SCC No. 38663
(38781 continued on next page)

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
Bill C-74, Part V

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

BETWEEN

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT
(Party Pursuant to Section 4 of
The Constitutional Questions Act, 2012)

and

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Party Pursuant to Section 5(4) of
The Constitutional Questions Act, 2012)

and

ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF QUÉBEC,
ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
and ATTORNEY GENERAL OF ALBERTA

INTERVENERS

(style of cause continued on the next page)

REPLY FACTUM OF THE APPELLANT ATTORNEY GENERAL OF SASKATCHEWAN (Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

---

and

and

ANISHINABEK NATION AND UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING, SASKATCHEWAN POWER CORPORATION AND SASKENERGY INCORPORATED, CANADIAN TAXPAYERS FEDERATION, INTERNATIONAL EMISSIONS TRADING ASSOCIATION, CANADIAN PUBLIC HEALTH ASSOCIATION, ATHABASCA CHIPEWYAN FIRST NATION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONENTAL DEFENCE CANADA INC., AND SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL, ASSEMBLY OF FIRST NATIONS, DAVID SUZUKI FOUNDATION, CANADA'S ECOFISCAL COMMISSION, CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL CORPORATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKTOON CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE AND YOUTH OF THE EARTH, PROGRESS ALBERTA COMMUNICATIONS LIMITED, CANADIAN LABOUR CONGRESS, OCEANS NORTH CONSERVATION SOCIETY, AMNESTY INTERNATIONAL CANADA, NATIONAL ASSOCIATION OF WOMEN AND THE LAW AND FRIENDS OF THE EARTH, SMART PROSPERITY INSTITUTE, CENTRE QUEBECOIS DU DROIT DE L'ENVIRONNEMENT ET EQUITERRE, GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD AND YOUTH CLIMATE LAB, ASSEMBY OF MANITOBA CHIEFS, CITY OF RICHMOND, CITY OF VICTORIA, CITY OF NELSON, DISTRICT OF SQUAMISH, CITY OF ROSSLAND AND CITY OF VANCOUVER

INTERVENERS

SCC File No: 38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

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 ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT,* RSO 1990, c C.34, s 8

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and

ATTORNEY GENERAL OF CANADA

RESPONDENT

and

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PART I - OVERVIEW

1. The Attorney General of Saskatchewan submits this Reply to respond to the interveners.

2. Saskatchewan agrees with and relies on the arguments set out in the reply factum of the Attorney General of Ontario as they relate to heads of power alternative to the Peace, Order and Good Government Power. In addition to these arguments, Saskatchewan offers several observations, principally with respect to the submissions of the Intervener, the Attorney General of British Columbia. Saskatchewan also replies herein to particular points concerning the emergency power doctrine and the relevance of international treaties.

PART II - ARGUMENT

A. Saskatchewan has Relied Upon Conventional Jurisprudence on the National Concern Doctrine of POGG

3. British Columbia contends that Saskatchewan has taken a "*sui generis*" approach to the national concern doctrine (para 14) when the opposite is true. Saskatchewan has relied upon conventional constitutional principles and jurisprudence on the national concern doctrine to argue that the *Greenhouse Gas Pollution Pricing Act,* SC 2018, c. 12 (the "*GGPPA*") is unconstitutional. In contrast, in an attempt to preserve a particular policy outcome, British Columbia and numerous other interveners supporting the constitutionality of the *GGPPA* have presented arguments that depart from well-established constitutional principles in a manner that, if accepted, would radically alter the division of powers.

4. British Columbia asserts that if a matter is not "in the province" and is not enumerated in the federal list, it must belong to Parliament under the general power granted by the opening words of s. 91 (paras 20 and 55). However, this not only circumvents the national concern test, which is strictly limited in scope, but also suggests that Parliament has a monopoly over matters falling outside the specified classes of subjects. As observed by the Attorney General of Quebec, the

Constitution Act, 1867[1] contains a competing provincial residuum that parallels and complements the federal residuum (para 19). When, as in the context of the GGPPA, "the legislative means employed to regulate a particular matter trench extensively upon provincial enumerated powers…it stands to reason that it should be dealt with locally."[2]

5. This accords with the high threshold test established by the national concern doctrine. However, like the Attorney General of Canada, British Columbia and other interveners are asking this Court to reformulate the national concern test to focus solely on provincial inability. In particular, British Columbia asserts that the approach with the national concern doctrine is to carefully and precisely define the "matter" and determine whether that matter is one that is subject to material and substantive provincial inability (para 21). This ignores the limited role assigned to provincial inability by Le Dain J. in *R v Crown Zellerbach* in which he cautioned that the provincial inability test is but "one of the indicia" used to assess whether a proposed matter of national concern has acquired the requisite level of singleness and indivisibility.[3]

6. Further, numerous interveners, including British Columbia, seek a new definition of provincial inability that requires the Court to determine whether the matter presents a "collective action problem." To be clear, these terms are not rooted in the jurisprudence on the national concern doctrine and, with respect, should be viewed by this Court with caution. British Columbia advances a version of the provincial inability test that contemplates a federal power of intervention to control provincial non-cooperation or where it is "necessary to protect the federation from devolving into a war of all against all" (para 46). However, the focus of the provincial inability inquiry, rooted in this Court's jurisprudence, is not on a lack of provincial cooperation, but on whether the intra-provincial and extra-provincial aspects of a subject matter are so functionally and conceptually inseparable that they require uniform treatment by one order of government.[4]

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[1] *Constitution Act, 1867,* (UK) 30 & 31 Victoria, c 3.
[2] Jean LeClair, The Elusive Quest for the Quintessential National Interest, 38 U.B.C.L. Rev. 353 (2005). p. 361.
[3] *R. v. Crown Zellerbach Canada Ltd*., [1988] 1 SCR 401 at para 35 [*Crown Zellerbach*].
[4] *Crown Zellerbach* at para 35.

7. The approach to provincial inability that focuses overwhelmingly on spillover effects would expand the national concern doctrine enormously. It would authorize the federal government to impose national standards with respect to virtually anything that it chose because the social, economic, or environmental effects of such legislation is "not in the province."

8. British Columbia suggests that Saskatchewan has incorporated a new step beyond characterization and classification into the national concern doctrine (para 22) with the introduction of a new "proposed POGG power" (para 15). It asserts that the Court does not create new federal heads of power under the national concern doctrine which can only be done through the Amending Formula (paras 10(a) and 30) but instead simply determines whether the pith and substance of the statute is one of national concern. While not explicit, it appears that British Columbia's argument is an attempt to justify the Saskatchewan majority's approach of embedding the federal policy of carbon pricing into the Constitution itself.[5]

9. However, the case law establishes that once a new matter is found to be of national concern, it becomes enfranchised as a new head of federal law-making power under s. 91 and can serve as the basis for federal legislation in the same manner as an enumerated head of power. This is not limited to a single statute – it encompasses any legislative means falling within that power. As succinctly put by Beetz J. in *Reference re Anti-Inflation Act*:

> The national concern doctrine illustrated by these cases applies in practice as if certain heads such as aeronautics or the development and conservation of the national capital were added to the categories of subject matters enumerated in s. 91 of the Constitution when it is found by the Courts that, in substance, a class of subjects not enumerated in either s. 91 or s.92 lies outside the first fifteen heads enumerated in s.92 and is not of a merely local or private nature. Whenever the national concern theory is applied, the effect is permanent although it is limited by the identity of the subject newly recognized to be of national dimensions.[6]

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[5] *Saskatchewan Reference* at para 431, per Caldwell and Ottenbreit JJA, dissenting; *Ontario Reference* at para 224, per Huscroft JA, dissenting.
[6] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at p. 461 [*Anti-Inflation Reference*].

10. This approach to the national concern doctrine is also illustrated with the federal aeronautics power, which has engendered several acts of Parliament or portions thereof, of which twenty-two are currently in force by the count of the federal government.[7] The national concern doctrine jurisprudence consistently involves adding new classes of subject matters to the federal list of powers that more broadly enable Parliament to pass further legislation in that area. It is British Columbia's approach of conflating the specific pith and substance of a law with a definition of the new power it 'comes within,' in an attempt to define the power narrowly, that is *sui generis*.

11. British Columbia (para 16) and numerous other interveners also state that Saskatchewan denies that the dominant tide of constitutional interplay and effective overlap applies to the national concern doctrine, as it does to other matters within enumerated heads of power.[8] This mischaracterizes Saskatchewan's argument. Saskatchewan acknowledges that there are constitutional doctrines which permit the Court to find an appropriate balance between inevitable overlap in rules made at the two levels of legislative power, while also recognizing the need to provide sufficient predictability in the operation of the division of powers.[9] However, new powers under the national concern branch of POGG, like enumerated powers, are exclusive. The national concern branch of POGG cannot be used to give the provincial and federal governments concurrent jurisdiction over the same matter. Such an interpretation flies in the face of the requirement that the new POGG power must be distinctive from matters of provincial jurisdiction. As Beetz J. described in the *Anti-Inflation Reference* in the context of inflation:

> The provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction.[10]

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[7] Transport Canada, List of Acts, Aviation: https://www.tc.gc.ca/eng/acts-regulations/acts.htm
[8] Other interveners also make this argument: Canada's Ecofiscal Commission at paras 28-30; National Association of Women and the Law and Friends of the Earth at para 12.
[9] *Canadian Western Bank v. Alberta,* 2007 SCC 22 at para 24.
[10] *Anti-Inflation Reference* at p. 444.

12. Furthermore, this Court has recognized that while the dominant tide of constitutional principles has been to allow a fair amount of interplay and indeed overlap between federal and provincial powers, they cannot override or modify the separation of powers.[11] In particular, in the *2011 Securities Reference,* this Court cautioned:

> [62] In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.[12]

13. In this case, an analysis of the *GGPPA* must go beyond abstract notions of theory or generalizations to examine how the legislation actually operates. The *GGPPA* is not allocating part of "a finite global commons." Further, while "allocating a portion of Canada's overall reduction targets" may have been the occasion for the *GGPPA*'s enactment, this description is too general to meaningfully describe its actual content. As noted by Beetz J. in the *Anti-Inflation Reference*, "in order to characterize an enactment, one must look at its operation, at its effects and at the scale of its effects rather than at its ultimate purpose where the purpose is practically all embracing."[13]

14. The *GGPPA* creates a GHG emissions pricing regime over fuels based on their location within a province (Part 1) and over industrial emitters located in a province (Part 2). If the federal government is not satisfied with the stringency of carbon pricing implemented by the province itself, the federal government will apply the *GGPPA* and its pricing regime in the province. By contrast, if the federal government is satisfied with the provincial carbon pricing regime, the *GGPPA* does not apply in that province and the provincial legislation will apply instead. However, this type of supervisory federal backstop-ism does not give rise to overlapping powers that have only an incidental intrusion into matters subject to provincial governments' authority. Rather, it can only be described as contemplating concurrent jurisdiction between the provincial and federal government, albeit the federal government has a built-in "trump card" to determine

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[11] *Reference re Securities Act,* 2011 SCC 66 at para 61 [*2011 Securities Reference*].
[12] *2011 Securities Reference* at para 62.
[13] *Anti-Inflation Reference* at p. 452.

which legislation will apply in any given province. This is entirely inconsistent with not only the exclusive nature of the national concern doctrine under the POGG power, but also the enumerated powers in s. 91 more generally.

15. Similar to Canada, numerous interveners have argued that the double aspect doctrine is applicable here to allow the federal government to legislate through the *GGPPA,* while still allowing the provinces to create their own provincial pricing regimes. However, as indicated by this Court in the *Securities Reference,* while the double aspect doctrine allows concurrent application of both federal and provincial jurisdiction, it does not allow concurrent jurisdiction.[14] In the context of the *GGPPA*, the federal backstop contemplates the provinces adopting legislation for the *same purpose* and in the *same legislative context*.[15] This does not give rise to two aspects and two distinct purposes between federal and provincial legislation. It amounts to creating concurrent jurisdiction over the same subject matter.

16. Similar to the federal securities legislation at issue in the *2011 Securities Reference* and in contrast to Canada, British Columbia, and numerous interveners' arguments, the *GGPPA* is not directed to only those aspects of GHG emissions that are national in scope. Nor does the *GGPPA* create a "single or uniform legislative treatment"[16] of carbon pricing across the country.[17]

17. The *GGPPA* applies carbon pricing to provincial sources or activities that give rise to GHG emissions, matters which are local concerns subject to provincial legislative competence, when the federal government determines that provincial carbon pricing stringency is inadequate. In order to meet the national concern test, Canada must identify an aspect of GHG emissions that is <u>**distinct**</u> from that of provincial matters. The very backstop nature of the *GGPPA*, which is premised on the provinces having competence to legislate <u>on the same subject matter</u>, fails the national concern test.

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[14] *2011 Securities Reference* at para 66.
[15] *Bell Canada v Québec (Commission de la santé & de la sécurité du travail)*, [1988] 1 SCR 749 at paras 39 and 46, Beetz J (CanLII) [*Bell Canada*].
[16] *Crown Zellerbach* at para 35.
[17] The factum of the Attorney General of Manitoba also makes this point at paras 41-49.

18. In the context of the national concern doctrine, provincial inability cannot be used as a basis to impose minimum national standards to secure cooperation between one or more provincial legislatures. The national concern doctrine operates by conferring Parliament with an exclusive jurisdiction over both the interprovincial and intraprovincial aspects of a particular matter.[18] The doctrine does not permit divided legislative control between federal minimum benchmarks and provincial measures - it results in removing provincial legislative jurisdiction in its entirety over a particular subject matter.

19. British Columbia (para 54) and other interveners[19] point out that in the Ontario Court of Appeal, Ontario was unable to identify a single provincial statute that would be rendered inoperative by the *GGPPA*. However, Saskatchewan asserts that if the *GGPPA* is found to be constitutional under a new federal power over the regulation of greenhouse gas emissions (which is how Saskatchewan says the new power must be defined) under the national concern branch of POGG, then Saskatchewan's legislation, *The Management and Reduction of Greenhouse Gases Act,* which has been in place since 2010 and which creates a provincial output based pricing system similar to Part 2 of the *GGPPA*, will be *ultra vires*. Quite simply, Saskatchewan's legislation will be "in relation to" the federal head of power, as its purpose and effects are the same.

20. Even if the new federal power is defined in the terms suggested by Canada and is confined to minimum national standards, the conclusion will be that provincial legislation is rendered constitutionally inapplicable by paramountcy whenever the provincial legislation imposes a standard that does not meet the minimums established by the federal legislation. In the case of *The Management and Reduction of Greenhouse Gases Act*, the provincial standards imposed on industry happen to meet the federal benchmark. However, the *GGPPA* renders unconstitutional any attempt by the province to exclude industries, like Saskatchewan's Crown Corporations, or to impose different or less stringent standards in the future.[20] Furthermore, industries regulated by provincial standards that are more stringent than what is set out in the *GGPPA* will be able to argue that the provincial legislation is *ultra vires* because it imposes a different "minimum" standard

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[18] *R v Hydro-Quebec,* [1997] 3 SCR 213 at paras 115, 67; *Johannesson v. Municipality of West St. Paul,* [1952] 1 S.C.R. 292 at pp. 311-32.

[19] See, for example, Factum of the Intervener, Canadian Public Health Association at para 29.

[20] *Saskatchewan Reference* at para 451, per Caldwell and Ottenbreit JJA, dissenting.

than the federal legislation, which will effectively make the federal standard both a floor and a ceiling.

21. British Columbia admits that diversity of response to the climate change crisis has proven necessary (para 4). Saskatchewan agrees that the provinces must be able to respond to the problems created by GHG emissions taking into account their unique regional differences. This cannot be accomplished with the *GGPPA*, which requires the provinces to implement the federal government's preferred policy choice or risk having the *GGPPA* imposed on them directly. This one-size-fits-all solution to environmental matters is neither constitutional nor optimal in a federal country characterized by diversity in geographical and socio-economic environments.

B. The *GGPPA* cannot be upheld through International Treaty Implementation

22. Some interveners, particularly Amnesty International Canada and the Smart Prosperity Institute, raise the question of whether Parliament should be endowed with additional powers over the area of GHG emissions given the existence of various international treaties.

23. In *Reference re Pan-Canadian Securities Regulation*,[21] this Court reiterated the Privy's Council's holding in the *Labour Conventions Case (Canada (Attorney General) v. Ontario (Attorney General)*,[22] that the valid exercise of the federal government's treaty-making power is distinct from the legislative enactment of such agreements into domestic law.[23] While the federal government may enter into international agreements that touch upon subjects falling within exclusive provincial jurisdiction, "individual provinces will only be bound by the terms of such an agreement once their respective legislatures enact them into law."[24]

24. Canada, with much experience, has found it feasible to enter into a myriad of international agreements, fully recognizing that a commitment made internationally without a corresponding commitment from the provinces relating to its powers is made at Canada's peril. Canada's ability

[21] 2018 SCC 48, [2018] 3 SCR 189 [*2018 Securities Reference*].
[22] [1937] AC 326 (JCPC) [*Labour Conventions*].
[23] *2018 Securities Reference* at para 66.
[24] *Ibid.*

to seek and obtain consensus from all levels of government in order to make an international commitment is a constructive illustration of cooperative federalism.

25. It should be noted that no international treaty entered into the record commits Canada to a carbon pricing system as being the necessary means of setting GHG emission reduction targets.

C. The *GGPPA* cannot be upheld under the emergency doctrine

26. Several interveners argue that the *GGPPA* can be upheld under the emergency branch of the POGG power. However, the failure by Canada to advance its own legislation on the basis of emergency should alone be fatal. The invocation of a national emergency and the highly exceptional power to suspend the normal operation of the Constitution ought never to be advanced in so casual a manner.

27. In any event, the *GGPPA* does not meet the criteria under the emergency doctrine. In particular, Parliament did not purport to legislate on the basis of an emergency at the time the *GGPPA* was enacted nor was it intended to be anything other than permanent in nature.[25] Under the *Anti-Inflation Act*, for example, the impugned legislation fixed an immediate in force date and prescribed a termination date subject to earlier termination under a prescribed procedure.[26]

28. Some interveners have argued that the legislation is temporary in a contextual sense despite the lack of an explicitly fixed timetable because it sets Canada down the path of meeting its Paris Accord target by 2030 and the transition to a low-carbon future for Canada.[27]

29. This would make valid exercise of the emergency power depend on the success of a particular policy adopted by Parliament. Such considerations have long been dismissed as irrelevant in a proper division of powers analysis. As succinctly put by the majority of this Court in *Reference re Anti-Inflation Act*, "the wisdom or expediency or likely success of a particular

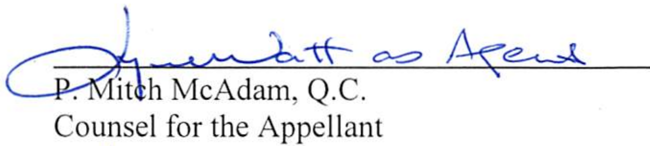
[25] *Anti-Inflation Reference* at p. 427.
[26] *Ibid*. at p. 383.
[27] Factum of the Intervener, David Suzuki Foundation at paras 23-26.

policy expressed in legislation is not subject to judicial review."[28] It is the true nature and character of the Legislation - not its ultimate results - that matters.

30. Saskatchewan submits that if emergency measures were extended outside a fixed termination date not subject to Parliamentary ratification, then the emergency doctrine itself must be subject to similar if not greater restrictions than the national concern branch of the POGG power, as its effect would be to eviscerate provincial jurisdiction on an indefinite basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 10th day of February, 2020.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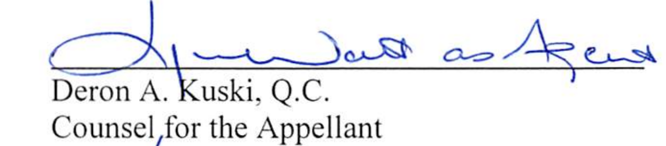
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