

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
GOVERNER 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

- and -

ATTORNEY GENERAL OF ALBERTA

Respondent

- and -

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Interveners

(Title of Proceedings continued on next page)

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TABLE OF CONTENTS

	Page No.
PART I - OVERVIEW OF POSITION AND FACTS	1
PART II - POSITION ON QUESTIONS RAISED	1
PART III - STATEMENT OF ARGUMENT	1
a) Health and the Environment are Examples of Concurrent Jurisdiction	1
b) Section 92A is Subject to Concurrent Jurisdiction	3
c) The GGPPA is Constitutional under the National Concern Branch	5
PART IV - TABLE OF AUTHORITIES	6

PART I - OVERVIEW OF POSITION AND FACTS

1. The *Greenhouse Gas Pollution Pricing Act* (“GGPPA”) is constitutional. The Alberta Court of Appeal (“ABCA”) erred by adopting a “watertight compartments” approach to interpreting the GGPPA. That approach is out of step with this Court’s emphasis on intergovernmental cooperation and valid overlap of provincial and federal legislation. The cooperative approach is critical when addressing amorphous issues such as the environment and public health. The Canadian Public Health Association (“CPHA”), as a national, independent, non-governmental organization at the forefront of public health policy for over a century, recognizes that legislative overlap in the area of public health is both inevitable and, in practice, essential.

2. The ABCA’s approach to s. 92A would create a “watertight compartment” for the natural resources industry that is without precedent and would impair national efforts to protect public health. A law is not directed at the “exploration for, development, conservation or management of natural resources” merely because it incidentally impacts the exploitation of natural resources by, for example, regulating emissions or toxic by-products in the interest of the public.

3. To the contrary, Federal laws protecting the environment and human health can and do validly impact companies and individuals involved in the exploitation of natural resources without purporting to “manage” those resources, and courts, including this Court, have upheld that legislation as constitutional. Similarly, the GGPPA is constitutional.

PART II - POSITION ON QUESTIONS RAISED

4. The GGPPA as a whole is constitutional. The ABCA majority erred in its decision.

PART III - STATEMENT OF ARGUMENT

a) Health and the Environment are Examples of Concurrent Jurisdiction

5. The ABCA’s decision fails to recognize that federal and provincial governments share jurisdiction over environmental and public health-related issues such as greenhouse gas (“GHG”) pollution. These issues are amorphous areas of law that lack the necessary definition to be categorized as a head of power under section 91 or 92.¹ They are not matters that are “subject to

¹ *Friends of the Oldman River v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 67-69.

specific constitutional assignment,” but instead “can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the... problem in question.”² As discussed below, courts have also specifically recognized concurrent and overlapping jurisdiction regarding provincial interests under s. 92A.

6. The ABCA’s decision is out of step with this Court’s movement away from “watertight compartments” towards an approach that embraces constitutional overlap and cooperation.³ That approach is particularly important when addressing “amorphous” issues like public health; as this Court recently held in *Reference re Genetic Non-Discrimination Act*, a case in which public health issues were at stake:

This Court’s approach to the division of powers has evolved to embrace the possibility of intergovernmental cooperation and overlap between valid exercises of provincial and federal authority. In keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed “watertight compartments” approach has long since been overtaken.⁴

7. It is well accepted that overlap “does not lead to a presumption that [Parliament] intended to rule out provincial legislation in respect of the same subject.”⁵ Nevertheless, the ABCA’s reasoning evidences just this presumption – treating federal legislation as displacing provincial power. This approach cannot be accepted. Parliament may legislate on legitimate federal purposes (here the environment and public health), without displacing provincial jurisdiction.⁶

8. The GGPPA does not purport to confer plenary power on the federal government in any event. As Feehan J.A. found in dissent, it “is structured to ... support provincial jurisdiction over existing carbon pricing policies” and “does not enforce a one-size fits all formula on provinces. It accommodates various provincial or territorial systems... [that] underlie the federal backstop.”⁷

² *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 142.

³ *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58 at paras 83-86.

⁴ *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 22.

⁵ *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 74.

⁶ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 39.

⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 1006.

b) Section 92A is Subject to Concurrent Jurisdiction

9. The ABCA erred in law by holding that ss. 92A(1), (2), and (4) confer “exclusive” jurisdiction over natural resources.⁸ Although s. 92A expanded the boundaries of provincial legislative authority on natural resources, the section does not oust federal power entirely. The ABCA’s approach treats any federal legislation that impacts natural resources as unconstitutional. This approach is not supported by our Constitution or the case law.

10. Instead, the federal government retains jurisdiction over national aspects of natural resources, even if exercising that jurisdiction has incidental effects on provincial interests. While s. 92A(1) gives provinces increased power over the development, conservation, and management of natural resources, the federal government retains its trade and commerce jurisdiction under s. 91(2) in respect of extra-provincial trade in resource production. Further, as stated in *Canadian Western Bank v. Alberta*, “merely incidental effects will not disturb the constitutionality of an otherwise intra vires law.”⁹

11. This Court has recognized concurrent jurisdiction in relation to s. 92A, making clear that “exclusive” provincial jurisdiction over natural resources does not displace federal jurisdiction. In *Ontario Hydro v. Ontario (Labour Relations Board)*, Lamer C.J. held that, while labour relations at Ontario Hydro were provincially regulated and the management of those activities fell under s. 92A(1)(c), employees engaged in the production of nuclear energy could be validly federally regulated under 92(10)(c) and the peace, order and good government (“POGG”) clause.¹⁰

12. The *Canadian Environmental Protection Act, 1999* (“CEPA”) offers an instructive example of a federal act that impacts provincial interests in national resources. CEPA regulates toxic substances nationally, including substances used or produced during the exploitation of natural resources in a province. It does so to further the protection of the environment and of public health. Regulated substances include volatile organic compounds associated with petroleum extraction,¹¹ industrial emissions (since 2005), carbon dioxide emissions related to coal-fired

⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para 60.

⁹ *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para 28.

¹⁰ *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 356.

¹¹ *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Schedule 1.

utilities (since 2012) and transportation emissions (since 2013).¹² Despite CEPA’s incidental impact on provincial jurisdiction over its natural resources industry, this Court held that it is a valid exercise of the federal government’s criminal law power in *R v. Hydro-Québec*.¹³

13. In *Syncrude Canada Ltd. v Canada*, the Federal Court of Appeal found that CEPA’s regulation of a natural resource product (there, fuel products) does not amount to federal “management” of natural resources. The regulation at issue in *Syncrude* required fuel producers and importers to include an average renewable fuel content based on the volume of diesel that they produce or import into Canada.¹⁴ The Federal Court of Appeal held that:

... Syncrude stands no different than any other consumer of diesel fuel in Canada, whether a trucking company, a municipal transit authority or a contractor with a diesel fuel requirement. The RFRs are laws of general application, **and not directed to the management of natural resources**.¹⁵ [Emphasis added.]

14. Alberta’s natural resources industry is in the same position as *Syncrude*. The GGPPA, like the regulation at issue in *Syncrude*, is a law of general application. Its regulation of GHG emissions is analogous to the regulation of toxic substances and petroleum products under CEPA. While the GGPPA has incidental effects on the provincial natural resource sector, it is not directed to the exploration, development, conservation, or management of those resources. A federal price on carbon does not interfere with provincial power in this regard.

15. The ABCA’s interpretation of s. 92A as creating not just exclusive provincial power, but provincial power *immune* from any federal concurrency, would nullify federal environmental and public health legislation wherever it impacted the natural resource industry. This would include important national regulation of toxic substances associated with that industry, including petroleum and refinery gasses under CEPA. Such an approach would negatively impact national

¹² *Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations*, SOR/2012-167; *Heavy Duty Vehicle and Engine Greenhouse Gas Emission Regulations*, SOR/2013-24.

¹³ *R v Hydro Québec*, [1997] 3 SCR 213 at para 152.

¹⁴ *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160.

¹⁵ *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at para 80.

efforts to protect public health and the environment, effectively creating an industry-based veto on legislation.

c) The GGPPA is Constitutional under the National Concern Branch

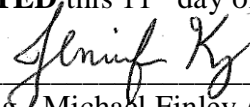
16. The national concern doctrine is not restricted to matters within the provinces' residual power under s. 92(16). Instead, it applies to "both new matters which did not exist at Confederation and to matters, which although originally matters of a local or private nature in a province, have since...become matters of national concern."¹⁶

17. Matters in any provincial head of power can become a matter of national concern under POGG if provinces cannot regulate an issue of national importance on their own. The GGPPA is constitutional because GHG emissions are a national public health problem, with effects that are borderless in nature and national (and indeed international) in scope. Since provinces cannot bind one another to reduce GHG emissions, the risk that one or more provinces will not cooperate in a national effort threatens the effectiveness of carbon pricing across the country. By extension, national public health, which is intimately linked to GHG reductions, would be endangered.¹⁷

18. The ABCA ruled that one province's actions with respect to the regulation of GHG emissions will not cause any measurable harm to other provinces now or in the foreseeable future. This is categorically untrue. Without a concerted carbon pricing scheme, carbon leakage is expected to hinder the federal government's ability to meet domestic and international targets.¹⁸

19. Thus, the GGPPA is an example of concurrent jurisdiction that embraces cooperative federalism and recognizes that coordinated efforts must be made if Canada is to effectively address the climate crisis and its public health effects.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 11th day of August 2020.



Jennifer L. King / Michael Finley / Liane Langstaff

¹⁶ *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para 33. See also *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 394-419.

¹⁷ Affidavit of Ian Culbert, Ontario Appellant's Record (OAR) at paras 29, 34 and 42.

¹⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at paras 1015-1016.

PART IV - TABLE OF AUTHORITIES

JURISPRUDENCE	At Paragraph(s)
<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40	7
<i>Canadian Western Bank v Alberta</i> , 2007 SCC 22	7, 10
<i>Desgagnés Transport Inc. v Wärtsilä Canada Inc.</i> , 2019 SCC 58	6
<i>Friends of the Oldman River v Canada (Minister of Transport)</i> , [1992] 1 SCR 3	5
<i>Ontario Hydro v Ontario (Labour Relations Board)</i> , [1993] 3 SCR 327	11
<i>R v Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	16
<i>R v Hydro Québec</i> , [1997] 3 SCR 213	12
<i>Re: Anti-Inflation Act</i> , [1976] 2 SCR 373	16
<i>Reference re Genetic Non-Discrimination Act</i> , 2020 SCC 17	22
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2020 ABCA 74	1, 2, 3, 8, 9, 18
<i>Schneider v The Queen</i> , [1982] 2 SCR 112	5,
<i>Syncrude Canada Ltd. v. Attorney General of Canada</i> , 2016 FCA 160	12
LEGISLATION AND REGULATIONS	At Paragraph(s)
<i>Canadian Environmental Protection Act, 1999</i> , S.C. 1999, c. 33	12
<i>Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations</i> , SOR/2012-167	12
<i>Heavy Duty Vehicle and Engine Greenhouse Gas Emission Regulations</i> , SOR/2013-24	12