

IN THE COURT OF APPEAL FOR SASKATCHEWAN

**IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
BILL C-74, PART 5**

**AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT
GOVERNOR IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN
UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, C c-29.01**

**FACTUM OF THE INTERVENER,
UNITED CONSERVATIVE ASSOCIATION**

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PART I - INTRODUCTION

1. This Reference is a case about the constitutional division of powers between the federal and provincial governments, and the proper balance of federalism in Canada.
2. By attempting to justify the enactment of the *Greenhouse Gas Pollution Pricing Act* (the “**GGPPA**”) using the national concern branch of the peace, order, and good governance (“**POGG**”) clause, Canada seeks to expand the federal government’s constitutional powers at the expense of the provinces.
3. Put simply, Canada seeks to claim a new, exclusive power to regulate greenhouse gas (“**GHG**”) emissions throughout Canada.
4. Canada’s position, if accepted, will upset the balance of federalism in Canada, and will leave the provinces, including Alberta, unable to develop their own policy solutions to deal with GHG emissions that are particular and unique to their individual, local circumstances.
5. The United Conservative Association (“**UCA**”) intervenes in this Reference to provide an Albertan perspective on Canada’s attempts to expand the federal government’s constitutional powers and the consequences for Albertans of such an expansion of the federal government’s powers.

PART II - JURISDICTION

6. The UCA agrees with Saskatchewan and Canada that this Court has jurisdiction to hear this Reference and provide its opinion on the constitutionality of the *GGPPA* by virtue of s. 2 of *The Constitutional Questions Act, 2012*, and Order-in-Council 194/2018.

PART III - STATEMENT OF FACTS

7. The UCA agrees with and adopts the Statement of Facts set out in the Factum of the Attorney General of Saskatchewan.

PART IV - POINTS IN ISSUE

8. The UCA agrees with the points in issue as stated by Saskatchewan.
9. The UCA submits that the *GGPPA* is unconstitutional, and that its enactment cannot be justified using the national concern branch of the POGG clause for the following reasons:

- (a) as GHG emissions are generated by an endless list of human activities and as nearly every sector of the Canadian economy generates GHG emissions, the regulation of GHG emissions lacks sufficient singleness, distinctness, and indivisibility to constitute a matter of national concern; and
- (b) a finding that the regulation of GHG emissions is a matter of national concern would grant the federal government an exclusive, plenary jurisdiction over the matter, leaving provinces, such as Alberta, unable to develop and implement GHG emission reduction programs that are specific to their unique, local circumstances. This would result in an impact on provincial jurisdiction that is irreconcilable with the fundamental distribution of powers under the Constitution.

PART V - ARGUMENT

A. Pith and Substance of the *GGPPA*

10. The UCA agrees with Canada that the first step in a proper division of powers analysis is to determine the pith and substance of the impugned

legislation, and that this requires a consideration of the purpose and effect of the impugned legislation to determine the matter to which the legislation relates.

11. The Preamble to the *GGPPA* notes that “greenhouse gas emissions contribute to global climate change”, and that “emissions of greenhouse gases are at the highest level in history”. It states that the Government of Canada is committed to taking “comprehensive action to reduce emissions across all sectors of the economy”.¹

12. Canada’s Factum demonstrates that the true purpose and effect of the *GGPPA* is to allow the federal government to regulate GHG emissions throughout Canada. Canada argues “the matter of GHG emissions is so vital to the nation as a whole that Parliament must have the authority to regulate it” while suggesting that “Federal jurisdiction to regulate GHG emissions does not impair the provincial legislatures’ power to regulate local matters and industries”.²

13. As the stated purpose of the *GGPPA* is to reduce GHG emissions across all sectors of the Canadian economy, and as the effect of the *GGPPA* will be to allow the federal government to regulate GHG emissions throughout Canada, the UCA submits that the true pith and substance of the *GGPPA* is the regulation of GHG emissions throughout Canada.

B. National Concern Branch of POGG

14. The UCA submits that the *GGPPA* is unconstitutional, and that its enactment cannot be justified using the national concern branch of the federal government’s POGG power.

¹ *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act, 2018*, No 1., SC 2018, c12, Preamble. Ontario Book of Authorities (“OBOA”) Vol 5, Tab 50.

² Factum of the Attorney General of Canada at paras. 2 and 99.

15. For a matter to qualify as a matter of national concern under POGG, it must have a singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern.³

16. In addition, it must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.⁴

17. The regulation of GHG emissions, the matter to which the *GGPPA* relates, meets neither of these requirements.

C. No Singleness, Distinctiveness, and Indivisibility

18. The requirement that a matter have sufficient singleness, distinctiveness, and indivisibility such that it is clearly distinguished from matters of provincial concern is intended to prevent new powers of a diffuse nature from being added to the list of federal powers.⁵ This prevents the expansion of the federal government's powers into matters of provincial concern.

19. As demonstrated by the Record submitted by Canada and Saskatchewan, GHG emissions are produced by a wide range of human activities. Almost every sector of the Canadian economy produces GHG emissions.

20. The sources of GHG emissions include private automobiles, heating of private homes and businesses, agriculture, animal husbandry, manufacturing, electricity generation, commercial transportation, railways, aviation, maritime shipping, forestry, cement production, waste disposal, and the extraction, processing, transportation, and distribution of fossil fuels.

³ *R. v. Crown Zellerbach*, [1988] 1 SCR 401 at 432, *Hydro-Quebec* at para 115 [*Crown Zellerbach*]. Canada Book of Authorities ("CBOA") Vol. 1, Tab 24; *R. v. Hydro-Quebec*, [1997] 3 SCR 213 at para. 115 [*Hydro-Quebec*] CBOA Vol 1, Tab 25.

⁴ *Crown Zellerbach* at 432, CBOA Vol. 1, Tab 24; *Hydro-Quebec* at para. 115, CBOA Vol 1, Tab 25.

⁵ *Reference re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458, CBOA Vol 1, Tab 26.

21. Given the breadth and scope of human activities that generate GHG emissions, there is no limit to the list or type of activities that the federal government seeks to regulate by way of the *GGPPA*.

22. Granting the federal government the jurisdiction to regulate GHG emissions throughout Canada would effectively give the federal government the jurisdiction to regulate an endless list of activities and nearly every sector of the Canadian economy, including matters and industries that clearly fall within provincial jurisdiction under ss. 92 and 92A of the *Constitution Act, 1867*.

23. The endless list of activities to which the *GGPPA* applies, and the fact that the *GGPPA* applies to nearly every sector of the Canadian economy demonstrates that the regulation of GHG emissions lacks sufficient singleness, distinctness, and indivisibility to distinguish it from matters of provincial concern, and the regulation of GHG emissions is not, therefore, a matter of national concern under POGG.

D. No Reconcilable Impact on Provincial Jurisdiction

24. The UCA submits that the consideration of whether a matter has a scale of impact of provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution requires consideration of the principles of federalism and subsidiarity. It also requires consideration of the actual effect of a finding that the impugned legislation is a matter of national concern under POGG on the balance of federalism in Canada.

1. Federalism

25. In *Reference re Secession of Quebec*, the Supreme Court of Canada recognized federalism as a fundamental organizing principle of Canada's Constitution.⁶

⁶ *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 32 [*Quebec Secession Reference*], Saskatchewan Book of Authorities ("SKBOA") Vol 2, Tab 26.

26. Canadian federation is based on the organizing principle that the provincial governments and the federal government are coordinate and not subordinate one to the other.⁷ It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Federalism demands that a balance be struck that allows both Parliament and the provincial legislatures to act effectively in their spheres.⁸

27. Federalism recognizes the diversity of the component parts of Confederation and the autonomy of provincial governments, such as Alberta's, to develop societies within their respective spheres of jurisdiction.⁹

28. Canada's federal structure facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective, having regard to this diversity.¹⁰

29. A key fact in this regional diversity is that the Canadian federation provides the opportunity for each province, including Alberta, to regulate its economy in a manner that reflects local concerns.¹¹

30. The federalism principle does not allow the court to say "This would be good for the country, therefore we should interpret the Constitution to support it." The sole question for the court to consider is constitutional compliance, not policy desirability of a particular piece of legislation.¹²

31. Federalism's status as a foundational constitutional principle is precisely why a consideration of whether a matter falls within the national concern doctrine

⁷ *Reference re Securities Act*, [2011] 3 SCR 837 at para. 71. [*Securities Reference*], UCA Book of Authorities ("UCABOA") Tab 3.

⁸ *Securities Reference* at para. 7, UCABOA Tab 3.

⁹ *Quebec Secession Reference*, at para. 58, SKBOA Vol 2, Tab 26.

¹⁰ *Ibid.*

¹¹ *R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR 342, at para. 85 [*Comeau*], UCABOA Tab 4.

¹² *Comeau* at para. 83, UCABOA Tab 4

of POGG requires the Court to be satisfied that the scale of impact of such a finding on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution.

2. *Subsidiarity*

32. A further key component of Canadian federalism is the principle of subsidiarity, the proposition that law-making and implementation are best achieved at a level of government that is closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.¹³

33. In *Reference re Assisted Human Reproduction Act*, Lebel and Deschamps JJ., writing for a group of four justices of the Supreme Court of Canada, noted that in the *Quebec Secession Reference* the Supreme Court of Canada suggested that the proper operation of Canadian federalism sometimes requires the application of the principle of subsidiarity in the arrangement of the legislative powers of the two levels of government.¹⁴

34. Noting that in the *Quebec Secession Reference* the Court stated that Canada's federal structure and the principle of federalism facilitates democratic participation by distributing power to the government thought to be most suited to achieving a particular societal objective,¹⁵ Lebel and Deschamps JJ, found that Court had recognized that applying the principle of subsidiarity was an inherent feature of a federal system of government, and that subsidiarity would enhance the democratic value of a federal system. They concluded that subsidiarity was an important component of Canadian federalism.¹⁶

¹³ 114957 *Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, 2001 SCC 40, 2 SCR 241, at para. 3 [*Spraytech*], CBOA Vol 1, Tab 1.

¹⁴ *Reference re Assisted Human Reproduction Act*, 2010 3 SCR 457, at para. 183 [*Assisted Reproduction Reference*], UCABOA Tab 2.

¹⁵ *Assisted Reproduction Reference* at para. 183, UCABOA Tab 2; *Quebec Secession Reference* at para. 58, SKBOA Vol 2, Tab 26.

¹⁶ *Assisted Reproduction Reference* at para. 183, UCABOA Tab 2.

35. Professor Hogg notes that “one of the primary goals of confederation in 1867 was to preserve a considerable degree of autonomy for the four original provinces”. He suggests that the original division of powers generally adhered to what we would now describe as the principle of subsidiarity, and that this has been reinforced by the broad judicial interpretation of the provinces’ power over property and civil rights.¹⁷ For Lebel and Deschamps JJ., Professor Hogg’s comments demonstrated that subsidiarity was an important component of Canadian federalism.¹⁸

36. While four other justices disagreed with the interpretation of the principle of subsidiarity advanced by Lebel and Deschamps JJ., and a fifth judge decided the case without reference to the principle of subsidiarity, the principle of subsidiarity was also considered by the majority of the Supreme Court of Canada in *Canadian Western Bank*, where the Court concluded that an expansive application of the doctrine of interjurisdictional immunity was undesirable as it “can also be seen as undermining the principles of subsidiarity”.¹⁹

37. The UCA submits that, as stated by Lebel and Deschamps JJ. in *Canadian Western Bank*, the principle of subsidiarity is an important component of Canadian federalism. It encourages the development of diverse societies and economies by allowing provincial governments, the governments located closest to the citizens of a province and the governments most responsive to their needs, to develop policies and programs that are specifically tailored to the unique circumstances of the individual provinces.

¹⁷ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, Vol 1 at pp. 5-12 to 5-14, UCA BOA Tab 5.

¹⁸ *Assisted Reproduction Reference* at para. 183, UCABOA Tab 2.

¹⁹ *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para. 45 [*Canadian Western Bank*], UCABOA Tab 1.

3. *National Concerns Become the Exclusive Jurisdiction of the Federal Government*

38. Canada suggests that a finding that the *GGPPA* was validly enacted under the national concern branch of POGG will not upset the jurisdictional division of powers. It suggests that the double aspect doctrine and the concept of co-operative federalism will allow for the concurrent operation of provincial statutes with the *GGPPA*.

39. In *Crown Zellerbach* the Supreme Court of Canada considered a similar suggestion regarding the possibility of overlapping or concurrent jurisdiction between the provinces and the federal government in matters of national concern. The Court considered Professor Gibson's suggestion that "'national dimension' concerns only the risk of non-co-operation [between the provinces], and justifies only federal legislation addressed to that risk."²⁰

40. Le Dain J. rejected this suggestion as being in conflict with the outcome of the *Anti-Inflation Reference*, holding that:

This would appear to be contemplate concurrent or overlapping federal jurisdiction which, I must observe, is in conflict with what was emphasized by Beetz J. in the *Anti-Inflation* reference—that 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.²¹

41. The Supreme Court of Canada reached the same conclusion in *R. v. Hydro-Quebec*, where the Court stated that:

Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and

²⁰ *Crown Zellerbach* at 433, CBOA Vol. 1, Tab 24.

²¹ *Ibid.*

paramount power of Parliament and has an obvious impact on the balance of Canadian federalism.²²

42. The effect of the Supreme Court of Canada's reasoning in *Crown Zellerbach* and *Hydro-Quebec* is that if regulating GHG emissions is a matter of national concern, then the federal government will have the exclusive jurisdiction of a plenary nature to regulate GHG emissions in Canada, including an exclusive, plenary jurisdiction to legislate with respect to the intra-provincial aspects of GHG emissions.

43. This will prevent the provinces, including Alberta, from legislating or implementing their own GHG emission reduction policies and programs as any provincial program that has the purpose or effect of reducing GHG emissions has the potential to fall within the federal government's exclusive jurisdiction to regulate GHG emissions, rendering any such program or policy *ultra vires* the province's jurisdiction.

4. Exclusive Federal Jurisdiction Over the Regulation of GHG Emissions is Irreconcilable with the Constitution's Fundamental Distribution of Powers

44. The Record submitted by Saskatchewan and Canada demonstrates that there is a wide range of policy options that can be utilized to achieve reduction in GHG emissions.

45. The principle of subsidiarity suggests that the provincial governments, as the level of government closest to the citizens of the province, and the level of government best suited to respond to local issues, should be afforded the opportunity to select those policy options that are best-suited to the unique social and economic circumstances of their respective provinces.

46. Federalism requires that the provinces be left free to legislate in their respective spheres of jurisdiction and to develop their economies in ways that reflect local concerns without interference from the federal government.

²² *Hydro-Quebec* at para. 115, CBOA Vol 1, Tab 25.

47. It also requires that the power afforded by one level of government not be used in a matter that effectively eviscerates the power of another level of government.

48. Given the broad range of policy options available to the provincial governments to regulate GHG emissions, the principles of federalism and subsidiarity suggest that the Court should be reluctant to accept an interpretation of the constitutionality of the *GGPPA* that would strip these options away from the provinces and prevent the provinces from developing GHG emission reduction programs that take the unique, local circumstances into account.

49. The Supreme Court of Canada highlighted the concern of an overly expansive interpretation of the federal government's powers in the *Securities Reference* where the Court noted that an overly expansive interpretation of the federal trade and commerce power would have the potential to duplicate, and perhaps displace through the paramountcy doctrine, the clear provincial powers over local matters and property and civil rights in the province.²³

50. The Court also stressed that the circumscribed scope of the federal trade and commerce power was linked to a key facet of federalism: the recognition of the diversity and autonomy of the provincial governments.²⁴

51. This concern about the expansive interpretation of federal power is of even more significance in matters of national concern, which become the exclusive jurisdiction of the federal government.

52. A finding that a matter is a matter of national concern necessarily results in a fundamental change to the division of powers and the balance of federalism by shifting jurisdiction over that matter, including any intra-provincial aspects of that matter, to the federal government. As noted by Le Dain J. in *Crown*

²³ *Securities Reference* at para. 72. UCABOA Tab 3

²⁴ *Ibid.* at para. 73. UCABOA Tab 3.

Zellerbach the national concern branch of POGG does not contemplate concurrent or overlapping jurisdiction with the provinces.

53. This is precisely why the Supreme Court of Canada warned against the “enthusiastic adoption” of the national concern doctrine in *Hydro-Quebec*.²⁵

54. Where the pith and substance of a rule set out in a statute considered as a whole is connected with an exclusive power of the other level of government, the statute is necessarily invalid.²⁶

55. As a result, a finding that the regulation of GHG emissions is a matter of national concern would necessarily give the federal government an exclusive, plenary jurisdiction over the regulation of GHG emissions throughout Canada, including the intra-provincial aspects of GHG emissions. This would include the jurisdiction to regulate the endless list of human activities that generate GHG emission and to regulate nearly every sector of the Canadian, and Albertan, economy – even those activities and industries that presently fall within provincial jurisdiction by virtue of ss. 92 and 92A of the *Constitution Act, 1867*.

56. The effect of this would be to effectively eviscerate the provinces’ existing powers to regulate GHG emissions and their existing powers to develop their economies in a manner that reflects local concerns. It also has the potential to render all existing provincial legislation targeted at reducing existing GHG emissions invalid.

57. Just as importantly, it will prevent the provinces from developing and enacting any new legislation, policies, or programs targeted at regulating or reducing GHG emissions.

58. For these reasons the UCA submits that the regulation of GHG emissions would have a scale of impact on provincial jurisdiction that is completely

²⁵ *Ibid.* at para. 116.

²⁶ *Assisted Reproduction Reference* at para. 186, UCABOA Tab 2.

irreconcilable with the fundamental distribution of legislative power under the Constitution such that it cannot be a matter of national concern.

PART VI - RELIEF

59. The UCA seeks this Court's opinion that the *GGPPA* is unconstitutional in its entirety, and that its enactment cannot be justified by reliance on the national concern branch of the POGG clause.

DATED at the City of Edmonton, in the Province of Alberta, this 25th day of January, 2019.

MCLENNAN ROSS LLP

Per: 

Ryan Martin and
Steven A. A. Dollansky,
Counsel for the United Conservative
Association

PART VII - AUTHORITIES

<u>Legislation</u>	<u>Tab</u>
<i>Greenhouse Gas Pollution Pricing Act</i> , being Part 5 of the <i>Budget Implementation Act</i> , 2018, No 1., SC 2018, c12.	OBOA 50
<u>Cases</u>	
<i>114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)</i> , 2001 SCC 40, 2 SCR 241. CBOA Vol 1, Tab 1.	CBOA 1
<i>Canadian Western Bank v. Alberta</i> , 2007 SCC 22, [2007] 2 SCR 3.	UCABOA 1
<i>Reference re: Anti-Inflation Act</i> , [1976] 2 SCR 373.	CBOA 26
<i>Reference re Assisted Human Reproduction Act</i> , 2010 3 SCR 457.	UCABOA 2
<i>Reference re Secession of Quebec</i> , [1998] 2 SCR 217.	SKBOA 26
<i>Reference re Securities Act</i> , [2011] 3 SCR 837.	UCABOA 3
<i>R. v. Hydro-Quebec</i> , [1997] 3 SCR 213.	CBOA 25
<i>R. v. Comeau</i> , 2018 SCC 15, [2018] 1 SCR 342.	UCABOA 4
<i>R. v. Crown Zellerbach</i> , [1988] 1 SCR 401.	CBOA 24
<u>Secondary Sources</u>	
Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5th ed. supplemented.	UCABOA 5