Court 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

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)

(Title of Proceeding continued on next page)

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

1. The Attorney General of Saskatchewan intervenes in this application to support the position of the Respondent Attorney General of Alberta, particularly in his position that that the *Greenhouse Gas Pollution Pricing Act* (hereinafter the "Act") is unconstitutional in its entirety.

2. Saskatchewan submits that the *Act* represents a serious and illegitimate attempt at displacing provincial jurisdiction over subject matters reserved for the provinces under sections 92 and 92A of the *Constitution Act, 1867*.

3. Saskatchewan submits that the self-described "backstop" mechanism of the *Act* represents an illegitimate interference with provincial jurisdiction and makes provincial sovereignty over provincial subject matters illusory. A backstop model in which provinces may exercise ordinary jurisdiction, but only subject to a "national standard" is an affront to Canadian federalism.

4. Provincial sovereignty over a subject matter means nothing unless it means total policy discretion to legislate as a province sees fit. The nature of the Canadian federation is that unified action on any particular issue requires negotiated cooperation on a matter that crosses jurisdictional boundaries.

5. Canada and the provinces together are fully equipped to address climate change or any other issue in a concerted way according to their respective spheres of jurisdiction. Cooperative federalism allows for creative approaches that respect – rather than jettison – the division of powers.

6. The Appellant fails to satisfy the high degree of reluctance demanded of the Canadian Constitution to disrupt the balance of the federation to carve out a new niche of federal jurisdiction away from the provinces under the National Concern doctrine of the POGG power.

7. A national standard must fail the test for the National Concern doctrine's application because a "national standard" cannot be understood to be a subject matter at all. It instead simply assumes that the federal government's view on an issue matter must prevail over all provinces,

simply because of the importance of the issue. The notion of a national standard cannot interfere with the policy discretion of a province over subject matters within its own jurisdiction.

8. Global concerns and international commitments have no bearing on this division of powers question. Just as Canada remains sovereign in the face of international movements, so do sovereign provinces.

PART II – POSITION

9. The Attorney General for Saskatchewan takes the position that the *Greenhouse Gas Pollution Pricing Act* is ultra vires the Federal Parliament.

PART III – ARGUMENT

A. Irrelevant Considerations

10. This appeal does not raise the question of risks posed to the country or the world by climate change; nor is it about whether putting a price on carbon is an effective policy tool to combat global warming caused by greenhouse gas emissions. It is improper to frame the jurisdiction question as turning on whether something will be done about a serious issue. The decision to tackle climate change is a political one. The strength of the collective will of Canadian society to act will play out politically. It is constitutionally impermissible to short-circuit the proper pathways of legislative action by ripping policy discretion from the provinces in favour of the federal government. In Canada, for over 150 years, policy issues have been divided by central and regional governments according to our Constitution to reflect and accommodate our enormous geographic space and diversity. This circumstance, and the fundamental fact of federal variety and freedom, is the bedrock of our legal structure.

11. The federal government insists on the urgency and heightened importance of the climate change challenge in order to invite the courts to alter the balance of powers in our country. Such

arguments may be relevant to an emergency power analysis but are irrelevant in a National Concern branch case.

12. The circumstances of international agreements are also wholly irrelevant to the scope of provincial legislative jurisdiction in a division of powers case as found in *A.G. Canada* v. *A.G. Ontario (Labour Conventions),*[1] recently affirmed by this Court in *Pan-Canadian Securities*.[2] Canada has a long history of successfully concluding treaties, notably in trade agreements, by first ensuring the concurrence of the provinces in matters over which they have jurisdiction.

B. Parliament's Jurisdictional Reach

13. The *Act* is unprecedented in Canadian history. The *Act*, in its preamble, acknowledges that provinces have the legislative jurisdiction to combat climate change by imposing their own carbon pricing regimes. However, the *Act* provides that when provinces (like Saskatchewan) have not imposed their own carbon taxes or when Provinces (like Manitoba) have not imposed sufficiently stringent carbon taxes, then the federal government will step in and impose carbon taxes in these provinces. This results in a federal legislative regime imposing carbon taxes in some provinces but not others. Saskatchewan says that this is fundamentally inconsistent with the principles of federalism which underlie our Constitution and, therefore, is *ultra vires*.

14. It is important to be clear about the scope of the power the Attorney General of Canada is asserting. The proposed transferred power demanded by the Attorney General of Canada is "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions". Canada asserts total "backstop" supervision and imposition powers over any initiative that it sees as an "integral" minimum standard to reduce GHG emissions. Canada is asking for more than backstop pricing in its interference with provincial powers. We do not yet know what this will further entail.

15. A power to set minimum standards over provincial jurisdiction makes provincial sovereignty meaningless. There are proper constitutional limits to provincial powers to be sure.

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[1] [1937] A.C. 326 (P.C.)
[2] *Reference Re Pan-Canadian Securities* 2018 SCC 48 at para. 66.

Some are *Charter* related. Others relate to respective federal powers and the doctrine of paramountcy, where there is some overlap in the proper exercise of different powers. None of the proper limitations over provincial powers assert that Parliament has a parental role of supervising the provinces. The closest concepts to this would be the emergency power, where provincial powers are temporarily displaced and, perhaps, the archaic disallowance power – also qualitatively and mechanically different.

16. The Attorneys General of Canada and British Columbia are asking for a novel recognition of dual jurisdiction that belies the basic nature of Canadian federalism which is premised on exclusivity. The requested doctrine seems to assume that either jurisdiction may regulate in this area provided each is ratcheting policy in a particular direction. This puts a policy assumption above the sovereignty of the proper legislature.

C. Provincial Autonomy

17. The concepts of provincial sovereignty and autonomy are fundamental to Canada's federal structure. The Privy Council recognized very early on in its jurisprudence concerning the Canadian Constitution that the provinces are sovereign and autonomous within the areas of jurisdiction assigned to them by the *Constitution Act, 1867* and have the right to make decisions with respect to these matters without their decisions being second guessed or overridden by the federal government. In *Reference re The Initiative and Referendum Act* in 1919, Viscount Haldane put it as follows:

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Province should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the

> Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.[3]

D. National Standards

18. Fundamentally problematic is that in order to justify this transfer of legislative authority, it is argued not that there is a genuine new power to describe, but that there be a national standard over what would otherwise be provincial powers.

19. Such a conclusion is both radical and illusory. A three-stage sleight-of-hand is performed. First, a mechanism is described: "pricing stringency" for example (which if not a tax must be understood as interference with local retail markets within provincial jurisdiction). Second, because authority to enact this interference would be provincial, the federal measure is said to be merely a national standard, and therefore distinct - a minimum requirement for the provinces as they exercise their own powers to enact the very same mechanism the federal government favours. Third, because the pith and substance of the measure is said to be a national standard, then by definition, no province is able to enact such a standard. It therefore falls to the federal government under National Concern. And all the while, the sleight-of-hand succeeds because of the pressure of the high importance of the problem being addressed, and because of the charged word "pollution" in the *Act* distracting from the reality of the regulation of ordinary daily activities and industrial pursuits in Canada.

20. This is not to say that there ought not to be national standards. National standards are undoubtedly a desirable thing in many areas. The *National Building Code* is an example. Provinces however remain sovereign in the establishment of construction standards within their territories and adopt the standard as they see fit. It is not surprising that there is wide conformity with or adoption of good standards that persuade the relevant authorities. There is never a question of imposing the Code onto provinces against their will. That is constitutionally impermissible.

21. A national standard over a provincial power must honestly be recognized to be in fact a federal takeover of a provincial power. There is nothing distinct about a national standard that

[3] [1919] AC 935, at p. 942.

separates it from the subject matter it qualifies. If a province has exclusive jurisdiction over property and civil rights in the province, but is subject to national standards, then it no longer has exclusive jurisdiction.[4] The same could be said for its exclusive jurisdiction over the management of natural resources under section 92A. Exclusive jurisdiction must include the right of a province to go in any direction that its elected legislature chooses, regardless of the views of Parliament that are constitutionally irrelevant with respect to that subject matter.

22. Similarly, there is nothing inherently modest about a minimum standard. The minimum is whatever the federal government wishes it to be, is as large as the federal government wishes it to be, and may at any time represent direct opposition to the will of a provincial legislature.

E. Backstop Legislation

23. The history of Canadian jurisdictional squabbles reveals the periodic necessity of checking the centralist instinct (the Ottawa-knows-best instinct) to encroach on provincial powers.

24. Back-stopism is a new form of federal overreach that has no accepted precedent in Canadian history. It is invasive and an affront to provincial sovereignty. It is all the more insidious given the false appearance of modesty. It says to the provinces, "you may act as you wish, provided you satisfy federal preferences". It says, "you may choose any direction you wish, provided it is our direction and provided you go as far as we say you must in that direction".

25. Back-stopism goes on to posit that not only is a province strait-jacketed by the policy mandates of Ottawa, but that Parliament is authorized to enter in and displace at any given time provincial will with a federal statute and that this is triggered simply by the failure of a province to satisfy the federal Cabinet in the exercise of provincial jurisdiction.

26. Back-stopism makes a mockery of modern co-operative federalism. Co-operative federalism is the freedom that the respective governments have to enter into creative arrangements

[4] See generally, Hamish Telford, "The Federal Spending Power in Canada: Nation Building or Nation-Destroying?" (2003) 33 Journal of Federalism 23, at p. 42 and Alexis Belanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const. F. 21.

in order to advance common goals.[5] Back-stopism instead represents coercive federalism which relies not on the power of persuasion and negotiated solutions favourable to all parties, but a mere show of flexibility that relies instead on the threat of direct interference by Ottawa. This is not a constitutional innovation that the courts should encourage.

27. A province that asserted a power to strait-jacket federal policy in a similar way would be transparently absurd. A different reaction to this federal illegitimate invasion, where the shoe is on the other foot, simply betrays a false assumption that the federal government has a primary role, even over provincial heads of power. This is contrary to Canadian federalism.

F. The Exclusive Nature of Canadian Legislative Powers

28. This Court recognized that environmental protection is not a subject matter that is exclusively within the jurisdiction of the provinces or of the federal Parliament. It also recognized that this is the very reason why the courts must be very wary of an expansive view of the POGG power as a tool for federal environmental protection.[6]

29. The exclusive nature of the POGG National Concern branch was confirmed in *R.* v. *Crown Zellerbach Ltd.* where Le Dain J. for the majority (in approval of the conclusions drawn by Beetz J. in the *Anti-Inflation Act Reference*) emphasized:

> Where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.[7]

30. The concern of the courts has been that neither level of government should be found to have exclusive jurisdiction in the diffuse domain of environmental protection. The importance of this subject matter is such that both levels must have space within their respective heads of power to regulate within their respective policy interests as they relate to their proper areas of jurisdiction.

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[5] See, *e.g.*, *Reference Re Securities Act* 2011 SCC 66 at paras 9, 62, 133
[6] *R.* v. *Hydro-Quebec*, [1997] 3 SCR 213, at paras. 112-116.
[7] [1988] 1 S.C.R. 401 at para. 34.

31. The operating word in sections 91 and 92 of the *Constitution Act, 1867* is the word "exclusively". There are a small number of concurrent areas of jurisdiction, such as agriculture and immigration in section 95. These are the exceptions that prove the rule. The doctrine of paramountcy and the doctrine of double aspects are mechanisms that exist only because of occasional overlap around the margins of the powers.

32. Canada's argument in this case, and the premise of the *GGPPA*, is that Canada and the provinces have concurrent jurisdiction over a matter that Canada asserts is of "National Concern" in the POGG sense. This is impossible, according to the *Crown Zellerbach* authority and all relevant others. The alternate argument - that the jurisdiction is different in that the federal government can be said only to have jurisdiction over national minimum standards integral to GHG emission reduction - is meaningless and constitutionally pernicious for reasons set out above. It cannot be the case that the National Concern power gives to Parliament and the provinces the power to impose the exact same burdens for the exact same reasons.

33. None of the National Concern cases present the notion of concurrent jurisdiction over the exact same matter as the *GGPPA* does. Both the preamble to the *Act* and the consistent arguments of the federal Attorney General insist that the federal government has authority to impose on the people and industries in a province the exact kinds of burdens the federal government expects the provincial governments to impose directly. Again, this is the novel mechanism of back-stop legislation. In *Crown Zellerbach*, by contrast, the federal government narrowly won jurisdiction over marine pollution, removing it altogether from provincial reach.

34. Finally, it is to be emphasized that the double aspects doctrine does not rescue the *GGPPA*. This doctrine does not do away with exclusive jurisdiction by allowing two levels of government to do the exact same thing for the exact same reason. As observed by Justice Beetz in *Bell Canada* v. *Quebec*:[8]

> The double aspect theory is neither an exception nor even a qualification to the rule of exclusive jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which

[8] [1988] 1 S.C.R. 749 at 766.

> Parliament and the legislatures may legislate on the same aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.

35. Saskatchewan submits that this exactly describes as forbidden what the *Act* wishes to assert is possible.

36. The federal Attorney General properly relies on the *Crown Zellerbach* decision's summary of the test for the National Concern doctrine. For a matter to be identified as a national concern, strict parameters were identified in order to prevent the POGG power from simply being a tool of endless jurisdictional erosion of provincial powers. These parameters were described as the requirement for "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."

37. Whatever else might be said of the *Act*, its attempt to create concurrent jurisdiction over greenhouse gas regulation cannot meet any test for "distinguishing it from matters of provincial concern". Again, both the structure of the *GGPPA* backstop mechanism and Canada's position fail to respect this requirement. Even if concurrent jurisdiction were possible in a POGG matter, POGG is found only where there is no concurrent provincial power according to *Crown Zellerbach*. A "backstop" statute is as distant as one could possibly get from this required distinction in that it is premised on provincial room to legislate in the matter.

38. The *GGPPA* may be said to be politically reconcilable with some provincial jurisdictions who happen to be content with the approval of the federal government, particularly if such provinces are not, for the time being, named in Schedule 1 by the Governor in Council for having insufficiently stringent carbon pricing regimes. But, of course, this is not the meaning of the division of powers reconciliation test. The test is whether the disruption to provincial legislative powers in a constitutional division of powers sense can be said to be minimal.

39. Saskatchewan submits the impact of the *GGPPA* on Saskatchewan's legislative authority and flexibility is irreconcilable. While Saskatchewan happens to be proud both of its own track record and further plans to deal with intra-provincial carbon emissions, the fundamental question is whether it has authority to set its own policies and legislation in the area of price controls without the coercion (rather than the influence) of the federal government.

PART IV - COSTS

40. The Attorney General for Saskatchewan makes no submission with respect to costs.

PART V – ORAL ARGUMENT

41. The Attorney General of Saskatchewan intends to present oral submissions at the hearing in accordance with the time allocation granted by the Court in the Draft Counsel sheet circulated August 4, 2020.

DATED at the City of Regina in the Province of Saskatchewan this 11th day of August, 2020.

for:

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PART VI – AUTHORITIES

Cases	**Para Refs:**
Bell Canada v Quebec, [1988] 1 RCS 749	34
Canada (AG) v. Ontario (AG) (Labour Conventions), [1937] AC 326 (PC)	12
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Secondary Sources

Belanger, Alexis, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const. F. 21	21
Telford, Hamish, "The Federal Spending Power in Canada: Nation Building or Nation-Destroying?" (2003) 33 Journal of Federalism 23	21