. While the Public Health Agency of Canada has provided guidelines to assist provinces in their own public health measures, each province and territory has determined what measures will be adopted. Some provinces require masks, others closed borders and yet, others have few legally mandated restrictions. What is abundantly clear from the pandemic we currently face is that provinces may take different approaches to achieve an outcome that will have impact on the rest

⁹ *ABCA Decision*, *supra* note 2 at para 310.

¹⁰ *ABCA Decision*, *supra* note 2 at para 552.

¹¹ 2020 SCC 17, para 155 [*Re Genetic*].

of the Country and the world. Simply because one province may choose to embrace a measure, and another does not, does not translate into the inability of one province to act. Provincial inability has to mean more than forming an alternate policy choice. The ABCA notes at para 315 “...*the mere fact something one province does might adversely affect another economically, socially or environmentally is not itself a basis for the federal government’s taking over provincial jurisdiction under the national concern doctrine.*”¹²

15. As recognized by the majority, the federal government is not without recourse. In addition to implementing its preferred policy within the federal spheres of legislative competence, Parliament’s enormous spending power wields significant influence over provincial policies and programs.¹³

16. The AGNB respectfully submits that the ABCA correctly concluded that provincial inaction with respect to the federal government’s preferred policy choice does not meet the provincial inability test under the national concern doctrine. Thus, the ABCA’s determination that the *Act* is unconstitutional should be upheld.

C. National concern has limits

17. The peace, order and good government (“POGG”) authority is a residuary power afforded to Parliament to ensure the distribution of legislative authority is exhaustive. The residuary nature expressly confines the matters that may fall into this category as ones that are not assigned exclusively to the provinces. The national concern branch, in its application of the POGG power, relates to local matters that are transformed into concerns for the whole country. Based on one or more provinces’ inability to act on its own to address the issue, the matter is morphed into federal jurisdiction of a plenary nature.

18. The ABCA concluded at para 187 that “*the national concern doctrine does not apply to matters falling within the provinces’ exclusive jurisdiction under s 92, 92A or 109.*” Their

¹² *ABCA Decision, supra*, note 2 at para 315.

¹³ *ABCA Decision, supra* note 2 at para 188.

determination is based on the jurisprudence respecting the national concern doctrine, in particular Beetz J's decision in *Re Anti-Inflation Act*.¹⁴

19. In referring to the series of cases where an impugned law was being touted as a matter of national concern, Beetz J noted that the subject matters did not fall within an enumerated head of provincial power and, further, that they constituted a matter of national concern.¹⁵ A distinction must be drawn between the elevation of a local or private matter (a matter falling exclusively under s 92(16)) to that of a national concern and a full-scale usurpation of several heads of provincial legislative competence. The ABCA noted, as did Beetz J, that matters of national concern should not fall within an enumerated head of provincial power.¹⁶ The result of such an encroachment would fundamentally alter the distribution of powers.

20. The *Act's* imposition of charges in fields such as mining, agriculture, and energy development, to name a few, infiltrates provincial jurisdiction under ss 92(10), 92(13) and 92A.¹⁷ The various enumerated subsections under s 92 are intended to be the exclusive legislative responsibility of the provinces. Neither the constitutional framers, nor the jurisprudence support the federal government upending the balance of powers.¹⁸

21. In *Re Genetic*, this Court continued to endorse a division of powers approach that promotes intergovernmental cooperation.¹⁹ Principles of cooperative federalism and overlapping jurisdiction support a limited use of establishing new plenary heads of power that result in a misalignment of jurisdiction.

22. While Canada would suggest the application of the *Act* is constrained to establishing minimum national standards integral to reducing nationwide GHG emissions, the ABCA rightly

¹⁴ [1976] 2 SCR 373, 68 DLR (3d) 452 [*Anti-Inflation*]; *ABCA Decision*, *supra* note 2 at para 175.

¹⁵ *Anti-Inflation*, *supra* note 14 at 457.

¹⁶ *Anti-Inflation*, *supra* note 14; *ABCA Decision*, *supra* note 2 at para 665.

¹⁷ *Constitution Act*, *supra* note 5.

¹⁸ *ABCA Decision*, *supra* note 2 at para 842.

¹⁹ *Re Genetic*, *supra* note 11 at para 22.

concluded that the regulation of GHG emissions, the true matter of the *Act*, is akin to the federal government assuming jurisdiction over the environment.²⁰ As the environment is not a matter that exclusively falls under either provincial or federal jurisdiction, the federal government must work collaboratively with provinces to ensure the proper balancing of powers is achieved. This is of absolute necessity when the matter is both within the sphere of provincial and federal competence.

23. To invoke a residual power, a matter must be sufficiently distinct, indivisible and be singular in nature to distinguish it from provincial matters. The ABCA further noted that a new plenary head of power must “*be one that Parliament should obviously have.*”²¹ When a matter invades so many classes of subject under provincial jurisdiction, how could it obviously belong to the federal government? It is a constitutional imperative that a national concern doctrine requires that the “*scale of impact on provincial jurisdiction*” be “*reconcilable with the fundamental distribution of legislative power under the Constitution.*”²²

24. The ABCA outlines how the *Act* invades every aspect of business operation and every day life in a clear effort to reduce GHG emissions.²³ As a result of its pervasive nature, there are no boundaries of its extent and form.²⁴ Yet, if all provinces implement their own carbon pricing schemes that align with federal standards, Wakeling J notes the *Act* serves no purpose, other than as “*a cheerleader.*”²⁵

25. The AGNB respectfully submits that the ABCA was correct in its determination that the *Act* is not a matter of a national concern, as it would permit Canada’s appropriation of several enumerated heads of provincial power. The national concern doctrine should be limited to instances where a matter of local or private nature in a province has risen to a national concern and in addition to its singleness, distinctiveness and indivisibility, the provinces must also be truly unable to act. A modern approach to our Constitution and its federal structure demands deference

²⁰ *ABCA Decision, supra* note 2 at para 836.

²¹ *ABCA Decision, supra* note 2 at para 684.

²² *Crown Zellerbach, supra* note 7 at para 33.

²³ *ABCA Decision, supra* note 2 at paras 800, 832, 847.

²⁴ *ABCA Decision, supra* note 2 at 296.

²⁵ *ABCA Decision, supra* note 2 at para 866.

to the respective areas of provincial competence. Intergovernmental cooperation, as opposed to complete federal legislative control, is the appropriate path to conquer the world's climate crisis.

PART IV – COSTS

26. The AGNB does not seek costs on this intervention and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of August, 2020.



Rachelle Standing
Isabel Lavoie Daigle
Counsel for the Intervenor,
The Attorney General of New Brunswick

PART VII – AUTHORITIES

Case Law		Cited at paragraphs
1	<i>Re Anti-Inflation Act</i> , [1976] 2 SCR 373, 68 DLR (3d) 452	18, 19
2	<i>Reference re Genetic Non-Discrimination Act</i> , 2020 SCC 17	12, 21
3	<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2020 ABCA 74	2, 3, 4, 6, 7, 8, 10, 11, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25
4	<i>R v Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401; 49 DLR (4th)	10, 23

Legislation		Cited at paragraphs	
1	<i>Greenhouse Gas Pollution Pricing Act</i> , SC 2018, c 12, s 186	<i>Loi sur la tarification de la pollution causée par les gaz à effet de serre</i> , LC 2018, ch 12, art 186	1, 2, 5, 6, 7, 16, 20, 22, 24, 25
2	<i>Constitution Act, 1867 (UK)</i> 30 & 31 Victoria, c 3	<i>Loi constitutionnelle de 1867</i> , 30 & 31 Victoria, c 3	7, 8, 19, 20, 23, 25