

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

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(style of cause continued below)

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(Pursuant to r. 42 of the Rules of the Supreme Court of Canada)

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PART I – OVERVIEW AND FACTS

1. In this appeal, the Attorney General of British Columbia (“AGBC”) argues that the Alberta Court of Appeal erred in its definitions of the pith and substance and double aspect doctrines of the Greenhouse Gas Pollution Pricing Act (“GGPPA”)¹ and that the Act falls within the federal government’s power under Peace, Order and Good Government (“POGG”).
2. The CTF intervenes in these appeals following the filing of a letter of Intention to Intervene in relation to a constitutional question filed on March 25, 2020. The CTF relies on the statements of facts in the Court’s file.
3. This factum is written in conjunction with an already filed factum in the companion appeals court file #38663 and #38781, filed January 27, 2020.
4. The majority and concurring opinions of the Alberta Court of Appeal (“ABCA”) wholly disagree with the assertion raised by AGBC in this appeal with regard to the GGPPA fitting into the narrow scope of the federal power under POGG.

PART II – QUESTIONS IN ISSUE

5. In its notice of constitutional question, the appellant Attorney General of British Columbia, asked the following:
 - i. Is the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c.12 unconstitutional in whole or in part?
6. It is the position of the Intervenor, the Canadian Taxpayers Federation (the “CTF”), that the conclusions of the Court of Appeal of Alberta should be confirmed by the Supreme Court of Canada, and the GGPPA should be declared unconstitutional and cannot fall within the limited scope of the POGG.

¹ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c.12, s. 186 (“GGPPA”)

PART III – ARGUMENT

A. The GGPPA and the POGG

7. Neither the “environment” nor “climate change” are mentioned in the *Constitution Act*². In *Friends of the Oldman River Society v Canada (Minister of Transport)* Justice LaForest stated:
- It must be recognized that the environment is not an independent matter of legislation under the Constitution Act, 1867 and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. (Emphasis Added)³
8. In *Crown Zellerbach*, Justice LaForest cautioned against recognizing a general federal power to legislate in relation to the environment, stating:
- To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction.⁴
9. It is clear from the current jurisprudence, that all environmental regulation falls somewhere between provincial and federal power. However, when it comes to “the real “matter” of the *Act* - the regulation of GHG emissions - falls squarely under specific heads of provincial powers is undeniable.”⁵ It was concluded by the majority in the Alberta reference that matters that already fall under a provincial head of power cannot be assumed under POGG.⁶ As parts of the *GGPPA* clearly fall within the provincial heads of power namely s 92 or 92A, it is impossible for the act to be held constitutional under the narrow scope of the POGG.⁷
10. Justice LaForest held that for a matter to qualify as a matter of national concern (1) it must have a “singleness, distinctiveness and indivisibility” that distinguish it from matters of provincial concern; (2) there must be provincial inability to address the matter; and (3) it must have “a scale

² [*Constitution Act, 1867*](#), 30 & 31 Victoria, c. 3 (U.K.) (“*Constitution Act*”)

³ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 (“*Oldman River*”), at Para 86

⁴ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 70 (“*Crwon Zellerbach*”).

⁵ Reference re [*Greenhouse Gas Pollution Pricing Act*](#), 2020 ABCA 74 (“**ABCA Carbon Tax Reference**”), para 262-280.

⁶ *ABCA Carbon Tax Reference*, *supra* at para 185-186.

⁷ *ABCA Carbon Tax Reference*, , *supra* at para 186.

of impact on provincial jurisdiction that is reconcilable within the fundamental distribution of legislative power.”⁸

11. In analysis of whether a matter in this case GHG emissions is

“single, distinctive, and indivisible, the further obiter on the national concern branch suggests that the courts are to consider whether the provinces are constitutionally incapable of regulating the matter”⁹
12. Stemming from the above it is logical then that any legislation that falls under the POGG of the national concern branch by definition cannot contain exemption for provinces that regulate the matter at issue namely [carbon tax with view of limiting GHG emissions].

“If any matter is to be regulated under the national concern branch of POGG, based on the underlying constitutional text and the cases that have stated the law on the point, the matter must be **indivisibly** regulated by the **federal government and is no longer subject to any provincial aspect.**”¹⁰[Empahis Added]
13. It is the respectful submission of the CTF that the *GGPPA* clearly infringes upon provincial head of power, especially when considering GHG emission from local projects which are extensively regulated by provinces, and fall squarely within the provincial powers enshrined in section s. 92(A), s. 92 (13) and s.109 of the *Constitution Act*, 1967.¹¹
14. There is no distinct “singleness, distinctiveness and indivisibility” that distinguishes the matter of GHG emissions from provincial concern, especially when it comes to Part II of the *GGPPA* which mainly regulates large emitters such as large resource based projects which are wholly in the jurisdiction of the provincial legislature under s. 92A (1) of the *Constitution Act*, 1867.
15. The ABCA specifically stated in its decision that the POGG should not be used as a “grand entrance hall” into provincial power.¹² That is exactly what the role of the *GGPPA* operation accomplishes, it distorts the division of power and imposes federal jurisdiction over a provincial

⁸ *Crown Zellerbach*, supra at para33. *ABCA Carbon Tax Reference*, supra at paras 183 and 406.

⁹ Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at p. 197.

¹⁰ *Ibid* at p. 197

¹¹ *ABCA Carbon Tax Reference*, supra at para 262-280.

¹² *ABCA Carbon Tax Reference*, supra at para 176

matter if provinces do not satisfy certain standards set as overreaching goals of the federal government.

16. The argument that GHG's are not confined to the province and there are extra provincial effects lacks the requisite singleness, distinctiveness and indivisibility under the POGG requirements as set out by the Supreme Court of Canada. The ABCA stated that the "mere fact a polluting substance cross[es] a provincial boarder would not be sufficient to invoke the national concern doctrine"¹³ Therefore, the argument that GHG emissions are an international/national issue does not in itself place the *GGPPA* within the narrow scope of the POGG federal power.
17. The ABCA and the Saskatchewan Court of Appeal ("SKCA") have both declined to find that the regulation of GHG's can be supported by the national concern branch.¹⁴
18. The Supreme Court of Canada has been consistent in its jurisprudence around POGG and once a matter is of national interest under POGG there is no more room for provincial jurisdiction.¹⁵ The Supreme Court of Canada determined that if a

"particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism"¹⁶

B. Conclusions

19. GHG regulation does not fall clearly under the federal jurisdiction as defined under the s.91 of the *Constitution Act*, 1867. The majority decision of the ABCA concluded that regulation of GHGs clearly falls at least partly within certain provincial heads of power. Therefore, it is not clearly ultra vires and constitutional by the *Constitution Act*, 1867 as within the jurisprudence of the federal government.

¹³ *ABCA Carbon Tax Reference*, *supra* at para 292. See also Supreme Court of Canada ruling in *Crown Zellerbach*, *supra* at 38.

¹⁴ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 138 and *ABCA Carbon Tax Reference*, *supra* at para 338.

¹⁵ *Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292, *Anti-Inflation Act*, [1976] 2 SCR 373, *Crown Zellerbach* and *R v Hydro-Québec*, [1997] 3 SCR 213 ("*Hydro*").

¹⁶ *R v Hydro-Québec*, *supra* at para 115.

20. If the *GGPPA* falls within the federal power under the POGG it would infringe too heavily on the jurisdiction of individual provinces. Furthermore, it does not meet the established test under the national concern doctrine as set out by the Supreme Court of Canada. It is respectfully submitted by the CTF that the POGG under the national concern doctrine cannot save the *GGPPA*, in making it constitutional. For POGG to have this expansive treatment, then Canada ceases to be a true Federation, and the provinces become subordinate to federal authority, as municipalities are within provinces.

21. Therefore, it is respectfully submitted that the *GGPPA* is wholly unconstitutional.

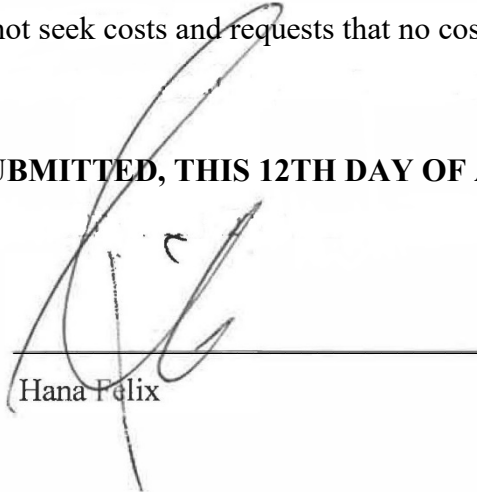
PART IV – COSTS

22. Canadian Taxpayers Federation does not seek costs and requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 12TH DAY OF AUGUST, 2020.



R. Bruce E. Hallsor, Q.C.



Hana Felix

PART VI – AUTHORITIES

Case Law:

<i>Anti-Inflation Act</i> , [1976] 2 SCR 373	18
<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , [1992] 1 SCR.....	7
<i>Johannesson v. Municipality of West St. Paul</i> , [1952] 1 SCR 292	18
<i>R v Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	8
<i>R v Hydro-Québec</i> , [1997] 3 SCR 213	18
<i>Reference re Genetic Non-Discrimination Act</i> , 2020 SCC 17	

Secondary Sources:

Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at p. 197.	11
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Legislation:

[*Constitution Act, 1867*](#), 30 & 31 Victoria, c. 3 (U.K.)

[*Loi constitutionnelle de 1867*](#), 30 & 31 Victoria, c 3

Greenhouse Gas Pollution Pricing Act, SC 2018, c.12, s. [186](#)

Loi sur la tarification de la pollution causée par les gaz à effet de serre (L.C. 2018, ch. 12, art. 186), a. [186](#)