

Court File No.: 39116

**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 -

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,
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BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF
SASKATCHEWAN, CANADIAN TAXPAYERS ASSOCIATION, CANADIAN**
(Style of cause continued on next page)

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AND SASKENERGY INCORPORATED**
(Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada)

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I. PART I – OVERVIEW

1. This factum is filed in relation to the appeal from the decision of the Alberta Court of Appeal¹ and the Order of this Court dated May 7, 2020.

II. PART II – STATEMENT OF ISSUES

2. This factum addresses two issues arising from the decision of the Alberta Court of Appeal and the Attorney General of British Columbia’s subsequent appeal to this Court, namely:

- (a) What is the pith and substance of the *Greenhouse Gas Pollution Pricing Act* (the “*GGPPA*”)²?
- (b) Does the national concern branch of POGG save the *GGPPA* from unconstitutionality?

III. PART III – STATEMENT OF ARGUMENT

A. *Matter of the Act*

3. While the Ontario and Saskatchewan Courts of Appeal focussed their characterizations of the matter of the *GGPPA* on minimum standards (“the establishment of minimum national standards of price stringency for GHG emissions” and “establishing minimum national standards to reduce GHG emissions”, respectively), the Alberta Court of Appeal observed that minimum national standards are but the tool selected by Parliament to serve the true purpose of the *GGPPA* and to achieve the desired effects of the *GGPPA*.

4. Rather, the purpose of the *GGPPA* is to regulate and reduce GHG emissions. The means by which the federal government seeks to do this is by setting minimum pricing

¹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [“*Alberta Reference*”].

² *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

standards relating to GHG emissions. The Alberta Court of Appeal found that the true matter of the *GGPPA* is, “at a minimum, regulation of GHG emissions,”³ and this means regulation of the natural resource-related industries that emit GHG.

5. The effect of the *GGPPA* is to regulate natural resource-related industries; the preamble, the legislation, and the regulations are all aimed squarely at the natural resources sectors and those that consume natural resources, how much electricity is generated, and how much natural gas is used. The affidavits filed by Saskatchewan Power Corporation (“**SaskPower**”) and SaskEnergy Incorporated (“**SaskEnergy**”) in the Alberta Reference also provide concrete evidence of the regulatory effects of the *GGPPA*.

6. It is respectfully submitted that common sense led the Alberta Court of Appeal to correctly conclude that: “All the labels counsel and courts can come up with to characterize the “matter”, including all the ones already used, cannot take the “matter” with which this Act actually deals, the regulation of GHG emissions, outside the scope of provincial jurisdiction.”⁴

B. National Concern Branch of POGG is not applicable to the GGPPA

7. To find that the *GGPPA* is made constitutional by operation of the national concern branch of the peace, order, and good government federal power (“POGG”), the Court would be required to significantly expand the national concern doctrine to be potentially extremely far-reaching. The Alberta Court of Appeal was appropriately hesitant to do so, noting that: “For generations, courts have been highly reluctant to use the national concern doctrine to create new judge-made heads of federal power.”⁵

8. From the perspectives of SaskPower and SaskEnergy, the more immediate concern is that Canada’s proposed expansion of the national concern doctrine in this case would

³ *Alberta Reference*, *supra* note 1 at para 211.

⁴ *Ibid.* at para 297.

⁵ *Ibid.* at para 17.

render s. 92A – that very specific and important bulwark of provincial jurisdiction – meaningless. The Alberta Court of Appeal noted that: “Assigning this *Act* or a class of laws of this nature to Parliament would forever alter the constitutional balance that exists between the heads of power allotted to Parliament and the provincial Legislatures in the federal Canadian state.”⁶ In reaching this conclusion, the Alberta Court of Appeal noted that it was required to consider the “full panoply” of provincial powers, which necessitated a review of the powers conferred to the provinces by way of s. 92A.⁷ The majority in both the Saskatchewan and Ontario Courts of Appeal failed to undertake that analysis.

9. Section 92A was borne out of another international crisis. The Federal Government’s response to the energy crisis of the mid-to-late 20th Century was the National Energy Program, which the Supreme Court of Canada described as “a blend of **tax and regulatory** policies aimed at realizing the three precepts stated by the responsible Minister, with emphasis on promoting the Canadianization of energy resources, the encouragement of energy conservation and the support of an allocation scheme”.⁸ As observed by the Supreme Court, the National Energy Program included a “pricing and revenue-sharing regime” over natural resources with the view towards regulating these industries.⁹ The Alberta Court of Appeal aptly noted that these interventionist policies¹⁰ of the Federal Government during that crisis led to over a decade of contentious intergovernmental disputes and strained Confederation to such a degree that a constitutional amendment was required to confirm that the Provinces have exclusive authority to legislate over development, conservation, and management of non-renewable natural resources and facilities for the generation and production of electricity in the Provinces.

⁶ *Ibid.* at para 21.

⁷ *Ibid.* at para 126.

⁸ *Reference re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1021 (emphasis added).

⁹ *Ibid.* at 1016.

¹⁰ This term was used by La Forest J. in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 376.

10. Confederation now faces a 21st Century crisis involving energy production and management. The Federal Government has again sought to impose pricing and regulatory policies on the Provinces in response to this crisis. Respectfully, the partners to Confederation could not have been any clearer in enacting s. 92A that the Provinces have the responsibility and the power to take on such challenges relating to natural resources and energy generation, and to come up with the policies and solutions that take into account the circumstances of each Province. The Alberta Court of Appeal summarized this point as follows:

[T]he arduously achieved *Resource Amendment* is not a constitutional nothing. The *Resource Amendment* and the provinces' proprietary rights confer significant powers over the sustainable development of natural resources – *and that necessarily includes regulation of GHG emissions through carbon pricing and otherwise*. In other words, short of the use of the federal declaratory power and the emergency POGG power, the purpose of s 92A, when passed, was to bar the federal government's intrusion into a province's development and management of its natural resources.¹¹

11. The resource amendment in s. 92A was part of the constitutional compromise that the provinces entered into with Canada in 1982 to preserve a Confederation strained by Canada's pricing and regulatory policies. Section 92A reflects the acknowledgement of the federal Crown that the Provinces can, and should, be entrusted with exclusive competence to legislate over the management of natural resources and electrical generation.

12. It is respectfully submitted that the Alberta Court of Appeal was also correct in distinguishing the analysis of this legislation from the analysis contained in *Crown Zellerbach*¹² and *Ontario Hydro*. Neither involved a legislative grant of power as specific and pointed as that found in s. 92A. Section 92A is not a broadly worded grant of authority from which one may surgically remove a single and distinctive matter; if the federal government is permitted to manage natural resources and electrical generation, then s. 92A, as an exclusive legislative grant to the Provinces, is simply lost.

¹¹ *Alberta Reference*, *supra* note 1 at para 271.

¹² *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401.

13. The Alberta Court of Appeal’s comments regarding the provincial inability component of the *Crown Zellerbach* test make clear the inherent conflict in Canada’s view of this issue. The Majority wrote: “The provinces have the unchallengeable jurisdiction to reduce GHG emissions.... [B]ecause the federal government believes a province’s failure to act would not ensure the overall efficacy of the federal government’s policy choice, the jurisdiction of *all the provinces* should be overridden. This cannot be.”¹³ Indeed, the fact that all the provinces have clear jurisdiction to reduce GHG emissions, have taken steps to do so as outlined in the Alberta record, and are recognized even within the *GGPPA* as having the ability to do so, all further demonstrate that the *GGPPA* cannot pass the ‘provincial inability’ test.

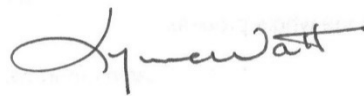
IV. PART IV - SUBMISSION CONCERNING COSTS

14. SaskPower and SaskEnergy do not seek costs and request that no costs be ordered against them.

V. PART V – ORDER SOUGHT

15. SaskPower and SaskEnergy support the orders requested by the Attorneys General of Saskatchewan, Alberta, and Ontario declaring that the *GGPPA* is wholly unconstitutional.

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


for:

David M.A. Stack, Q.C.

Counsel for the Intervener, Saskatchewan
Power Corporation and SaskEnergy
Incorporated

¹³ *Alberta Reference*, *supra* note 1 at para 311.

VI. PART VI – TABLE OF AUTHORITIES AND LEGISLATION

	Cited at Paragraph No.
Authorities	
<i>Ontario Hydro v Ontario (Labour Relations Board)</i> , [1993] 3 SCR 327	9, 12
<i>R v Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	12, 13
<i>Reference re Exported Natural Gas Tax</i> , [1982] 1 SCR 1004	9
Statutes	
<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> (L.C. 2018, ch. 12, art. 186)	