Court File No. 39116

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR 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 FOR ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S. 26

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant

-and-

ATTORNEY GENERAL OF ALBERTA

Respondent

-and-

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This factum supplements Oceans North Conservation Society's ("**Oceans North**") factum in the companion appeals (SCC File No. 38663/38781) where it was granted intervener status to advance submissions on how the impacts of greenhouse gas ("**GHG**") emissions and climate change on the Arctic is material to this Court's application of the national concern doctrine. In this factum, Oceans North focuses on Chief Justice Fraser and Justices Watson and Hughes' (the "majority") application of the national concern doctrine. Specifically Oceans North says:

a. The majority creates a false distinction between marine pollution and GHG pollution in attempting to distinguish this case from *Crown Zellerbach*.[1]

b. The majority misapplies the provincial inability test by not examining the severity of the consequences of provincial non-cooperation, and downplays Alberta's role specifically in creating those consequences.

c. The majority misapplies the principle of subsidiarity in analyzing whether the matter is one of national concern that would be reconcilable with federalism, and relies on speculative findings as to business losses with no evidentiary support.

PART II – OVERVIEW OF INTERVENER'S POSITION

2. The *Greenhouse Gas Pollution Pricing Act* (the "***Act***") is constitutional under the national concern doctrine as an exercise of Parliament's jurisdiction to legislate for peace, order, and good government of Canada under s. 91 of the *Constitution Act, 1867*.

PART III - STATEMENT OF ARGUMENT

A. GHG EMISSIONS ARE A FORM OF MARINE POLLUTION

3. In the analysis of singleness, distinctivness, and indivisibliity, the majority at para. 292 attempts to distinguish the facts of this case from the facts of *Crown Zellerbach* by saying that "[t]he problem in *Crown Zellerbach* that justified adding 'marine pollution' as a federal head of power was the *inability to detect the source of the pollution*."[2]

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[1] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 [***Crown Zellerbach***]
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 ("**ABCA Reasons**"), para. 292 [emphasis in original]

4. However, as discussed in detail in Oceans North's Factum in the companion appeals, GHG emissions are a form of marine polution. More than 30% of GHG emissions are absorbed directly into the oceans and cause adverse consequences like ocean acidification.[3] The majority may have overlooked this point because of their hesitancy to weigh into what they viewed as "dueling" factual records,[4] but the insidious impacts of GHG emissions as a marine pollutant were undisputed and expressly admitted to by Alberta's affiant on cross-examination.[5]

5. The majority points to the fact that sources of GHG emissions are readily identifable – one simply has to look at the regulated entites under the *Act*.[6] However, this does not answer the point that Le Dain J. was making regarding the difficulty of observing the boundary between the territorial sea and internal marine waters.[7] That same difficulty is present with GHG emissions that are absorbed into marine waters. Le Dain J. was not speaking about the sources of pollution – as in who was repsonsible for the pollution. Indeed, it was obvious that Crown Zellerbach, as the company charged for contravening the *Ocean Dumping Act*, was the source of pollution in that case.

6. Alberta in its factum falls into similar errors as the majority. Contrary to what Alberta asserts at paras. 20 and 27-28 of its factum, the fact that GHG emissions can pollute more than just marine environments, are more difficult to trace and identify than traditional forms of pollution such as toxic waste, and have far greater impact in scale and duration, makes it *more* of a reason that a federal law designed to combat that problem is one of national concern – not less.

B. ASSESSING THE CONSEQUENCES OF FAILED PROVINCIAL ACTION IS CENTRAL TO THE PROVINCIAL INABILITY TEST

7. On the provincial inability test, the majority says that the fact that Alberta disproportionately produces GHG emissions which can have negative consequences on other

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[3] Factum of Oceans North, filed January 24, 2020 ("**Oceans North's Factum**"), paras. 5-7
[4] ABCA Reasons, paras. 247-250
[5] Supplementary Record of the Attorney General of Alberta ("**SR**") Vol. 10, Record of the Attorney General of Alberta ("**AR**"), Transcript of Cross Examination of R. Savage, p. 56. See also, SR Vol. 11, Record of the Attorney General of Canada ("**CR**"), Affidavit of John Moffet, September 30, 2019 ("**Moffet Affidavit**"), Ex. G, pp. R310-355, Ex. K, R440
[6] ABCA Reasons, para. 293
[7] *Crown Zellerbach*, p. 437

provinces is irrelevant to the analysis.[8] They provide a number of examples where provinces may do something to the detriment of other provinces, concluding that "the mere fact something one province does might adversely affect another economically, socially or environmentally is not itself a basis for the federal government's taking over provincial jurisdiction under the national concern doctrine."[9]

8. In Oceans North's submission, the disproportionate distribution of costs and benefits of transboundary pollution is a relevant, if not central, consideration in the provincial inability test.[10] However, it is not the "mere fact" that one Province may act in a way that adversely affects another Province that justifies the use of the national concern doctrine. One must also look at the consequences, including the scale of impact, of failed provincial cooperation. While some of the examples given by the majority at para. 315 relating to trade barriers are difficult to understand, as interprovincial and international trade are clearly matters of federal jurisdiction, the example of the failure of a province to have a stringent vaccination program to combat a disease is a timely one. If the failure of a province to have such a program adversely affected other jurisdictions to such a degree that it imperiled the very survival of that part of the country – a federal law to remedy that collective action problem would be appropriately upheld under the national concern doctrine. That is the situation the Arctic faces in regards to climate change.

9. At first blush, it may appear that there is nothing generally problematic with the majority's "bottom line" that "[h]ow the provinces exercise their jurisdiction to regulate GHG emissions is a policy question not a legal one"[11]. However, taken to the extreme, it means that one Province could adversely affect another jurisdiction to the point of that jurisdiction's destruction without any ability of the federal government to remedy the issue. That cannot be the case – as it would defeat the whole point of federalism. The appropriate question is *when* it becomes a legal and a constitutional problem. That is why it is important as the first step in the national concern doctrine to look at the extent that the matter in question goes beyond what is merely local and provincial in nature. As outlined in Oceans North's Factum in the companion appeals, the matter is one of

[8] ABCA Reasons, paras. 313-314
[9] ABCA Reasons, paras. 315
[10] Oceans North's Factum, paras. 11-16
[11] ABCA Reasons, para. 316

paramount national concern with international character and international implications.[12] Catastrophic and irreparable change to the Arctic – a significant portion of Canada – is at stake.

10. The majority does not consider these facts in its applicaiton of the provincial inability test, but rather suggests that "it is disingenuous, not to mention unfair, to imply that, because Alberta continues to generate the wealth it does, Alberta cannot be counted on to regulate its own industries and do its part in reducing GHG emissions."[13] This does not accord with the evidentiary record, which clearly shows Alberta being one of the highest per capita emitters in the world, and has continued to increase its emissions significantly.[14] If any region of the country has been treated unfairly, it is those who live in the Arctic, as they have the highest exposure and vulnerability to the impacts of GHG emissions, are least responsible for it, and least able to address the problem.[15]

11. Alberta's familiar refrain to the fact that there are other much larger polluters globally (at least in an absolute sense)[16] reinforces the collective action problem therefore the need for federal action. There is no doubt that GHG emissions from Alberta *are* a cause of the harm, even if it is not the sole or the biggest cause. The fact that one jurisdiction can point its finger to another jurisdiction to justify its continued emissions simply underscores the collective action problem and the unrealistic possibility of cooperation. Every jurisdiction must do its part to reduce emissions; no reduction is negligible.[17] Federal minimal standards correct the collective action problem by ensuring all provinces do their part to reduce emissions.

C. SUBSIDIARITY SUPPORTS UPHOLDING THE ACT

12. One of the constitutional principles relied on by the majority is the principle of subsidiarity.[18] The majority uses this principle in the last step of the national concern test – in assessing whether upholding the law would be reconcilable with federalism. The majority says

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[12] Oceans North's Factum, paras. 7-10
[13] ABCA Reasons, para. 313
[14] SR Vol. 14, CR, Expert Report of Rivers, Sept. 27, 2019, Ex. D, pp. R1210-1214
[15] SR Vol. 11, CR, Moffet Affidavit, Ex. G, p. R347
[16] Factum of Attorney General of Alberta, July 15, 2020, para. 27; ABCA Reasons, para. 324
[17] Supreme Court of the Netherlands, January 13, 2020, *Ugrenda Foundation v. The State of the Netherlands*, Case Number: 19/00135 (The Netherlands) at paras. 5.7.7-5.7.8
[18] ABCA Reasons, paras. 137-141

that provinces are best suited to decide the appropriate combination of policy choices to balance the issues of climate change with sustaining the economy.

13. Oceans North does not dispute the importance of the principle of subsidiarity. The record demonstrates, consistent with Oceans North's experience, that local communities in the Arctic, and especially Inuit communities, are critical in creating effective local adaptation and mitigation efforts.[19] But the principle of subsidiarity does not mean there can be no federal regulation in the area. Indeed, in Justice L'Heureux-Dubé's seminal passage about the principle of subsidiarity in *Spraytech*, she quotes from the Brundtland Commission stating that local governments should be empowered to exceed, but not lower, national norms.[20] As Chief Justice McLachlin explained, the principle of subsidiarity contemplates jurisdictional overlap, and in *Spraytech,* "the town supplemented federal pesticide controls by further restricting the use of certain substances".[21] The principle of subsidiarity is meaningless if another jurisdiction can undermine all local efforts. That is precisely what is at risk for those in the Arctic.

14. The majority also makes dire statements about the implications of an unraveling economy and the loss of business competitiveness to the benefit of Alberta's foreign oil and gas competitors.[22] These statements are entirely speculative, and the majority cites to no support in the record where such losses would be due to the *Act*. What the majority does not reference at all, and what is abundantly clear from the record, is the irreversible harm that will befall the Arctic if the *status quo* is maintained. National unity, cooperation, and survival, foundational to Canadian federalism, is what is at stake and relevant to the analysis – not speculation of business losses.

PART IV - ORDERS SOUGHT

15. Oceans North does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 10, 2020

agent for

David W.L. Wu
Counsel for the Intervener, Oceans North

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[19] SR Vol. 12, CR Moffet Affidavit, Ex. G, p. R347, Ex. I, pp. R406, R414-415
[20] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 3
[21] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, para. 70
[22] ABCA Reasons, paras. 330-332

PART V - TABLE OF AUTHORITIES