SCC 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, 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

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(continued on next page)

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PART I – OVERVIEW

1. The three appellate courts below all disagreed about how to characterize the 'matter' of the *Greenhouse Gas Pollution Pricing Act* ('*GGPPA*' or '*Act*') – the essential issue in this appeal. Moreover, none of them addressed the long line of cases supporting Parliament's authority to regulate the *cross-border* impacts of pollution under its POGG power, which has informed federal law-making for decades. Consequently, they all failed to properly characterize the 'matter' of the *Act* as addressing the *interprovincial and international impacts of GHG pollution.*

2. The Alberta Court of Appeal (ABCA), in particular, adopted an extremely broad characterization of the *Act*'s 'matter', as addressing greenhouse gas (GHG) regulation in its entirety. The ABCA's 'all or nothing' approach did not reflect the reality – recognized by this Court – that federal-provincial *concurrency* is common and essential in environmental regulation, because most pollution (including GHGs) has both intra-provincial and extra-provincial impacts.

3. This factum supplements the Ecofisal Commission's factum concerning the Ontario Court of Appeal (OCA) and Saskatchewan Court of Appeal (SKCA) decisions; it cross-references any places where it incorporates the arguments and authorities from that first factum ("CEC1").

PART II – STATEMENT ON THE ISSUE

4. The *GGPPA* falls within the national concern branch of the POGG power.

PART III – STATEMENT OF ARGUMENT

A. The ABCA erred in characterizing the 'matter' of the Act

5. There are three main options for characterizing the 'matter' of the *Act* and delimiting federal power over GHGs under POGG.[1] The first approach, taken by the OCA and the A-G Canada, is to characterize the matter as "setting national minimum standards for regulating GHGs". (The SKCA and A-G BC propose a narrower variant: setting minimum standards for carbon pricing.)

6. The ABCA rejected this national standards approach. It characterized the 'matter' of the *Act* as "the regulation of GHG emissions in their entirety" (¶253). This broad (and erroneous) characterization then ripples through the judgement; it is the basis for the Court's conclusion that the *Act* does not fall within the National Concern power.

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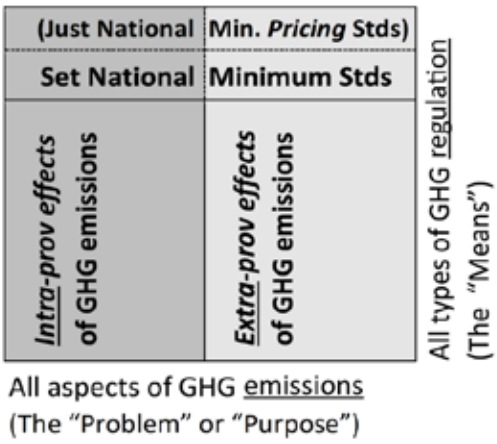
[1] This issue is addressed in more depth in the Commission's first factum (CEC1 ¶¶6-11).

7. The Commission proposes a third approach – one that was not addressed by the ABCA – focusing on the *geographic scope* of the problem. It submits that the matter of the *Act* is to address the interprovincial and international impacts of GHG pollution. This is a 'vertical' approach to bounding federal power over GHGs; it divides responsibility based on the nature of the problem (addressing *extra-provincial* impacts), as opposed to the 'horizontal' approach followed by the OCA and SKCA – dividing responsibility based on the legislative means used to address the problem (setting national standards). [The accompanying diagram, from the Commission's first factum, is provided for ease of reference.]



8. This vertical characterization reflects the *Act*'s stated purpose in its preamble ("climate change [is] an international concern which cannot be contained within geographic boundaries"). It also is consistent with over 40 years of judicial and legislative precedent, as explained below.

The ABCA's characterization is inconsistent with judicial and legislative precedent

9. The ABCA's broad approach to characterization is inconsistent with the *GGPPA's* purpose and effects. Moreover, it is inconsistent with the precedent from this Court about how to characterize an Act's pith and substance. This Court has warned against defining the matter of federal POGG jurisdiction in broad terms – such as all of the "environment", "pollution", "inflation", or, in this case, "regulation of GHG emissions in their entirety". (CEC1 ¶26)

10. The purpose of the 'single, distinct and indivisible' test is to determine if a federal matter is distinct from matters of provincial authority. By specifying 'provincial inability' as a key factor of that test, this Court has emphasized that matters which cause substantial impacts beyond a province – where provincial inaction (or ineffective action) could significantly affect others provinces or countries – are particularly likely to be ones of national concern.[2]

11. In line with this judicial direction, for over 40 years, Canada's courts have consistently found that addressing the interprovincial or international impacts of pollution is a matter of national concern. The ABCA did not address this long line of cases, in characterizing the matter of the

[2] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 33 (4)

Act. These authorities, which are addressed in the Commission's first factum (CEC1 ¶¶16-17), have found the following to be matters of national concern: interprovincial water pollution; marine pollution; atomic energy / radiation; "toxic substances which move across provincial or international borders"; and international air pollution.

12. Consistent with this line of authority, Parliament has passed many statutes over the past five decades targeting interprovincial and international air and water pollution. (CEC1 ¶18)

Federal-provincial 'concurrency' is common in Canadian environmental regulation

13. The practical effect of federal authority over the extra-provincial impacts of pollution is that there is a significant amount of jurisdictional overlap in environmental regulation in Canada. Federal and provincial laws often address the same pollution from the same sources, but for different purposes. The federal laws focus on the extra-provincial impacts, and provincial laws focus on intra-provincial impacts.

14. For example, coastal cities (e.g. Victoria) or industries in BC that discharge into provincial marine waters cause local pollution that is regulated under provincial law. (CEC1 ¶30) Those same emissions contribute to pollution of the ocean (a global commons) which affects other countries; therefore, they are also subject to federal regulation, as upheld in *Crown Zellerbach*.

15. This Court has recognized that this degree of "concurrency" is common and "essential" in the area of environmental law,[3] because of the nature of pollution: it often has *both* significant local and extra-provincial impacts.

16. The same is true for GHGs. They pollute the atmosphere (a global commons, like the oceans) and cause significant impacts on other provinces and countries. At the same time, GHGs and climate change also affect their province of origin, through increased floods, fires, storms, heat waves, droughts, melting permafrost, etc. In other words, GHGs cause impacts that are mainly extra-provincial (and regulated federally), but also intra-provincial impacts that are regulated provincially, like many other types of pollution. Provinces may also regulate GHG emissions and their sources under several other heads of power. (CEC1 ¶34)

17. Upholding the *GGPPA* under POGG will not preclude overlapping provincial GHG laws, as the ABCA posits (¶¶149, 209). If that were so, provinces could not regulate pollution of their

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[3] *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 153-154.

marine waters, and the City of Ottawa could not regulate land use in the National Capital Region.[4] This watertight compartments view of federalism has long been rejected. (CEC1 ¶¶29-30)

B. The risk of 'provincial inaction' to reduce Canada's GHG emissions is very real

18. The 'provincial inability' test asks "what would be the effect on extra-provincial interests of a provincial failure to deal effectively with …the matter"? (*Crown Zellerbach* at para 33). In the case of GHGs, that risk of provincial inaction is very real. Canada signed the UNFCCC in 1992. From 1992 to 2015, the federal government did not take meaningful legislative action to reduce emissions; it left it mainly up to provinces. All provinces took *some* action. And a few, to their credit, did enough to *reduce* their emissions. But most did not, and Canada's emissions rose by 20% from 1990 to 2015 (and Alberta's emissions rose by 59% in this period).[5] Along the way, Canada missed both of its international climate commitments – its 1997 Kyoto target (reduce by 6% by 2012) and its 2009 Copenhagen commitment (reduce by 20% by 2020).[6] In 2015, Canada made a new GHG reduction commitment, under the Paris Agreement. The federal government then decided to develop a national climate plan with provinces. As part of that plan, it brought in backstop carbon pricing legislation to ensure that all provinces do their share to meet this target.

19. In light of this history, it is surprising, to say the least, for these three provinces to argue that it should be left up to the provinces to ensure that Canada reduces its overall emissions and meets its international commitments; and to argue that the constitution should be interpreted in a novel way to preclude the federal government from doing so.

C. The ABCA's 'provincial impact' findings are speculative and unsupported

20. The ABCA predicted (¶335) that upholding the *Act* would open the floodgates to federal GHG laws affecting a wide range of activities (based on its broad characterization of the matter),

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[4] There *are* some matters of national concern that *do* largely preclude provincial legislation, such as atomic energy or aviation. *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327. That is because, in those cases, the matter of national concern is the entire activity and the associated physical facilities. You cannot have two different governments regulating a nuclear power plant or an airport. For extra-provincial pollution, by contrast, federal POGG authority does not cover an entire activity or facility; it applies to one (important) side effect from operating those facilities. Concurrent federal and provincial regulation is possible, and has been going on for decades.

[5] Affidavit of Dominique Blain at para 22, Supplementary Record of the A-G Alberta, Vol XIII at R1019. (The evidence in the record gives 1990, not 1992, as the base year for emissions, presumably because that was the base year used in the UNFCCC and Kyoto Protocol.)

[6] Affidavit of John Moffet, para 34, Consolidated Record (in Nos. 38663 & 38781), Vol I at pp 23-24.

and would "undermine democracy and federalism". The Court was particularly concerned about federal GHG laws applying to natural resource activities; it seemed to suggest that these activities should be immune from federal environmental regulation (¶¶265-273). That is a novel proposition: one that is at odds with the reality and history of environmental regulation in Canada.

21. Oil and gas development – and most industrial and economic activities – have long been subject to a range of federal environmental laws: not only those addressing cross-border air and water pollution (discussed above), but also federal laws on fisheries, migratory birds, endangered species, toxic substances, environmental assessment, and more. Most of those laws overlap to some degree with provincial laws, but that has not prevented provinces from developing their resources or managing their environmental impacts. Indeed, to minimize duplication, many federal environmental laws have backstop provisions similar to the one in the *Act*. (CEC1 ¶31).

22. **In conclusion**, the ABCA, and the governments of Alberta, Ontario and Saskatchewan, reject the approach taken by the OCA and SKCA. However, they do not offer a realistic constitutional alternative to achieve the fundamental objective of the *GGPPA*: ensuring Canada meets its international GHG reduction targets, as part of the global effort to avoid dangerous climate change. To say "the provinces *could* collectively take sufficient action" ignores the very real risk that they will not – and the fact that they have not collectively done so over the past 28 years. In effect, these three provinces argue for a constitutional outcome that will surely result in Canada failing to meet its climate commitments. Upholding the *GGPPA* will allow both orders of government to act effectively (and cooperatively) within their respective spheres to tackle climate change – arguably the most serious economic and environmental challenge of our time.

PART IV – SUBMISSIONS ON COSTS

23. The Commission does not seek costs and asks that it not be liable for costs to any party.

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

Stewart A.G. Elgie, LSM
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PART V – TABLE OF AUTHORITIES

Cases	**Para(s)**
Ontario Hydro v Ontario (Labour Relations Board), [1993] 3 SCR 327	17
Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74	6, 17, 20
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401	10, 14, 18
R v Hydro-Québec, [1997] 3 SCR 213	15