

**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:

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APPELLANT
(Intervener)

-and-

ATTORNEY GENERAL OF ALBERTA

RESPONDENT
(Appellant)

-and-

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(Style of cause continued on next page)

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COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN
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(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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PART I – OVERVIEW

1. Climate change is defined by generational inequality. Canadian federalism is intended to benefit future generations. Canadian constitutional doctrines, including subsidiarity, support federal jurisdiction to enact the *Greenhouse Gas Pollution Pricing Act* (the “Act”).

PART II – POSITION

2. The Intergenerational Climate Coalition maintains that the entire *Act* is constitutional. In light of Canada’s fundamental concern for children and future generations, Parliament has authority under the national concern or emergency branch of POGG to set minimum national standards to reduce greenhouse gas (“GHG”) emissions, including a national backstop price.

PART III – ARGUMENT

A. Generational Asymmetry Defines Climate Change

3. Anthropogenic climate change is, by definition, a human problem. It is caused by human activities that emit greenhouse gases. Those gases have accumulated over decades and now threaten to tip our environment irreversibly into an increasingly unstable and inhospitable state.

4. More fundamentally, we have allowed – and continue to allow – those gases to accumulate because of a very human predicament: the people who benefit from GHG emissions are not the same people who will bear the costs of those emissions.

5. Current generations reap the rewards from GHG emissions, from warm homes in the winter to cheap summer travel, while future generations will suffer the consequences: extreme weather, floods, droughts, diseases, and the huge financial costs of adapting to those impacts.

6. Future generations also have no right to vote or otherwise participate in our decisions about whether and how to reduce GHG emissions. They depend on us to protect them from this systemic risk that threatens their interests, their environment, and their very existence.

7. This generational asymmetry defines the political reality of climate change. It is a fundamental aspect of this human problem, but it is entirely overlooked by the majority of the Alberta Court of Appeal and the Attorney General of Alberta. However, it is essential to

understanding the threat, the matter, and the relevant constitutional resources in this case.

B. Federalism Requires More Than a Balance Between Jurisdictions

8. Federalism is one of the principles that underlie and sustain the Canadian Constitution. It is one of the “vital unstated assumptions upon which the text is based” and must be understood in relation to the other constitutional principles and the Constitution as a whole.¹

9. The principle of federalism requires an interpretive approach that is both holistic and purposive. As this Court wrote in *Re Secession of Quebec*, federalism supports and facilitates the principle and practice of democracy by enabling citizens “to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.”²

10. In turn, democracy serves certain substantive goals, such as the promotion of self-government.³ In *R. v. Oakes*, the Court identified more specific values of democracy consistent with a familiar vision of human flourishing:

“respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁴

11. A purposive approach to the principle of federalism confirms similar motivating concerns. Federalism, by definition, does involve a jurisdictional balance between the provinces and the federal government.⁵ However, that balance must be understood and employed as a means to an end, not preserved as an end in itself. Federalism also serves a particular understanding of the good life illuminated by our practices, jurisprudence, and history.

12. As Justices Binnie and Lebel wrote for the majority in *Canada Western Bank*:

[22] ...The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and **to foster co-operation among governments and legislatures**

¹ *Re Secession of Quebec*, [1998] 2 SCR 217, at paras. 49-50.

² *Re Secession of Quebec*, at para. 66. See also para. 58.

³ *Re Secession of Quebec*, at para. 64.

⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136.

⁵ See, e.g., *Canada Western Bank v. Alberta*, 2007 SCC 22, at para. 24.

for the common good.

[23] ...the very functioning of Canada’s federal system must continually be reassessed in light of the fundamental values it was designed to serve.

[24] As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order...The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called “co-operative federalism.”⁶

13. Just as federalism must evolve in service of the common good, democracy also entails rigorous and perpetual improvement: “a functioning democracy requires a continuous process of discussion...No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top.”⁷

14. Our commitments to federalism and democracy orient us toward the future and, in particular, to the well-being of those Canadians who will come after us. They require us to consider how our decisions will impact future generations and their ability and willingness to carry on those traditions. We practice federalism and democracy today in part so that future Canadians will perceive their advantages and will adhere to them tomorrow. When we talk about federalism and the balance between jurisdictions that it requires, we cannot stop there. We have to remember the underlying purpose for the division of powers: to make life better for our children, grandchildren, and other future Canadians.

15. This concern is not just a product of contemporary jurisprudence. It also animated the framers of the *Constitution Act, 1867*. In addition to the comments made by John A. MacDonald and cited in the Intergenerational Climate Coalition’s first factum (para. 15):

- a) Both the Quebec Resolutions and the London Resolutions stated that “the best interests and future prosperity of British North America will be promoted by a Federal Union” (#1) and adopted “a view...to the promotion of the best interests

⁶ *Canada Western Bank*, at paras. 22-24 (emphasis added).

⁷ *Re Secession of Quebec*, at para. 68. See also para. 63.

of the people of these Provinces” (#3).⁸

- b) During the debates on Confederation, Mr. Hope Mackenzie stated that “union is desirable, not only because of its present advantages, but on account of our future prospects.”⁹
- c) The Honourable George Brown spoke more expansively on the topic:

the whole great ends of this Confederation may not be realized in the lifetime of many who now hear me. We imagine not that such a structure can be built in a month or in a year. What we propose now is but to lay the foundations of the structure – to set in motion the governmental machinery that will one day, we trust, extend from the Atlantic to the Pacific. And we take especial credit to ourselves that the system we have devised, while admirably adapted to our present situation, is capable of gradual and efficient expansion in future years to meet all the great purposes contemplated by our scheme.¹⁰

16. Like federalism and democracy, this commitment to the well-being of future generations is so evident and so fundamental to our system of government that it is “simply assumed.”¹¹ However, this basic orientation is missing from the account of federalism set out by the Alberta Court of Appeal majority and the Attorney General of Alberta.

C. Subsidiarity Favours Federal Jurisdiction in This Case

17. Subsidiarity is an underlying principle of federalism that assists in interpreting the heads of power in sections 91 and 92 of the *Constitution Act, 1867*.¹² In *Spraytech*, Justice L’Heureux-Dubé described subsidiarity as:

“the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.”¹³

18. Subsidiarity is a practical doctrine. Although it “indicates a preferable level (the lowest one

⁸ G. P. Browne, *Documents on the Confederation of British North America*, Toronto: McLelland and Stewart, pp. 154 and 217.

⁹ Canada, Parliamentary Debates on the Subject of the Confederation of the British North American Provinces, 8th Prov Parl of Canada, 3rd Sess (Quebec: Hunter, Rose & Co, 1865), p. 681.

¹⁰ *Id.* at p. 86 (Hon. Mr. Brown).

¹¹ *Re Secession of Quebec*, para. 62.

¹² *Re Assisted Human Reproduction Act*, 2010 SCC 61, para. 273; *Re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, para. 137.

¹³ *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para. 3.

possible)...whenever the theoretically optimal level is unable to accomplish a particular task, it is then up to the other level to take responsibility for this task.”¹⁴

19. As the Alberta Court of Appeal majority wrote, subsidiarity “reflects the political realities of our geographically large country whose population is concentrated in certain provinces.”¹⁵

20. The “political reality” in this case is the fundamental asymmetry of climate change. Current generations will enjoy the benefits from activities that generate GHG emissions, while future generations of Canadians will bear the full health, environmental, and financial costs of climate change. We have the votes and the ability to reduce emissions now, before we reach critical tipping points. They do not. They depend entirely on us to protect them.

21. The citizens who will be most affected by our GHG emissions are our future generations. The level of government closest to those future Canadians is the federal government. Today, we know only that they will be Canadians; we do not know which province they will inhabit.

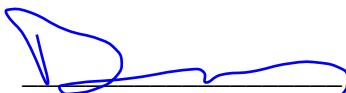
D. Conclusion

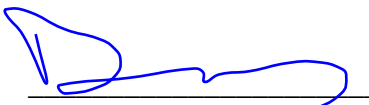
22. This is the rare federalism case that puts the interests and vulnerabilities of children and future generations squarely before the Court. Our federal system aims to promote their well-being. That basic commitment must inform the Court’s analysis of climate change and the Act.

PART IV – COSTS

23. The Intergenerational Climate Coalition does not seek costs for this intervention and appearance, and should not be subject to a costs award.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this August 12, 2020.


for: Nathan Hume


for: Emma K. Hume

¹⁴ Jean-François Gaudreault-DesBiens, “Constitutional Cases 2010: The ‘Principle of Federalism’ and the Legacy of Patriation and Quebec Veto References” 54 SCLR (2d) 77, at p. 107, quoting W. Ossipow, “Architecture Fédéraliste et Exigence de Justice” (1998) 9 Philosophie politique 113, at 127.

¹⁵Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74, para. 139.

PART VII – AUTHORITIES

CASES	CITED AT PARA.
<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40	17
<i>Canadian Western Bank v Alberta</i> , 2007 SCC 22	11, 12
<i>R v Oakes</i> , [1986] 1 SCR 103	10
<i>Re Assisted Human Reproduction Act</i> , 2010 SCC 61	17
<i>Re Greenhouse Gas Pollution Pricing Act</i> , 2020 ABCA 74	17, 19
<i>Re Secession of Quebec</i> , [1998] 2 SCR 217	8, 9, 10, 13, 16,
STATUTES & TREATIES	CITED AT PARA.
N/A	N/A
SECONDARY SOURCES	CITED AT PARA.
Canada, <i>Parliamentary Debates on the Subject of the Confederation of the British North American Provinces</i> , 8th Prov Parl of Canada, 3rd Sess (Quebec: Hunter, Rose & Co, 1865)	15
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