Court of Appeal File No. C65807
MH9500

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, No. 1,* SC 2018, c.12

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Part I: Overview

1. The Attorney General of Saskatchewan has intervened in this *Reference* case to support the position of the Attorney General of Ontario that the *Greenhouse Gas Pollution Pricing Act*[1] is unconstitutional in its entirety. The Government of Saskatchewan has steadfastly opposed the federal government's attempts to impose a carbon tax on individuals and small businesses in Saskatchewan and elsewhere in the country. The Government of Saskatchewan initiated its own *Reference* case with respect to the constitutionality of the *Act* by Order-in-Council 194/2018 under *The Constitutional Questions Act, 2012*[2] on April 19, 2018. This Order-in-Council posed a question to the Saskatchewan Court of Appeal that is similar to the question before this Court.[3] The Saskatchewan *Reference* case was heard on February 13 and 14, 2019. The Court reserved its decision.

2. As indicated in the Saskatchewan *Reference* case, Saskatchewan says that this case is not about the risks posed to the country or the world by climate change. This case is not about whether putting a price on carbon is an effective policy tool to combat global warming caused by greenhouse gas emissions. In Saskatchewan's opinion, this case is fundamentally about the nature of our federation. The *Act* is unprecedented in Canadian history. The federal government recognizes that provinces have the legislative jurisdiction to combat climate change by imposing their own carbon pricing regimes (ie, carbon taxes). However, the *Act* provides that when provinces (like Saskatchewan) have not imposed their own carbon taxes or when Provinces (like Manitoba) have not imposed sufficiently stringent carbon taxes, then the federal government will

[1] Joint Book of Authorities, Vol. V, No. 90.
[2] SS 2012. c. C-29.01.
[3] See Appendix "A".

step in and impose carbon taxes in these provinces. This results in a federal legislative regime imposing carbon taxes in some provinces but not others. Saskatchewan says that this is fundamentally inconsistent with the principles of federalism which underlie our Constitution and, therefore, is *ultra vires*.

3. Saskatchewan also says that the *Act* cannot be upheld under the national concern branch of the peace, order and good government (POGG) power. The new matter that the federal government seeks to have recognized as a federal head of power under POGG, namely, the cumulative dimensions of greenhouse gas emissions, is not sufficiently distinct or divisible from matters otherwise within provincial jurisdiction. Recognition of such a jurisdiction would result in an unnecessary tilting of the balance of the federation towards the centre. Saskatchewan says that Part One of the *Act* is simply an attempt by the federal government to impose an indirect fuel tax on consumers which is unconstitutional because it fails to comport with section 53 of the *Constitution Act, 1867*[4] because essential elements of the tax are delegated to the Governor in Council. Saskatchewan further says that Part Two of the *Act* is primarily aimed at the regulation of local industries within provincial jurisdiction (the provincial private sector) and, accordingly, is beyond federal jurisdiction. Part Two lacks a constitutional foundation and, therefore, it is unnecessary for the Court to determine whether the charges imposed by Part Two are regulatory charges or taxes. However, if the Court decides that it is necessary to consider this issue, Saskatchewan says that the charges are not regulatory because there is no nexus between how the revenues generated by the charges are spent and the regulatory regime. Therefore, the charges are simply taxes. As taxes, the Part Two charges suffer from the same constitutional infirmity as the

[4] RSC 1985, Appendix II, No. 5.

Part One charges. They violate section 53 because essential elements are delegated to the Governor in Council.

Part II: Facts

4. Saskatchewan adopts the facts as set out by the Attorney General of Ontario.

Part III: Issues and Law

A. Principles of Federalism

5. Saskatchewan's position is that the *Act* is unconstitutional in its entirety. Saskatchewan relies on the principles of federalism. Saskatchewan says that the fact that the *Act* applies in some provinces but not others violates the principles of federalism and is, in and of itself, a sufficient reason for the Court to find the *Act* to be *ultra vires*. In *Reference re: Secession of Quebec*[5], the Supreme Court recognized that certain principles, like federalism, inform and sustain the Constitution. These principles were described by the Court as the very life blood of the Constitution. The Court went on to identify four fundamental principles that form the foundation of our Constitution. One of these principles is federalism. The Court indicated at para 37 that the significance of the adoption of the federal system in Canada could not be exaggerated. At para 56, the Court described federalism as the "lode star" of our constitutional structure. The Court indicated that each level of government is sovereign in its assigned areas of jurisdiction. Each

[5] Joint Book of Authorities, Vol. IV, No. 49.

level of government is autonomous from the other within these areas. The Court indicated that these spheres of autonomy are guaranteed by the Constitution.

6. In 2018, the Supreme Court revisited the principles of federalism in *R v Comeau*[6]. The issue in that case concerned the meaning of section 121 of the *Constitution Act, 1867*. The Respondent argued that section 121 should be interpreted as imposing a free-trade regime on Canada. The Supreme Court disagreed. In reaching its conclusion, the Court relied on the principles of federalism and concluded that the full economic integration called for by the Respondent's interpretation of section 121 would curtail the freedom of action and the sovereignty guaranteed to the provinces by the Constitution. The Court concluded that section 121 had to be interpreted in a way that respected the principles of federalism and provided space for each province to regulate its own economy in a way that reflects local interests. The Court refused to accept an interpretation that would subsume provincial powers or eviscerate them. A jurisdictional balance was required and this had to be the most important consideration.

7. The concepts of provincial sovereignty and autonomy are not new. The Privy Council recognized very early on in its jurisprudence concerning the Canadian Constitution that the provinces are sovereign and autonomous within the areas of jurisdiction assigned to them by the *Constitution Act, 1867* and have the right to make decisions with respect to these matters without their decisions being second guessed or overridden by the federal government. In *Reference re The Initiative and Referendum Act* in 1919, Viscount Haldane put it as follows:

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Province should be represented, entrusted with

[6] Joint Book of Authorities, Vol III, No. 39.

> exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.[7]

8. Saskatchewan says that the principles of federalism are relevant to this case in three ways. First, they provide a stand-alone basis on which the *Act* can be found to be *ultra vires*. As noted in *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island*, these fundamental constitutional principles are the means by which the underlying logic of the *Constitution Act, 1867* can be given the force of law.[8] Second, it is well accepted that these principles can be relied upon as interpretive tools in assessing the scope of federal and provincial powers. [9] Third, the test for determining whether a matter falls under the national concern branch of the POGG power expressly provides that the impact on the balance of powers in the federation must be taken into account.[10]

9. Saskatchewan submits that the principles of federalism require federal laws to have uniform application across the country. If there is no need for a uniform national law, but rather there is only a need for a law that applies in one or two provinces, the matter should not be seen to fall under federal jurisdiction. It should be seen to fall under provincial jurisdiction. This accords

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[7] [1919] AC 935, at p. 942.
[8] [1997] 3 SCR 3 at para 95. See also Beverly McLachlin "Unwritten Constitutional Principles: What's Going on? (2006) NZTPIL 147.
[9] See, *Reference re Senate Reform* 2014 SCC 32, at para 25; *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at p. 752 and *Reference re: Resolution to Amend the Constitution* [1981] 1 SCR 753 at pp. 821-824, 840-841 and 905-906.
[10] Joint Book of Authorities, Vol. III, No. 40, at p. 432.

with the underlying logic of the division of powers. It was never intended that the federal government would be allowed to use its powers to legislate for individual provinces. Uniformity in the application of federal law is a constitutional requirement. Nothing less will satisfy the demands of federalism. In this case, Part One of the Act only applies in Ontario, New Brunswick, Manitoba and Saskatchewan.[11] Part Two of the Act only applies in Ontario, New Brunswick, Prince Edward Island, Manitoba and partially in Saskatchewan.[12] This inconsistent application across the country renders the Act *per se* unconstitutional.

10. There have been very few cases that have dealt with the need for uniform federal laws. The notion of uniformity is supported by several old Privy Council cases such as the *Johnny Walker* case[13] which held that Dominion customs duties could be applied to provinces as long as there was "no partiality" in their operation. More recently, cases like *R v Sheldon S.*[14] and *Haig v Canada*[15] have rejected the notion that section 15 of the *Charter* requires uniformity in the application of federal law. But these were *Charter* cases, not division of powers cases. It is submitted that they do not stand for the proposition that, from a division of powers perspective, federal laws can be applied selectively in some provinces, but not others.

11. It is also important to keep in mind exactly what the Court said in *Sheldon S.* The Court indicated that differential application of federal law can be a legitimate means of forwarding the

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[11] Draft Regulations Amending Part I of Schedule 1 and Schedule 2 to the *Greenhouse Gas Pollution Pricing Act* published by the Honourable William Francis Morneau, P.C., M.P., Minister of Finance on October 23, 2018.
[12] *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*: SOR/2018-212 dated October 19, 2018.
[13] *Attorney General of British Columbia v Attorney General of Canada* [1924] AC 222 at p. 225; See also *Attorney General of Canada* [1896] AC 348, at p. 367.
[14] [1990] 2 SCR 254.
[15] [1993] 2 SCR 995.

values of a federal system. It is, therefore, submitted that *Sheldon S.* suggests that even if there is not a general rule requiring uniformity in the application of federal law, laws that apply in some provinces but not others are constitutionally suspect if the reason for their non-uniform application is not consistent with the principles of federalism. Saskatchewan submits that this is the case here. The Act does not further the principles of federalism. It subverts them by substituting the federal government's views about a matter within provincial jurisdiction for the views of the provincial government. This sort of second guessing of provincial decisions with respect to matters within their jurisdiction is incompatible with federalism.

12. Support for this proposition can be derived from the legal opinion on the constitutionality of the *Act* that the Government of Manitoba obtained from Dr. Bryan Schwartz of the University of Manitoba in 2017.[16] Dr. Schwartz suggested that credible arguments exist to challenge the constitutionality of the federal scheme. He said that the scheme could be considered unconstitutional because it ignores the underlying principle of the equality of the provinces which was recognized in the *Senate Reference*. While he acknowledges that case law suggests that federal laws do not have to apply uniformly throughout the country, he suggested that where federal laws are applied in different provinces <u>arbitrarily</u>, it could be argued that the legislation is unconstitutional. Saskatchewan accepts and adopts Dr. Schwartz's thesis, with one variation. Saskatchewan says that where the differential treatment is based not on varying social or economic conditions among the provinces but rather is based on how a province has chosen to exercise its legislative jurisdiction with respect to the matter, the legislation is *per se* unconstitutional. There is no need for the Court to weigh the relative merits of the various approaches to determine if the

[16] Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals prepared by Bryan P. Schwartz for the Government of Manitoba, October 6, 2017.

federal government is acting arbitrarily. Whether provincial measures will be as effective as federal measures is not the test. Whether the federal government is respecting provincial autonomy with respect to matters within their jurisdiction is the test.

13. Finally, Saskatchewan submits that even if there is not a general rule requiring uniform federal laws, there is such a rule with respect to federal taxing measures. In support of this proposition, Saskatchewan relies on the following. First, the authority to tax is one of the most powerful tools that governments possess. As noted by LaForest J. in the *GST Reference*[17], the power to tax is the power to destroy. The potential for misuse of a power to tax in one province, but not others, is manifestly apparent. Second, in his book, *The Allocation of Taxing Power under the Canadian Constitution*, Professor LaForest said:

> The comprehensive reach of section 91(3) [of the *Constitution Act, 1867*] indicates that no limitations should be imposed on the power except such as are clearly set out or inhere in the federal structure of the constitution.[18]

14. Third, in *Abbott v City of St. John*[19], the principle of uniformity was accepted by the Supreme Court for provincial and municipal taxes. These powers have to be exercised uniformly and without discrimination. Fourth, in *Minister of Finance v Smith*[20], Viscount Haldane said that federal taxation should be applied the same throughout the country and should not vary from province to province based on the particularities of provincial law. Fifth, the Report of the *Royal Commission on Dominion-Provincial Relations*[21], commonly referred to as the Rowell-Sirois

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[17] Joint Book of Authorities, Vol. III, No. 47, at p.497.
[18] Joint Book of Authorities, Vol. V, No. 82, at p. 31.
[19] (1908) 40 SCR 597.
[20] [1927] AC 193.
[21] Newton Rowell and Joseph Sirios, *Report of the Royal Commission on Dominion-Provincial Relations, Book I-Canada: 1867-1939,* Government of Canada Publications, 1939.

Report, from 1939 recommended the adoption of new national programs like unemployment insurance which would be funded by federal tax dollars. But the Commission emphasized that these new federal taxes would have to be applied on a uniform basis and would have to treat the residents of all Provinces equally. In making these statements, it is submitted that the Commissioners were not proposing something new but rather were simply expressing the existing limits on federal taxing powers that flow out of the principles of federalism. Sixth, the American Constitution expressly provides in Article 1, Section 8, Clause 1 that federal taxation must be applied uniformly throughout the United States and cannot vary along state lines.[22] Finally, sections 92A(2) and 92A(4) of the *Constitution Act, 1867* expressly recognize this principle. They authorize provinces to enact laws dealing with the export of natural resources and the taxation of those resources so long as those laws do not discriminate or differentiate between provinces.

15. Saskatchewan therefore submits that the *Act* is unconstitutional because of its uneven application across the country and because it represents a second-guessing of provincial decisions with respect to matters within provincial jurisdiction which is not consistent with the principles of federalism. Saskatchewan also says that it is not necessary for the Court to engage in a traditional pith and substance analysis to determine this issue because the legislation is constitutionally illegitimate on a principled basis. The Supreme Court recently adopted a similar approach to the issues raised in *Reference re: Pan-Canadian Securities Regulation.*[23] In that case, one of the allegations was that that legislation was inconsistent with the principle of parliamentary sovereignty. The Court examined this issue as a threshold issue without considering pith and

[22] See Ronald D. Rotunda and John R. Nowak, *Treatise on Constitutional Law-Substance and Procedure,* 5th ed., Vol I, Para 5.4, the Uniformity clause, at pp 759-762 and *United States v Ptasynski* 462 US 74 (1983).
[23] Joint Book of Authorities, Vol. IV, No. 48.

substance. It was only after this issue had been dealt with that the Court turned to pith and substance in order to determine if the legislation fell within Parliament's jurisdiction under the general branch of the trade and commerce power.

B. The *GGPPA* is Fundamentally Inconsistent with the POGG Power

16. Whether the measures contained in the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") create taxes or simply impose pricing controls on certain commodities, such measures cannot be justified as being within the jurisdiction of Parliament to legislate for the Peace, Order and Good Government ("POGG") of Canada pursuant to section 91 of the *Constitution Act, 1867*.

17. Parliament is authorized by the POGG power only to make laws "in relation to Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces." Parliament therefore cannot rely on the POGG power to legislate with respect to matters which it acknowledges fall within provincial jurisdiction. Yet the preamble to the *GGPPA* expressly acknowledges that carbon pricing is a matter that falls within provincial jurisdiction. The nature of the POGG power is fundamentally inconsistent with its application to backstop legislation which applies in some Provinces and not others.

18. Canada cites *Crown Zellerbach*[24] as a leading case in summarizing the doctrine of the national concern branch of Parliament's POGG power. In his review of the POGG power, Justice LeDain for the majority begins by identifying early descriptions of the doctrine, first in the *Local*

[24] Joint Book of Authorities, Vol. III, No. 40.

Prohibition case, an 1896 decision of the Privy Council, in which the power is discussed and particularly the caution that is required when considering its application (at 423).

19. LeDain J. cites as more recent authority the minority decision of Beetz J. (dissenting, but not on the proper analysis and description of the national concern doctrine) in the *Anti-Inflation Reference*. The opinion of Beetz J. remains the authoritative source in this area. He also emphasized caution.[25] In *Crown Zellerbach*, the principles of POGG national concern were summarized at pages 432 and 433. For such a matter to be identified as a national concern, strict parameters were identified in order to prevent the POGG power from simply being a tool of endless jurisdictional erosion of provincial powers.

20. The judicial reticence identified as critical is less necessary where POGG is invoked to fill in for "new matters which did not exist at Confederation" (such as aeronautics). But there is properly a heavy burden of persuasion on Canada where there is a call for a permanent transfer of jurisdiction. The ordinary way to change the balance of the division of powers, of course, is not through judicial means but through constitutional amendment. An illustrative example of this is the addition to section 91 of the *Constitution Act, 1867* of head number 2A – unemployment insurance. This was achieved after both the Supreme Court and the Privy Council found that subject matter to be within provincial competence notwithstanding the economic crisis of the Great Depression.[26]

[25] Joint Book of Authorities, Vol. III, No. 44 at 458.
[26] See *A.G. Canada v. A.G. Ontario (Employment and Social Insurance)* Joint Book of Authorities, Vol. I, No. 11.

21. While conceding that neither "the environment" nor "pollution generally" nor "air pollution at large" are distinct matters, Canada posits that GHG emissions, or the cumulative effects thereof, are sufficiently distinct to authorize Canada's displacing jurisdiction. Saskatchewan disagrees and submits that Canada's argument is based on a misunderstanding of both how "matters" are defined for constitutional purposes and the role of the POGG power.

22. There is nothing qualitatively different about a notional subset of "pollution" that is defined by Parliament with a list of involved fuel chemicals. The *GGPPA* applies to various emissions, including those produced through the processing or burning of gasoline, diesel, coke, kerosene, to name a few. The requirement of distinctiveness is not met simply by bringing specificity of regulation to an area that is already recognized as insufficiently distinct.[27] This is not a qualitative difference. If all that is required to render air pollution distinct is to list the types of emissions that fall thereunder, then there is no limit to Canada's ability to take over the jurisdictional space entirely by endlessly adding to the chemical list.

23. In *Crown Zellerbach*, the Court found that marine pollution satisfied the test because of its "predominantly extra-provincial as well as international character and implications". It arrived at this conclusion not because there happened to be an international preoccupation with the question, but because coastal waters are geographically interprovincial and international in nature.[28] The *GGPPA* does not aim to prevent inter-provincial and international pollution from Saskatchewan blowing downwind into and harming other jurisdictions. Instead, it aims to create a system of intra-provincial disincentives to incrementally affect demand through different mechanisms across

[27] Joint Book of Authorities Vol. III, No. 41 at 286-289.
[28] *Supra*, note 24 at 436-437.

Canada in such a way as to reduce the use of certain fuels in favour of other forms of energy or power.[29]

24. Canada argues that a province's failure to apply a tax or a charge on fuel prices (rather than reducing emissions in other ways) harms British Columbia. Even if the absence of the backstop will result in more emissions from Saskatchewan, and this difference would represent a meaningful volume that would have a measurable effect (premises which Saskatchewan does not admit), there is no analogy to be drawn between the direct actions of one province upon a downstream or downwind neighbour. It is akin to saying that there could be a theoretical claim for damages in nuisance law between one province and another in the absence of traceable molecules crossing a border. This type of theoretical exercise in causation comes nowhere near enough to justify federal intrusion upon Saskatchewan's provincial powers.

25. Canada is positing is that Saskatchewan harms her provincial neighbours not by polluting their air directly, but by refusing to have an identical policy standard as Canada in Canadian jurisdicitions' commitments towards aggregate volume contribution to global GHG levels.

26. The requirement of singleness is further belied by the patch-work, politically motivated and uneven application of the backstop system under the *GGPPA*. It cannot be that a matter of singleness can be applied with such wide variation in different parts of the country, where the only test of uniformity is one of a subjective assessment, by the federal government, of whether particular provinces have sufficiently "stringent" pricing mechanisms.

[29] Contrast *Interprovincial Co-operatives* v. *The Queen*, Joint Book of Authorities, Vol. II, No. 27.

27. Furthermore, the nature of the *GGPPA* is instructive. Canada, under its criminal law power, could presumably set limits of emissions beyond which they are prohibited under pain of criminal sanction. The Act however does not purport to limit emissions or even to require permission to emit. Instead it requires interference with the retail economy in order to have an indirect effect. This is far too broad and indirect to be seriously considered as single, distinct and indivisible from provincial authority.

28. There is also a failure to meet the requirement that the national concern branch of the POGG power be reserved for matters distinguishable from matters of provincial concern in the division of powers sense, (as an element of the necessity of distinctiveness). Both the structure of the *GGPPA* backstop mechanism and Canada's position before this Court fail to respect this requirement.[30] Even if concurrent jurisdiction were possible in a POGG matter, POGG is not found *except* where there is no concurrent provincial power. A "backstop" statute cannot conform to this required distinction in that it is premised on provincial room to legislate in the matter.

29. The *GGPPA* may be said to be politically reconcilable with some provincial jurisdictions who happen to be content with the approval of the federal government, particularly if such provinces are not, for the time being, named in Schedule 1 by the Governor in Council for having insufficiently stringent carbon pricing regimes. But, of course, this is not the meaning of the provincial reconciliation test. The test is whether the disruption to provincial legislative powers in a constitutional division of powers sense can be said to be minimal.

[30] *Supra*, note 24 at 432.

30. Incidentally, Saskatchewan points out that on a policy level, the *GGPPA* is far less reconcilable with provincial goals than it could be. The *GGPPA* does not recognize other mechanisms of emission reduction which is the stated goal. It insists on pricing as the necessary mechanism.

31. Saskatchewan submits the impact of the *GGPPA* on Saskatchewan's legislative authority and flexibility is irreconcilable. While Saskatchewan happens to be proud both of its own track record and further plans to deal with intra-provincial carbon emissions, the fundamental question is whether it has authority to set its own policies and legislation in the area of price controls – to do much, to do little, or to do nothing. Canada has nothing to say about this impact other than, "Saskatchewan is free instead to introduce new taxes as certain other provinces have."

32. As Professor Hogg points out, "The requirement of "distinctness" is a necessary but not a sufficient condition for a matter to be admitted to the national concern branch… A distinct matter would also have to satisfy the provincial inability test…"[31] Le Dain J. explained that this test is a subset of the "distinctiveness" requirement[32]. In this regard, it is relevant to consider the extra-provincial effects of a province's actions. Where one province is not able to control the interprovincial aspects of another province's actions to its detriment and to the detriment of the country, the matter may be said to raise the situation of a provincial inability. That is not the case here, where, as acknowledged by Canada, the intended effect of reduction of GHG emissions is globally cumulative in the aggregate.

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[31] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. at 17-16.
[32] *Supra*, note 24 at 432.

33. The provincial inability test is not a provincial *unwillingness* test. If Saskatchewan has full sovereign legislative authority within section 92 of the *Constitution Act, 1867* to impose a carbon pricing regime, then it also has full sovereign legislative authority not to. Its decision not to does not make the province unable to do so. Again, Canada's own claims, respecting contrasting policy decisions of other provinces demonstrates that it believes that the provinces are fully capable – not unable – to legislate carbon pricing.

34. Overwhelmingly, the primary effect of the backstop on Saskatchewan is entirely intra-provincial, not inter-provincial. The primary effect is on the consumers of the province as they fill their gas tanks, heat their homes, and operate machinery in their businesses.

35. There is another fundamental problem. The Supreme Court recognized that environmental protection is not a subject matter that is exclusively within the jurisdiction of the provinces or of the federal Parliament. It also recognized that this is the very reason why the Courts must be very wary of an expansive view of the POGG power as a tool for federal environmental protection.[33]

36. The exclusive nature of POGG national concern was repeated in *Crown Zellerbach* where Le Dain J. for the majority (again in approval of the conclusions drawn by Beetz J. in the *Anti-Inflation Act Reference*) emphasized:

> 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.[34]

[33] *Supra*, note 27.
[34] *Supra*, note 24 at p. 433.

37. The concern of the courts has been that neither level of government should be found to have exclusive jurisdiction in the domain of environmental protection. The importance of this subject matter is such that both levels must have space within their respective heads of power to regulate within their respective policy interests as they relate to their proper areas of jurisdiction.

38. In the rare occasions where the Courts are to conclude that a subject matter must belong to Parliament because of the test for national concern is met, the conclusion is constitutionally drastic in that there is necessarily the attendant conclusion that only Parliament can legislate on that matter. A conclusion in this case that "greenhouse gas emissions" are a matter within federal jurisdiction under the national concern branch of POGG is tantamount to adding "greenhouse gas emissions" to the enumerated powers set out in section 91. Accordingly, any provincial legislation that is "in relation to" greenhouse gas emissions would be *ultra vires.*

39. The *GGPPA* purports to recognize provincial jurisdiction in the area of GHG emissions and both formally in its preamble and operationally through delegated assessment on whether to impose the pricing on a particular province according to that province's recognized constitutional powers.

40. It is not the case that simultaneous exclusive jurisdiction under POGG and recognition of the provinces to enact identical schemes may be understood as a situation of "co-operative federalism". Even if it were the case that the imposition of the backstop carbon tax (or "pricing") onto Saskatchewan could in any way be described as "co-operative" rather than coercive, there is no authority to suggest that the tide of co-operative federalism as a division of powers model can cloak a province with legislative jurisdiction to enact on subject matters which are in the exclusive

jurisdiction of Parliament. On the contrary, this was explicitly forbidden by the Supreme Court of Canada in the recent *Reference re: Pan-Canadian Securities Regulation*.[35]

41. Finally, it is to be emphasized that the double aspects doctrine does not rescue the *GGPPA*. This doctrine does not do away with exclusive jurisdiction by allowing two levels of government to do the exact same thing for the exact same reason.[36]

C. The Pith and Substance of Carbon Pricing

42. If Canada is right in asserting that the *GGPPA* is a pricing measure and not a tax, then legislating interference on the prices of commodities within a province (the pricing "scheme" as it is called in the preamble to the *GGPPA*) is a matter of property and civil rights in the province.

43. While the *GGPPA* may be motivated by environmental concerns, it is a fiscal act – imposing either a tax or a pricing regime on the provinces. This makes the *Anti-Inflation Reference* far more applicable in its analysis (dealing as it does with economic interference measures) than the *Crown Zellerbach* decision which regulates chemical flow directly. In the *Anti-Inflation Reference*, Canada was relying on POGG to keep prices down. In this case, Canada is relying on POGG to artificially increase prices. The principles applicable in both cases are the same.

44. Another instructive decision that illustrates the proper characterization of market regulation with a claim at national concern justification is to be found in the *Reference Re Natural Products*

[35] Joint Book of Authorities, Vol. IV, No. 48.
[36] *Bell Canada* v. *Quebec,* [1988] 1 S.C.R. 749 at 766.

Marketing Act.[37] As in the *Anti-Inflation Reference*, the Supreme Court found a federal intra-provincial price scheming to be *ultra vires* the federal Parliament despite POGG claims to the contrary. This judgment and analysis subsequently received unqualified approval by the Judicial Committee of the Privy Council.[38] In a companion case, relating to Employment and Social Insurance, another sweeping federal statute was considered. Again, Parliament felt it was necessary to deal with a larger issue than the local interests necessarily interfered with that were within provincial jurisdiction. Lord Atkin dealt also with the question of mixed jurisdiction where there were elements of federal competence:

> Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.[39]

D. Industrial Regulation

45. Saskatchewan says that the pith and substance of Part II of the Act is the regulation of industries within the province such as steel manufacturers. The regulation of these industries is a matter that falls under provincial jurisdiction over "local works and undertakings" and "property and civil rights" under sections 92(10) and (13) of the *Constitution Act, 1867*. As noted by Professor Hogg in his text book, *Constitutional Law of Canada*[40], ever since the *Parsons* case in

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[37] [1936] S.C.R. 398; see also, *Re Board of Commerce Act, 1919* [1921] 1 AC 191 at p. 197 and *Fort Francis Pulp and Power Co. v Manitoba Free Press Co.* [1923] AC 695, at p. 703.
[38] *AG BC v. AG Canada (Natural Products Marketing)* [1937] AC 377.
[39] *Supra*, note 26.
[40] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. at pp. 20-1 to 20-2 and at pp. 21-8 to 21-10.

1881[41], it has been recognized the regulation of specific industries, including the prices at which their products are sold, is a matter falling within provincial, not federal, jurisdiction.

46. There is no doubt that the federal government could impose greenhouse gas emission limits on businesses that are otherwise within federal jurisdiction like aviation, railways, shipping and interprovincial pipelines. However, it is submitted that the federal government has no jurisdiction to impose emission limits or pricing structures on businesses otherwise within provincial jurisdiction. A similar issue arose in *Reference re: Anti-Inflation Act.* [42] The federal government attempted to impose wage and price controls on both the federal private sector and the provincial private sector. Justice Beetz in his dissenting judgment (but not on this point) was very clear in stating that the control and regulation of local trade and of commodity pricing in the provincial private sector has consistently been held to lie within exclusive provincial jurisdiction. He concluded that the *Act* interfered with provincial jurisdiction on a large scale and was *prima facie ultra vires*. It is submitted that similar reasoning is applicable in this case. By including the provincial private sector under Part II of the *Act*, the legislation exceeds federal jurisdiction and is *ultra vires*.

47. The Attorney General of Canada argues that all greenhouse gas emissions have national and global implications. While Saskatchewan does not dispute the scientific evidence which suggests that "emissions anywhere have effects everywhere", Saskatchewan submits that this does not justify ignoring the impacts of the *Act* on local industry who will be faced with difficult choices

[41] *Citizens' Insurance Company v Parsons* (1881-82) 7 AC 96; see also, *Home Oil Distributers Ltd. v Attorney General of British Columbia* [1940] SCR 444*,* at p. 451.
[42] *Supra,* note 25 at pp. 441-442.

about cutting production or increasing prices. As indicated in cases like the *Natural Products Marketing Act Reference*,[43] the fact that a company's products might be sold outside their province of origin does not justify the federal government taking over regulation of the local aspects of the business such as the prices at which the product is sold. It is submitted that similar reasoning is applicable in this case. The fact that greenhouse gas emissions have extra provincial effects cannot override the fact that the *Act* is primarily about regulating local industries.

E. Taxation or Regulatory Charges?

48. It is Saskatchewan's position that the fuel charges imposed by Part One of the *Act* are in pith and substance taxes. All of the hallmarks of taxation are present – the fuel charges are enforceable by law, they are imposed under the authority of Parliament, they are imposed by a public body and they are intended for a public purpose.[44] The fuel charges are imposed on wholesalers with the intention that they will pass along the cost to their customers. The fuel charges operate as a classic indirect tax.

49. The Attorney General of Canada does not deny that all of the hallmarks of taxation are present. However, the Attorney General argues that the charges are not taxes, but rather are regulatory charges. In order to be considered a regulatory charge, the Attorney General has to show that there is a regulatory regime and that there is a sufficient nexus between the charges and the regulatory regime. The Supreme Court has identified the following indicia of a regulatory

[43] *Supra*, note 37.
[44] *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, at p. 363; See also, *Re: Eurig Estate* Joint Book of Authorities Vol. I, No. 19, at para 15 and *Westbank First Nation v British Columbia Hydro and Power Authority* Joint Book of Authorities Vol. IV No. 56 at para 21.

regime – a complete and detailed code of regulation; a specific regulatory purpose which seeks to affect the behavior of individuals; actual or properly estimated costs of the regulation and a relationship between the regulation and the person being regulated.[45]

50. Saskatchewan submits that there is no regulatory regime associated with the fuel charges under Part One of the *Act.* Consumers are not regulated in anyway. There is no required or prohibited conduct under Part One. Consumers aren't told to do anything except to pay additional money when they purchase fuel. The Attorney General of Canada says that a complete regulatory code is not required because the charges themselves have a regulatory purpose. They are intended to change consumer's behavior by increasing the price of fuel and thereby driving down demand. However, it is submitted that a regulatory purpose alone is not sufficient to create a regulatory regime. Something more is required. Consumers must be regulated in some way. Otherwise, the charges are simply a tax in disguise.

51. Furthermore, the required nexus between the revenues raised by the charges and the regulatory regime must be met. The Attorney General of Canada denies that this is a requirement and says that as long as the charges are intended to alter behavior, it doesn't matter how much revenue is raised or what the revenue is used for. Saskatchewan submits that this is not the case[46]. The power to tax carries with it special constitutional responsibilities embedded in sections 53 and 125 of the *Constitution Act, 1867*. Something more than simply an intention to alter behavior – which is present in many taxation schemes – must be required to avoid these constitutional obligations.

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[45] *Ibid*. (*Westbank First Nation*) at para. 24.
[46] *Eurig Estate, supra* note 44, at paras 21 and 22; *Westbank First Nation, supra* note 44, at para. 22.

52. As indicated above, it is Saskatchewan's position that the regulatory regime imposed on heavy emitters under Part Two of the *Act* is unconstitutional because it over reaches federal jurisdiction by virtue of its inclusion of the provincial private sector. Accordingly, there is no constitutional foundation for the excess emission charges provided by Part Two and it is not necessary for the Court to determine if they are taxes or regulatory charges. Nevertheless, it is Saskatchewan's position that the excess emission charges are also taxes. Saskatchewan admits that there is a skeletal regulatory regime contained in Part Two. Unlike consumers, heavy emitters are told to do something – to limit their emissions to the cap set by Environment and Climate Change Canada. But it is submitted that this does not amount to the "complete and detailed code of regulation" that is required to constitute a regulatory regime.

53. It is also submitted that the lack of any nexus between the revenues raised by the charges and the regulatory regime means that the charges cannot be considered to be regulatory. Again, the Attorney General of Canada admits that there is no nexus between the revenues raised by the excess emission charges under Part Two and the regulatory purposes of the *Act*. While the funds have to be returned to their province of origin, they will either be paid over to provincial governments, or to individuals as tax credits, with no strings attached. Alternatively, the revenues will be spent by the federal government on schools, hospitals, small businesses, municipalities and Indigenous communities. The revenues raised by the charges are simply paid into the Consolidated Revenue Fund and are spent on typical government expenditures. There is no nexus to the regulatory purposes of the *Act* at all.

54. It is further submitted that once the revenues raised by the charges are untethered from the regulatory purposes of the *Act*, they can no longer rely on the constitutional anchor that supports the regulatory aspects of the legislation. They must constitutionally stand on their own.[47] And they must be considered to be taxes. There is simply no other head of federal power which could apply.

55. Therefore, it is Saskatchewan's position that both the fuel charges under Part One and the excess emission charges under Part Two are taxes, not regulatory charges. Accordingly, section 53 of the *Constitution Act, 1867* applies. Section 53 enshrines the principle of no taxation without representation[48]. Section 53 requires that the essential aspects of taxing measures – the who, what and where – must be set out in legislation and cannot be delegated to subordinate bodies like the Governor in Council. Only "details and mechanisms" can be delegated[49].

56. In this case, Saskatchewan says that section 53 is violated. The *Act* delegates the authority to determine which provinces both taxes apply in to the Governor in Council. Saskatchewan says that it is unconstitutional to apply federal taxes in some provinces but not others. However, even if this proposition is wrong, Saskatchewan says that which provinces a tax applies in is such a fundamental aspect of the tax that it must be set out in the statute and cannot be delegated. Citizens

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[47] See *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, at paras 55-58; and *General Motors of Canada Ltd. v City National Leasing,* Joint Book of Authorities, Vol. II, No. 23, at pp. 665-672.

[48] *Eurig Estate, supra*, note 44 at paras 30-32; *620 Connaught Ltd. v Canada (Attorney General),* Joint Book of Authorities, Vol. I, No. 1, at paras 4-5.

[49] *Eurig Estate, , supra*, note 44, at para 30; *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General),* Joint Book of Authorities Vol. II, No. 33, at para 75.

are entitled to have a matter of this importance debated in and decided upon by Parliament. Nothing less will satisfy the principle of no taxation without representation.

Part IV: Answer Requested

57. Saskatchewan respectfully requests that the Court answer the question posed by this *Reference* case as follows – the Act is unconstitutional in its entirety.

DATED at the City of Regina in the Province of Saskatchewan this 4th day of ~~February~~ March, 2019.

P. Mitch McAdam, Q.C.
Counsel for the Government of Saskatchewan

Alan Jacobson
Counsel for the Government of Saskatchewan

PART V – AUTHORITIES

Cases

620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7, [2008] 1SCR 131

Abbott v City of St. John (1908), 40 SCR 597

AG BC v. AG Canada (Natural Products Marketing) [1937] AC 377

Bell Canada v Quebec, [1988] 1 RCS 749

British Columbia (Attorney General) v. Canada (Attorney General), [1923] 4 DLR 669, [1924] AC 222 (JCPC)

Canada (AG) v. Ontario (AG) (Labour Conventions), [1937] AC 326 (PC)

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44

Canada (Attorney General) v. Ontario (Attorney General) (Unemployment Insurance), [1937] AC 355 (PC)

Citizens' Insurance Company v Parsons (1881-82), 7 AC 96

Eurig Estate (Re), [1998] 2 SCR 565

Fort Francis Pulp and Power Co. v Manitoba Free Press Co., [1923] AC 695

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 SCR 641

Haig v Canada, [1993] 2 SCR 995

Home Oil Distibuters Ltd. v Attorney General of British Columbia, [1940] SCR 444

Hunter v Southam Inc., [1984] 2 SCR 145

Interprovincial Co-Operatives Ltd. v. Dryden Chemicals Ltd., [1976] 1 SCR 477

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31

Lawson v Interior Tree Fruit and Vegetable Committee of Directon, [1931] SCR 357

Minister of Finance v Smith, [1927] AC 193

Ontario (AG) v. Canada (AG) (Local Prohibition), [1896] UKPC 20, [1896] AC 348 (PC)

Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), 2001 SCC 15, [2001] 1 SCR 470

Ontario Home Builders' Association v. York Region Board of Education, [1996] 2 SCR 929

Ontario Hydro v Ontario (Labour Relations Board), [1993] 3 SCR 328

Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39

R v Big M. Drug Mart, [1985] 1 SCR 295

R. v. Comeau, 2018 SCC 15

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

R. v. Hydro-Québec, [1997] 3 SCR 213

R v Sheldon S., [1990] 2 SCR 254

Re Board of Commerce Act, 1919, [1922] 1 AC 191

Re Insurance Act of Canada, [1932] AC 41 (PC)

Re: Exported Natural Gas Tax, [1982] 1 SCR 1004

Reference re Goods and Services Tax, [1992] 2 SCR 445

Reference Re Natural Products Marketing Act [1936] S.C.R. 398

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48

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

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

Reference re: Manitoba Languate Rights, [1985] 1 SCR 721

Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3

Reference re: Resolution to Amend the Constitution, [1981] 1 SCR 753

Reference re: Senate Reform. 2014 SCC 32, [2014] 1 SCR 704

United States v Ptasynski, 462 US 74 (1983)

Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 SCR 134

Secondary Sources

Beverly McLachlin "Unwritten Constitutional Principles: What's Going on?
(2006) NZTPIL

Comments of Sir John A Macdonald, Attorney General of Canada West on February 6, 1865 in Parliamentary debates on the subject of the confederation of the British North American provinces, 3rd session, 8th Provincial Parliament of Canada, Hunter Rose & Co., Parliamentary Printers

Gérard La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, Canadian Tax Paper No. 65, 2nd ed. (Toronto: Canadian Tax Foundation 1981)

Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals prepared by Bryan P. Schwartz for the Government of Manitoba, October 6, 2017

Newton Rowell and Joseph Sirios, *Report of the Royal Commission on Dominion-Provincial Relations, Book I- Canada: 1867-1939,* Government of Canada Publications, 1839

Peter W. Hogg, *Constitutional Law of Canada, 5th ed. at 17-16*

Ronald D. Rotunda and John R. Nowak, *Treatise on Constitutional Law-Substance and Procedure,* 5th ed., Vol I, Para 5.4, the Uniformity clause, at pp 759-762 and *United States v Ptasynski* 462 US 74 (1983)

Legislation

Constitution Act, 1867

Constitution of the United States

Greenhouse Gas Pollution Pricing Act

The Constitutional Questions Act, SS 2012, c. C-29.01

The Management and Reduction of Greenhouse Gases Act, SS 2010, c. M-2.01

The Oil and Gas Emissions Management Regulations, RRS c.0-2, Reg. 7

"Appendix "A"

Province of Saskatchewan

Order in Council 194/2018

Approved and Ordered: 19 April 2018

~~Lieutenant Governor~~ Administrator

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that:

(a) the question set out in the attached Schedule "A" be referred to be the Court of Appeal for hearing and consideration pursuant to section 2 of *The Constitutional Questions Act, 2012*;

(b) the opinion and reasons of the Court of Appeal shall be deemed a judgment; and

(c) the parties to the proceedings shall be the Government of Saskatchewan and the Attorney General of Canada.

President of the Executive Council

(For administrative purposes only.)

Recommended by: **Minister of Justice and Attorney General**

Authority: ***The Constitutional Questions Act, 2012,* section 2**

CERTIFIED TRUE COPY
ORDER IN COUNCIL # 194/2018

Clerk of the Executive Council

Schedule "A" to OC 194/2018

The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act,* RSO 1990, c. C34, 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

Court of Appeal File No.: C65807

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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