Court of Appeal File No.: C65807

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

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TABLE OF CONTENTS

PART I - INTRODUCTION

1. This Reference is a case about the division of powers between the federal and provincial governments and the proper balance of federalism in Canada. The United Conservative Association ("**UCA**") agrees with the positions advanced by Ontario and submits that the *Greenhouse Gas Pollution Pricing Act* (the "***GGPPA***") is unconstitutional.

2. By attempting to justify the enactment of 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 is attempting 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, leaving the provinces, including Alberta, unable to develop GHG emission reduction policies that are particular to their unique social and economic situations.

5. The UCA intervenes in this Reference to provide an Albertan perspective on Canada's attempts to expand the federal government's constitutional powers and the resulting consequences for Albertans.

PART II - FACTS

6. The UCA agrees with and adopts the facts as set out in the Factum of the Attorney General of Ontario.

PART III - ISSUES AND LAW

7. The UCA submits that the pith and substance of the *GGPPA* is to regulate GHG emissions across all sectors of the Canadian economy, regardless of their source. Canada's suggestion that the pith and substance is the "cumulative dimensions of GHG emissions", not the regulation of GHG emissions, offers a distinction without any meaningful difference.

8. The enactment of the *GGPPA* cannot be justified using the national concern branch of POGG for the following reasons:

(a) GHG emissions do not have sufficient singleness, distinctness, and indivisibility to constitute a matter of national concern because they are generated by an endless list of human activities and nearly every sector of the Canadian economy; and

(b) Granting the federal government the power to regulate GHG emissions as a matter of national concern under POGG would give the federal government the exclusive jurisdiction over the regulation of GHG emissions, including the intra-provincial aspects of regulating GHG emissions, which would have an impact on provincial jurisdiction that is irreconcilable with the fundamental distribution of powers under the Constitution given the foundational constitutional principles of federalism and subsidiarity.

PART IV - ARGUMENT

A. Pith and Substance of the *GGPPA*

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

10. While Canada now argues that the pith and substance of the *GGPPA* "relates to the cumulative dimensions of GHG emissions", there is no logical distinction between

the regulation of the "cumulative dimensions" of GHG emissions and the regulation of GHG emissions. They are one and the same matter.

11. The stated purpose of the *GGPPA* is to reduce GHG emissions across all sectors of the Canadian economy. It is not possible to address the "cumulative dimensions" of GHG emissions without directly addressing the activities that give rise to GHG emissions. The effect of the *GGPPA* will be to allow the federal government to regulate GHG emissions throughout Canada. Accordingly, the UCA agrees with Ontario that the true pith and substance of the *GGPPA* is the regulation of GHG emissions throughout Canada, regardless of their source.

> *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act*, 2018, No 1., SC 2018, c12, Preamble.

B. National Concern Branch of POGG

12. 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.

> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, at 432;
> *R. v. Hydro-Quebec*, [1997] 3 SCR 213, at para 115

13. 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.

> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, at 432;
> *R. v. Hydro-Quebec*, [1997] 3 SCR 213, at para 115

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

C. No Singleness, Distinctiveness, and Indivisibility

15. Requiring that a matter of national concern has sufficient singleness, distinctiveness, and indivisibility such that it is clearly distinguished from matters of provincial concern prevents new powers of a diffuse nature from being added to the list of federal powers. This prevents the expansion of the federal government's powers into matters of provincial concern.

Reference re: Anti-Inflation Act, [1976] 2 SCR 373, at 458

16. The Record submitted by Canada and Ontario demonstrates that GHG emissions are produced by a wide range of human activities. Almost every sector of the Canadian economy produces GHG emissions.

17. The sources of GHG emissions include private automobiles, heating 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.

18. 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*.

19. 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 human activities and nearly every sector of the Canadian economy, including matters and industries that clearly fall within Alberta's jurisdiction under ss. 92 and 92A of the *Constitution Act, 1867*.

20. As a result, the regulation of GHG emissions lacks sufficient singleness, distinctness, and indivisibility to distinguish it from matters of provincial concern, and is not, therefore, a matter of national concern under POGG.

D. No Reconcilable Impact on Provincial Jurisdiction

21. Requiring that a matter of national concern has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution ensures that a finding that a matter is a national concern will not upset the balance of federalism in Canada.

22. This necessarily requires consideration of the principles of federalism and subsidiarity. It also requires consideration of how transferring a matter to the exclusive jurisdiction of the federal government will alter the balance of federalism in Canada.

1. Federalism

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

Reference re Secession of Quebec, [1998] 2 SCR 217, at para 32

24. 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. 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.

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837, at paras 71 and 7

25. 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.

Reference re Secession of Quebec, [1998] 2 SCR 217, at para 58

26. 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.

Reference re Secession of Quebec, [1998] 2 SCR 217, at para 58

27. A key fact in this regional diversity is that the Canadian federation provides the opportunity for each province, including Alberta, to develop and regulate its economy in a manner that reflects local concerns. This recognizes that one province may choose do address a problem in a different way than another province.

R. v. Comeau, 2018 SCC 15, [2018] 1 SCR 342, at para 85

28. 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.

R. v. Comeau, 2018 SCC 15, [2018] 1 SCR 342, at para 83

29. In the context of the national concern branch of POGG, federalism is much more than just an interpretive guide to the constitutional division of powers. It is part of the test that must be applied by this Court. A matter cannot become a national concern if such a finding would upset the fundamental distribution of legislative power under the Constitution upon which Canadian federation is founded.

2. Subsidiarity

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

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

31. 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 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. Lebel and Deschamps JJ. found that Court had recognized that 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 is an important component of Canadian federalism.

> *Reference re Assisted Human Reproduction Act*, 2010 3 SCR 457, at para 183; *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para 58

32. 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. For Lebel

and Deschamps JJ., Professor Hogg's analysis confirms that subsidiarity is an important component of Canadian federalism.

> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented, Vol 1 at pp. 5-12 to 5-14;
> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, at para 183

33. 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, subsidiarity was also considered by the majority of the Supreme Court of Canada in *Canadian Western Bank*. 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".

> *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para 45

34. 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. For Albertans, the principle of subsidiarity recognizes the reality that the federal government in Ottawa is often not capable of understanding and addressing the concerns of Albertans.

35. The national concern analysis requires an analysis of the effect that a finding that a matter is a national concern would have on the balance of federalism in Canada. As subsidiarity is an important component of Canadian federalism, the national concern analysis necessarily requires the application of the subsidiarity principle to the question

of whether a finding that a matter is a national concern has an impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

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

36. Canada suggests that a finding that the *GGPPA* was validly enacted under the national concern branch of POGG will not upset the constitutional division of powers. It seems to suggest that the double aspect doctrine will allow provincial statutes targeted at reducing intra-provincial GHG emissions to operate concurrently with *GGPPA*.

Canada's Factum at para 73

37. This argument overlooks a fundamental problem: a finding that a matter is a national concern under POGG gives Parliament an exclusive, plenary jurisdiction in relation to the matter, "including its intra-provincial aspects".

R. v. Crown Zellerbach Canada Ltd., [1988] 1 SCR 401, at 433

38. Canada's submissions also overlook the fact that the double aspect doctrine does not operate as an exception to or a qualification of the rule of exclusive jurisdiction. It does not create concurrent fields of jurisdiction. Where the federal government and a province pursue the same legislative objective by similar techniques and means, the double aspect doctrine cannot save provincial legislation that falls within the exclusive jurisdiction of the federal government.

Bell Canada v. Quebec (Commission de la Sante et de la Securite du Travail), [1988] 1 SCR 749 at paras 38 and 298-299

39. 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.

> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, at para 186

40. The Supreme Court of Canada considered an argument similar to Canada's in *Crown Zellerbach*. There, the Court considered the suggestion by Professor Gibson that the national concern branch involved a limited or qualified application of federal jurisdiction, and that only the aspect of a problem that is said to be beyond provincial control, not the entire problem, would fall within federal competence under the national concern branch of POGG.

> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, at 432-433

41. 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.** (emphasis added)
>
> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, at 433

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

R. v. Hydro-Quebec, [1997] 3 SCR 213, at para 115

43. 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.

44. This will prevent the provinces, including Alberta, from legislating or implementing their own GHG emission reduction policies and programs as any provincial legislation that has the purpose or effect of reducing GHG emissions, whether intra-provincial or extra-provincial 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*.

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

45. The Record submitted by Ontario and Canada demonstrates that there is a wide range of policy options available to achieve reductions in GHG emissions.

46. 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 their unique, local circumstances into account.

47. 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. 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. The principle of subsidiarity requires 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.

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.

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837, at para 72

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.

Reference re Securities Act, 2011 SCC 66, [2011] 3 SCR 837, at para 73

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 Zellerbach* the national concern branch of POGG does not contemplate concurrent or overlapping jurisdiction between the federal government and 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*.

R. v. Hydro-Quebec, [1997] 3 SCR 213, at para 116

54. For these reasons, 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*.

55. 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 GHG emissions invalid.

56. 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.

57. For these reasons the UCA submits that the regulation of GHG emissions would have a scale of impact on provincial jurisdiction that is completely irreconcilable with the fundamental distribution of legislative power under the Constitution such that it cannot be a matter of national concern.

PART V - ANSWER REQUESTED

58. 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 26th day of February, 2019.

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SCHEDULE A – AUTHORITIES CITED

CASES

114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241

Bell Canada v. Quebec (Commission de la Sante et de la Securite du Travail), [1988] 1 SCR 749

Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 SCR 3

R. v. Comeau, 2018 SCC 15, [2018] 1 SCR 342

R. v. Crown Zellerbach Canada Ltd., [1988] 1 SCR 401

R. v. Hydro-Quebec, [1997] 3 SCR 213

Reference re: Anti-Inflation Act, [1976] 2 SCR 373

Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 SCR 457

Reference re Secession of Quebec, [1998] 2 SCR 217

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SECONDARY SOURCES

Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. supplemented.

SCHEDULE B – LEGISLATION CITED

LEGISLATION

Greenhouse Gas Pollution Pricing Act, being Part 5 of the *Budget Implementation Act*, 2018, No 1., SC 2018, c12, Preamble.

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

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Proceedings commenced at Toronto

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