File No.: 39116

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF 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 OF ALBERTA UNDER THE *JUDICATURE ACT,* RSA 2000, c. J-2, s. 26

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Intervener)

- and-

ATTORNEY GENERAL OF ALBERTA

Respondent
(Appellant)

-and-

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(Title of Proceeding Continued on p. 2)

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INDEX

PART I – OVERVIEW AND STATEMENT OF FACTS 1

PART II – POSITION ON APPELLANT'S QUESTION 1

PART III – ARGUMENT 1

A. The Alberta Court of Appeal Correctly Held that the Pith and Substance of the Act is the Regulation of Greenhouse Gas Emissions 1

B. Regulating Greenhouse Gas Emissions is Not an Appropriate Matter to Add to the List of Enumerated Federal Powers Through the National Concern Doctrine 4

C. The Regulation of Greenhouse Gas Emissions Is Not a Single, Distinct and Indivisible Matter Suitable for Federal Regulation Under the National Concern Doctrine 5

1) The Court of Appeal Correctly Applied "Provincial Inability" 7

D. Giving Parliament Jurisdiction over Greenhouse Gas Emissions Would Radically Alter the Constitutional Division of Powers 9

PART IV – COSTS 10

PART V – TABLE OF AUTHORITIES 11

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Unlike the majorities of the Ontario and Saskatchewan Courts of Appeal, four judges of the Alberta Court of Appeal came to the conclusion that the *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186 (the "Act") cannot be upheld under the national concern branch of the Peace, Order and Good Government power. This Court should affirm that finding.

2. The Alberta majority correctly concluded that the pith and substance of the Act was, as Canada itself initially and frankly argued, the regulation of greenhouse gases *simpliciter*. It then correctly held that regulating greenhouse gases is not suitable to be permanently conferred on Parliament as a new matter of national concern: it lacks the requisite singleness, distinctness, and indivisibility and it would impermissibly unbalance the constitutional division of powers.

3. Ontario continues to rely on the facts set out in its factum on its own and Saskatchewan's appeals and adopts the further facts stated by the Attorney General of Alberta in this appeal.

PART II – POSITION ON APPELLANT'S QUESTION

4. The Attorney General of British Columbia ("British Columbia") relies on the national concern branch of the Peace, Order and Good Government ("POGG") power as the sole basis for the constitutionality of the Act. Ontario submits that the Act cannot be upheld under that power.

PART III – ARGUMENT

A. The Alberta Court of Appeal Correctly Held that the Pith and Substance of the Act is the Regulation of Greenhouse Gas Emissions

5. In striving to uphold the Act, the majority and concurring opinions in the other references and the dissent in Alberta adopted characterizations of the Act's pith and substance, or "matter" that inaccurately attempt to portray its scope as narrow and innocuous:[1]

- Saskatchewan majority (Richards CJS and Jackson and Schwann JJA): "the establishment of minimum national standards of price stringency for GHG

[1] Alberta Reasons at paras. 253-56 (majority)

emissions" (para. 125);

- Ontario majority (Strathy CJO and MacPherson and Sharpe JJA): "establishing minimum national standards to reduce greenhouse gas emissions" (para. 77);
- Ontario concurrence (Hoy ACJO): "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (para. 166); and
- Alberta dissent (Feehan JA): "to effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions" (para. 943).

6. The evolution of the Act's alleged pith and substance in response to the various arguments raised against its validity is reflective of characterization exercises that were overly influenced by classification.[2] Each new characterization reflected a further attempt to narrow the Act's pith and substance beyond what the Act's actual purpose and effects allow to avoid upsetting the balance of powers between the federal government and the provinces. While characterization should capture the law's essential character in terms that are as precise as the law will allow, precision should not be confused with narrowness that does not reflect the law's true character.[3] As the Alberta majority correctly found, "it is the *Act* that dictates the characterization; the characterization does not dictate the scope of the *Act*."[4] Nor is it "the court's role to try and find a way to wedge federal legislation into the national concern doctrine."[5]

7. As the Alberta majority correctly found, it is overly narrow to characterize the Act as merely establishing "minimum national standards" of anything. Rather, the purpose and effect of

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[2] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 31 [*Reference re Genetic Non-Discrimination Act*]; *Chatterjee v Ontario (Attorney General),* 2009 SCC 19 at para. 16, [2009] 1 SCR 624

[3] *Reference re Genetic Non-Discrimination Act* at para. 32

[4] Alberta Reasons at para. 207 (majority)

[5] Alberta Reasons at para. 208 (majority)

both Parts of the Act at issue here is more accurately characterized as the regulation of greenhouse gas emissions.[6] The Act's Preamble indicates Parliament's intent to take "*comprehensive* action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change," including the use of pricing of greenhouse gas emissions "on a basis that *increases over time*".[7] This is not the language of minimum standards.

8. The Act's legal and practical effects are similarly comprehensive. Part 1 of the Act provides that a "charge" can be placed on any "fuel" sold, consumed, produced, or imported into Canada, fuel being broadly defined as any "substance, material, or thing" prescribed by the Governor in Council. As the Alberta majority held, there is no upper limit on the price that can be set on greenhouse gas emissions, no limits on how stringent a provincial pricing mechanism needs to be to satisfy the Governor in Council to exempt a province from Part 1's application, and in fact, given that a price can be placed on anything, no limit on the federal Executive's power "to take *whatever other steps the Executive decides should be taken to mitigate climate change*."[8]

9. In any event, the words "minimum standards" do not limit the scope of the Act in any meaningful way. As the Alberta majority noted:

> "Minimum standards", because they are minimum, cover the entire waterfront of regulation of all aspects of GHG emissions. That means the federal government would control GHG emissions from zero content and composition to infinity. And since the *Act* prescribes a minimum price for GHG emissions but no maximum, the federal government would also control GHG emissions from a zero price to infinity. In the result, this would give the federal government control over "the regulation of GHG emissions" in their entirety. Viewed from this perspective, while "minimum

[6] Alberta Reasons at para. 256 (majority)
[7] *Greenhouse Gas Pollution Pricing Act*, Preamble [emphasis added]
[8] Alberta Reasons at paras. 221-27 (majority) [emphasis added]

> national standards for price stringency of GHG emissions" is certainly a more subtle and less obvious way of saying "regulation of GHG emissions", in the end there is no substantive difference between the two characterizations.[9]

Nor is it an answer that the federal government may choose not to exercise the full scope of discretion granted it. The *Act*'s validity cannot depend on the ebb and flow of discretion exercised underneath it.[10]

10. The Alberta majority's characterization of the Act's pith and substance is neutral and as precise as the law requires. It has come back to what Canada itself initially and frankly asserted at the outset of the litigation of these references – that the pith and substance of the Act 'is *no less than* the 'regulation of greenhouse gas emissions.''"[11]

B. Regulating Greenhouse Gas Emissions Is Not an Appropriate Matter to Add to the List of Enumerated Federal Powers Through the National Concern Doctrine

11. The Alberta majority correctly held that regulating greenhouse gas emissions, however formulated, is not a matter suitable for permanent federal regulation as a matter of national concern. The Alberta majority did so on two bases. First, the Alberta majority held that matters which fall within any of the provincial enumerated powers, other than the residual s. 92(16) power, cannot also fall within the national concern doctrine.[12] While it is open to this Court to accept that reasoning, it is not necessary that it do so to conclude that the *Act* is *ultra vires.*

12. Second, the Alberta majority held that even if the national concern doctrine could apply, the "matter" at issue – no matter how characterized – would not meet the *Crown Zellerbach* test: it lacks the necessary singleness, distinctiveness, and indivisibility; and permanently conferring

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[9] Alberta Reasons at para. 253 (majority)
[10] *R v. Hydro-Québec*, [1997] 3 SCR 213 at para. 73 (*per* Lamer C.J. and Iacobucci J., dissenting but not on this point)
[11] Alberta Reasons at para. 256 (majority)
[12] Alberta Reasons at paras. 185-86 (majority)

Parliament jurisdiction over it would radically alter the balance of the Canadian federation. In Ontario's submission, they were correct in so holding.

C. The Regulation of Greenhouse Gas Emissions is Not a Single, Distinct and Indivisible Matter Suitable for Federal Regulation Under the National Concern Doctrine

13. The Alberta majority correctly held that greenhouse gas emissions are insufficiently single, distinct, or indivisible to be regulated under the national concern doctrine. The regulation of greenhouse gases is not a discrete matter. It is an aggregate of provincial powers; no more acceptable as an exclusive head of federal power than the "environment" or "climate change".[13] The fact that provinces may avoid being "listed" if they have their own carbon pricing schemes in place itself demonstrates that the Act's matter is not single, distinct or indivisible. Parliament can only gain permanent jurisdiction over a new matter of national concern "when it is *beyond* the power of the provinces to regulate." How, then, can the provinces be expected to regulate the exact same matter in order to avoid the federal "backstop"?[14]

14. The Alberta majority correctly distinguished the regulation of greenhouse gas emissions from the regulation of marine pollution that was at issue in *Crown Zellerbach*. In *Crown Zellerbach,* Le Dain J made clear that it was not simply the possibility of the movement of pollutants across the boundary from inland marine waters (i.e. marine waters within a province) to the territorial sea (an area governed by federal jurisdiction) that rendered dumping in marine waters "indivisible" under the national concern doctrine. Rather, it was the difficulty in determining, for regulation and enforcement purposes, whether a regulated entity was polluting marine waters within a province, or in the territorial sea outside the province:

> [T]he difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable

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[13] Alberta Reasons at paras. 288 and 296-97 (majority)
[14] Alberta Reasons at para. 291 (majority)

> degree of uncertainty for the application of regulatory and penal provisions. *This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances*."[15]

As the Alberta majority noted, no such problem exists with respect to greenhouse gas emissions within a province. The sources of emissions from industry and regulated persons within each province are readily identifiable.[16] Each province can regulate greenhouse gases emitted in their jurisdictions. There is no jurisdictional uncertainty in determining where such emissions arise. [17]

15. Nor does the use of "minimum national standards" or "minimum national pricing standards" language alter this conclusion, as they allow Parliament to intrude on a wide range of provincial powers whenever it prefers a different approach to regulation. Minimum national standards or prices could be established concerning home heating and cooling; land use zoning; public transit; road design and use; and any other matter that impacts greenhouse gas emissions. The disparate and broad types of standards and prices that would be permissible under such a new federal power illustrates how it would not be single, distinct and indivisible. As the Alberta majority put it, "backstoppism" is not a separate head of federal power.[18]

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[15] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 437 [emphasis added] [*Crown Zellerbach*]

[16] Alberta Reasons at para. 293 (majority)

[17] In contrast, see *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para. 114 [Ontario Reference] and *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para. 154 [Saskatchewan Reference] where the majority decisions of both courts failed to properly distinguish *Crown Zellerbach.*

[18] Alberta Reasons at paras. 294-95 (majority). See also Ontario Reference at paras. 237 (*per* Huscroft JA dissenting)

1) The Court of Appeal Correctly Applied "Provincial Inability"

16. The Alberta majority correctly held that "while provincial inability can be an indicia of distinctiveness, the one is not a proxy for the other."[19] It also correctly held that "provincial inability" refers to whether the provinces, acting alone or in concert, have the *jurisdictional* ability to regulate greenhouse gas emissions and not merely where there is a practical inability of one province to regulate greenhouse gas emissions emitted in other provinces.[20]

17. Applying that test to the Act, the Court of Appeal held that there is no provincial inability, because the provinces, acting alone or in concert, are constitutionally capable of enacting their own preferred schemes; a comparable scheme to the federal Act; or, the exact same scheme. The backstop language demonstrates that the provinces could do just that.[21]

18. The Ontario and Saskatchewan decisions illustrate the problems applying a broader test for "provincial inability" would cause. The Ontario majority held that "provincial inability" exists because provinces cannot, on their own, reduce Canada's net emissions or set minimum national standards.[22] But if that were the test, there would be provincial inability every time Parliament sets a national standard because by definition no province can do so.[23]

19. Similarly, the Saskatchewan majority held that, because climate change is a global problem, it requires a global response.[24] But in today's increasingly interconnected world, many local issues relating to property and civil rights are also global issues. Applying so lenient a test would unduly expand the national concern doctrine and threaten the entire division of powers.

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[19] Alberta Reasons at para. 299 (majority)
[20] Alberta Reasons at para. 308 (majority)
[21] Alberta Reasons at para. 310 (majority)
[22] Ontario Reference at para. 117 (*per* Strathy C.J.O.)
[23] Alberta Reasons at para. 309 (majority)
[24] Saskatchewan Reference at para. 156 (*per* Richards C.J.S.)

20. The Ontario majority also found provincial inability because one province might choose not to cooperate in setting a single national standard.[25] But there is nothing to prevent the provinces working together to reduce greenhouse gas emissions. As the Alberta majority points out, the provinces can and have worked together to solve international environmental issues.[26]

21. The "provincial inability" standards applied by the Ontario and Saskatchewan majorities are inconsistent with this Court's approach to interpreting the general trade and commerce power – another head of power that threatens to overlap significantly with provincial matters, thus requiring a narrow interpretation to preserve the balance of the federation.

22. This Court has held that, to determine whether a matter will be sufficiently national in scope to be regulated under the general trade and commerce power (rather than as a matter of property and civil rights), it must be "of such a nature that provinces, *acting alone or in concert*, would be *constitutionally incapable* of enacting it."[27] The Alberta majority correctly held a similar analysis should be applied to the provincial inability analysis here. Otherwise, the test for applying the *residual* national concern doctrine would be broader than the test for determining whether a matter falls under the *enumerated* general trade and commerce power – a result incongruous with our constitutional architecture.[28]

23. As the Alberta majority points out, the provinces are not incapable of acting. Nor have they in fact chosen not to act. On the contrary, every province can and has done so.[29]

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[25] Ontario Reference at para. 120 (*per* Strathy C.J.O.)
[26] Alberta Reasons at para. 310 (majority)
[27] *Reference re Securities Act,* 2011 SCC 66 at para. 80, [2011] 3 SCR 837 [emphasis added]; Saskatchewan Reference at paras. 413-14 (*per* Ottenbreit and Caldwell J.J.A., dissenting)
[28] Alberta Reasons at para. 305 (majority)
[29] Alberta Reasons at para. 310 (majority)

D. Giving Parliament Jurisdiction over Greenhouse Gas Emissions Would Radically Alter the Constitutional Division of Powers

24. For a "matter" to qualify as a matter of national concern, it must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.[30] The Alberta majority correctly held that recognizing the regulation of greenhouse gas emissions as a permanent new federal head of power would not be reconcilable with the constitutional division of powers.

25. Whether the proposed new "matter" is characterized broadly or narrowly, recognizing it as a permanent new matter of national concern would permit Parliament to, in its sole discretion, intrude deeply into traditional areas of provincial jurisdiction without necessarily giving heed to the significant regional differences that led Canada to adopt a federal form of government. Furthermore, since the concept of "minimum standards" has no upper limit, nothing would prevent Parliament from validly imposing any standards it prefers on virtually any activity or product. After all, nearly everything we do produces greenhouse gas emissions.[31]

26. Contrary to the findings of the Ontario majority, the backstop nature of the Act does not make room for provincial choice in a manner consistent with our constitutional architecture. Rather, it drastically limits provincial freedom to choose how best to combat the environmental concerns all provinces share in a manner consistent with local needs and concerns.[32] A province's choice to combat climate change by means other than pricing, or to pair a lower price with other tools, can be overridden just because it is not Parliament's preferred policy choice.

27. Allowing Parliament to do so would be inconsistent with our constitutional architecture. Under the Constitution, Parliament and the provincial Legislatures are coequal in their respective

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[30] *Crown Zellerbach* at 432
[31] Alberta Reasons at para. 333 (majority)
[32] Alberta Reasons at paras. 316, 330 (majority)

spheres. Neither is subordinate to the other. The powers of the provincial Legislatures are not granted by the Parliament of Canada, and they cannot be taken away, altered, or controlled by the Parliament of Canada.[33] Rather, as the Alberta majority points out, they can only be altered by a constitutional amendment to which, unlike the creation of a new matter of national concern, the provinces have the right to dissent.[34]

28. If Parliament can take over wholesale areas of provincial jurisdiction simply by (1) establishing that a subject is important to the nation; (2) claiming that "national standards" are needed as a result; (3) putting a price on whatever it wishes to regulate; and (4) allowing provinces some discretion as to how to comply with Parliament's dictates, the careful balance of the division of powers would be disrupted. As the Alberta majority concluded, "the power to tax is not the only power to destroy. Undermining the provinces' powers through federal legislation which might at first blush appear benign, but which is anything but, is equally destructive."[35]

PART IV – COSTS

29. Ontario does not seek costs in respect of its participation as an intervener in this matter and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 11TH DAY OF AUGUST, 2020

Josh Hunter Padraic Ryan Otto Ranalli

[33] Saskatchewan Reference at para. 216 (*per* Ottenbreit and Caldwell JJA, dissenting); *Hodge v The Queen* (1883), [1883] JCJ No 2 at para. 36, 9 App Cas 117 at 132 (PC); *Reference re Secession of Quebec,* [1998] 2 SCR 217 at paras. 55-58

[34] Alberta Reasons at para. 337 (majority); *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 38(3)

[35] Alberta Reasons at para. 341 (majority)

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE	**Paragraph Reference in Factum**
Chatterjee v Ontario (Attorney General), 2009 SCC 19	6
Hodge v The Queen (1883), [1883] JCJ No 2, 9 App Cas 117 (PC)	26
R. v. Crown Zellerbach Canada Ltd., [1988] 1 SCR 401	14, 23
R v. Hydro-Québec, [1997] 3 SCR 213	9
Reference re Genetic Non-Discrimination Act, 2020 SCC 17	6
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544	5, 14, 15, 18, 20
Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40	5, 14, 19, 21, 26
Reference re Secession of Quebec, [1998] 2 SCR 217	26
Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837	21

LEGISLATION	**Paragraph Reference in Factum**
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (English): s. 38(3) (French): s. 38(3)	26
Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12, s. 186 (English): Preamble (French): Préambule	7