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IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018 c. 12

Distributed to Panel

AND

IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, c. J-2, s. 26

DOCUMENT: **REPLY FACTUM**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 20th day of June, 2019

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I. OVERVIEW OF REPLY

1. All parties in this case agree that the provinces have both the constitutional jurisdiction and practical ability to regulate GHG emissions from provincial entities, businesses, and industries.

2. The provinces have exercised this jurisdiction, including by establishing various forms of carbon pricing mechanisms, in the manner they deem appropriate for their own unique environmental, economic, and social circumstances.

3. Canada seeks to strip the provinces of their jurisdiction in this area by claiming a permanent supervisory power over provincial GHG emissions policies.

4. The *GGPPA* is built on the premise that the federal government is the best judge of what is required in each province, and can therefore assume provincial jurisdiction with respect to this matter if the provinces do not comply with the federal government's directions.

5. If permitted to stand, this will destroy the fundamental principle of federalism that underlies Canada's Constitution: that the provinces are co-ordinate with, not subordinate to, the federal government when exercising their constitutional jurisdiction.

6. Canada and the supporters of the *GGPPA* say that there are two factors that justify this rewriting of our federal system – first, the importance of reducing GHG emissions, and second, that carbon pricing is the necessary means by which to do this.

7. There is no dispute that reducing GHG emissions is a matter of pressing importance. However, this case arises because of genuine policy disagreements over <u>how</u> to accomplish that common objective, and who has the final say over provincial GHG emissions policies.

8. And no party before this court disputes that carbon pricing can lead to a reduction in emissions. Indeed, most provinces have independently adopted forms of carbon pricing. Alberta in particular has embraced carbon pricing for over a decade, applying it to the primary source of GHG emissions in Alberta: large industrial emitters.

9. However, the extent to which provinces rely on carbon pricing as opposed to other policy measures, as well as the type, scope, application, and stringency of any carbon pricing mechanisms, are fundamentally policy choices involving difficult policy trade-offs, the impacts of which will vary from province to province depending on their unique local circumstances.

10. The division of powers cannot depend on the Court's assessment of the relative costs and benefits of the many GHG emissions policies available to provincial governments, much less a view of the best overall policy balance in this enormously complex public policy area.

11. What matters is which level of government has jurisdiction to decide what policies to adopt, not the specific policies they choose to adopt from time to time.

12. And it is clear that, in our federal system, the federal government has no jurisdiction over the type or stringency of GHG emissions reductions policies the provinces must adopt to regulate local emission sources. This is a matter within the exclusive jurisdiction of the provinces.

13. The *GGPPA*'s supporters say that this conclusion can be avoided by artificially narrowing the essential subject matter at issue, GHG emissions, with reference to "national minimum standards", and to the specific policy tools and policy objectives sought to be achieved through the *GGPPA*. This approach is fundamentally inconsistent with the national concern doctrine.

14. The essence of the national concern doctrine is that, in order to fall within federal jurisdiction, (a) there must be a *single* and *indivisible* matter that is inherently beyond any province's jurisdiction, such that the federal government must regulate the *entire* indivisible matter; and (b) that recognizing exclusive federal jurisdiction over this *entire* indivisible matter would not unduly disrupt the existing division of powers.

15. The *GGPPA* does not even purport take over the entire subject matter of GHG emissions – it merely subjects provincial jurisdiction over the regulation or pricing of GHG emissions in the provinces to federal policy supervision and oversight.

16. This is inconsistent with the basic premise of the national concern doctrine: that there must be a single, indivisible subject matter that is taken out of provincial jurisdiction entirely.

17. And while the *GGPPA* itself constitutes a significant intrusion into areas of provincial jurisdiction, if the *GGPPA* purported to take the regulation of GHG emissions away from the provinces *entirely*, that would even more obviously disrupt the existing division of powers.

18. As such, the *GGPPA* does not fall within the national concern branch of POGG. And because it does not fall under any other head of federal power, it is unconstitutional.

II. REPLY TO POGG NATIONAL CONCERN ARGUMENTS

A. The POGG National Concern Analysis

19. The Attorneys General of Canada ("**AGC**") and British Columbia ("**AGBC**"), and the intervenors in favour of the *GGPPA* (collectively, the "**GGPPA Supporters**"), now accept that the regulation of "GHG emissions" does not fall within the national concern branch of POGG.[1]

20. It is not a single and indivisible matter that can be distinguished from matters clearly falling within provincial jurisdiction, and giving the federal government exclusive jurisdiction over this matter would eviscerate well-established provincial jurisdiction.

21. In an attempt to obscure this constitutional reality and artificially squeeze the *GGPPA* into the national concern power, the GGPPA Supporters offer a broad menu of increasingly elaborate and artificial formulations of the asserted subject matter that the *GGPPA* regulates.

22. These asserted subject matters include "national minimum standards to reduce GHG emissions, by means of pricing that applies with comparable stringency throughout Canada";[2] "national minimum standards that are integral to reducing Canada's nationwide GHG emissions";[3] and "minimum national pricing standards to allocate part of Canada's overall targets for greenhouse gas emissions reductions";[4] amongst others.[5]

23. The fact that none of the GGPPA Supporters, or any of the previous judgments upholding the *GGPPA*, can agree on how to describe what the essential subject matter of the *GGPPA* is, speaks volumes. It demonstrates that it is impossible to identify an inherently single, distinctive, and indivisible subject matter falling within the national concern power.

24. And by attempting to describe the matter of national concern as simply what the *GGPPA* does – i.e. creating national minimum standards for GHG pricing policies in the provinces – rather than what the *GGPPA* regulates – i.e GHG emissions – the GGPPA Supporters' beg the very

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[1] As all 10 judges in the Ontario and Saskatchewan references have accepted: see *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ("***SKCA Decision***") [Alberta Brief of Authorities ("**ABOA**") Tab 21]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ("***ONCA Decision***") [ABOA Tab 20].
[2] Factum of the Athabasca Chipewyan First Nation, dated November 4, 2019 ("**ACFN Factum**"), para 19.
[3] Factum of the Attorney General of Canada, dated October 24, 2019 ("**AGC Factum**"), para 104; Factum of Climate Justice et al, dated November 4, 2019 ("**CJ Factum**"), para 49.
[4] Factum of the Attorney General of British Columbia, dated November 4, 2019 ("**AGBC Factum**"), at para 53.
[5] See e.g. Factum of the Assembly of First Nations, dated November 4, 2019 ("**AFN Factum**"), para 4; Factum of the Canadian Public Health Association, dated November 4, 2019 ("**CPHA Factum**"), para 18.

constitutional question to be decided. That fundamental question is whether the essential subject matter that the *GGPPA* regulates is a single and indivisible matter of national concern.

25. In fact, these artificial subject matters distort the national concern analysis to the point that it becomes impossible to sensibly apply. It is not possible to determine, for example, if a "national carbon pricing and trading regime that allows for a variety of provincial approaches and potentially inter-provincial compliance trading in order to facilitate nationwide GHG reductions consistent with Canada's Paris Agreement commitments",[6] is a "single" or "indivisible" subject matter.

26. It is not a subject matter *at all*, as this term properly is understood under the POGG national concern doctrine. Rather, it is a fabricated "subject matter *label*"[7] or a "narrowly defined sub-component of the matter",[8] including a description of a particular policy means and certain substantive objectives for regulating the subject matter, along with the addition of language ("national", "nationwide") that seeks to predetermine the analysis.

27. These attempts to evade the necessary national concern analysis should be rejected. Instead, the Court should focus on the essential subject matter, or what Alberta calls the "POGG subject matter", that is asserted to be a matter of national concern: GHG emissions.

28. In response, the AGBC says, first, that there is no such thing as a "POGG subject matter", there is only a "pith and substance" of a particular piece of legislation, and second, that the "pith and substance" must be described at the "most determinate and least general" level of abstraction.[9]

29. With respect to the first point, this dispute about terminology is immaterial. Whether, the analysis is technically done as a matter of the "pith and substance" of the *GGPPA*,[10] as AGBC submits, or as a question of what essential "subject matter" is asserted to be a matter of national concern, as Alberta submits, the approach of the GGPPA Supporters is not consistent with the national concern analysis, or the previous cases is this area.

30. The Attorney General of New Brunswick correctly points out, there was no fundamental dispute in the previous POGG cases regarding what subject matter the federal government was

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[6] Factum of International Emissions Trading Association, dated November 4, 2019 ("**IETA Factum**"), para 31.
[7] AGC Factum, para 92.
[8] AGBC Factum, paras 27.
[9] AGBC Factum, paras 30, 34-53.
[10] Perhaps notably, the term "pith and substance" is not found anywhere in the *Crown Zellerbach* decision. The terms used are "subject-matter of the Act", "subject-matter", or the "matter of national concern". See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 ("***Crown Zellerbach***"), paras 18, 30-33 [ABOA Tab 15].

attempting to assert jurisdiction over. The courts simply asked whether the essential subject matter being regulated – such as "marine pollution", "toxic substances", "atomic energy", "aeronautics", "radiocommunications", or "inflation" – were matters that came within the scope of the national concern branch of the federal government's POGG power.

31. Legislation enacting "national minimum standards" will *necessarily* be beyond the powers of the provinces, as a matter of fact; but the question is whether the subject matter *being regulated by those national standards* is an indivisible matter of national concern that extends beyond the reach of provincial powers.

32. Moreover, the national concern doctrine adds "by judicial process new matters or new classes of matters to the federal list of powers"[11] – e.g. the "aeronautics power",[12] "power over radiocommunications",[13] and the powers over "atomic energy",[14] the "development of the National Capital Region",[15] or "marine pollution".[16]

33. As such, the national concern analysis must be based on the *essential* subject matter asserted to be of national concern, rather than *one particular way* in which the subject matter *can* be regulated and *for what specific reasons*, as confined to *one particular piece* of legislation. The latter approach adopted by the GGPPA Supporters would, in effect, make the *statute itself* a matter of national concern, rather than the alleged subject matter that the statute purports to regulate.

34. Prior national concern cases have focused on the essential subject matter being regulated because doing so is central to the analysis; it is not, as the AGBC submits, because it just so happened that the particular legislation before the Court was broader in scope.[17] It is always *possible* to more precisely specify the purposes and means of particular pieces of legislation.

35. For instance, the legislation at issue in the *Anti-Inflation Reference* could have been described more narrowly and precisely as "the establishment of national minimum guidelines to

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[11] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 ("***Anti-Inflation***"), at 458 [ABOA Tab 17].
[12] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 ("***COPA***"), paras 37, 40 [Alberta Supplemental Brief of Authorities ("**ASBOA**") Tab 39].
[13] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 ("***Rogers***"), paras 42, 46-47 [ABOA Tab 27].
[14] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [ABOA Tab 8].
[15] *Crown Zellerbach, supra*, paras 26, 28 [ABOA Tab 15], with reference to *Munro v. National Capital Commission*, [1966] SCR 663.
[16] *Crown Zellerbach, supra*, paras 37-39 [ABOA Tab 15]; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at 64 [ABOA Tab 4].
[17] AGBC Factum, para 41.

control inflation by means of national price and wage controls that are integral to reducing nationwide inflation in accordance with national policy targets".

36. Similarly, in *Crown Zellerbach*, the subject matter of the legislation could have been described as "the creation of national minimum standards for the regulation of marine pollution across the country by prohibiting any deliberate disposal of substances by specified vessels without a permit, in order to reduce national marine pollution to a level consistent with Canada's national marine pollution objectives and in an attempt to fulfil the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*".

37. These would have been more detailed specifications of the particular pieces of legislation before the Court, which AGBC says is required. But that was not the approach of the Court; rather, it identified the essential subject matter that the legislation purported to regulate, i.e., "inflation" and "marine pollution", respectively.

38. In fact, Justice Beetz specifically warned that the Court should not to rely on creative labeling as a basis for finding a new 'matter' of national concern, noting that "there are in language a great many expressions other than those used for the labels in the federal and the provincial lists", but these "innumerable other expressions" cannot overtake the existing division of powers.[18]

39. Justice Beetz' point was not that the Court should seek to artificially refine and specify the alleged subject matter, as the GGPPA Supporters have done, by including language such as "the establishment of national minimum standards" or "integral to nationwide reductions" or "to allocate part of Canada's overall targets" for regulating the alleged matter of national concern.[19]

40. His point was that if the essential subject matter being regulated was not a single and indivisible matter that falls outside of provincial jurisdiction, the Court should find the federal legislation unconstitutional, because it seeks to regulate an aggregate of matters, including those that fall within provincial jurisdiction. The same conclusion should be reached here.

41. And contrary to what the AGBC submits, adopting an artificially narrowed subject matter is not protective of provincial jurisdiction;[20] rather, it merely *disguises* the true impact on provincial jurisdiction, which is to transfer broad swaths of it to Canada. As Jean Leclair explains:

[18] *Anti-Inflation, supra* at 451 [ABOA Tab 17].
[19] This seems to be the implication of AGBC's argument. See AGBC Factum, paras 29-30, 41.
[20] AGBC Factum, paras 37, 67-68.

> The conceptual indivisibility test must be applied using the approach of Justice Beetz in *Anti- Inflation*; that is, to the matter said to be of national interest (tobacco use), and not to the legislative means employed to ensure its regulation (control of advertising). In other words, the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its " ... exclusive jurisdiction of a plenary nature to legislate in relation to that matter", Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt. [21] (emphasis added)

42. That is precisely what Canada is doing here:[22] it purports to only be regulating a "very limited aspect" of GHG emissions, but accepting its argument would necessarily grant Canada supervisory jurisdiction over all provincial GHG emissions policies, on the same basic reasoning – that GHG emissions enter the global atmosphere, and Canada knows best what policies in this area the provinces should adopt.

43. Therefore, regardless of what the analysis is called – whether it is a pith and substance analysis as understood in the national concern cases, or identifying the essential subject matter asserted to be the matter of national concern – the result is the same: the relevant matter is the regulation of "GHG emissions", as Canada initially submitted in the Saskatchewan reference.

B. The "Minimum National Standards" Argument

44. The GGPPA Supporters say that the *GGPPA* falls within the national concern power because it does something only a federal government can do: create national minimum standards.[23]

45. Again, federal enactments create "national standards" by definition, and no province can enact "national standards", again, by definition.[24] This basic fact contributes nothing to the national concern analysis, other than revealing a misguided attempt to bypass it entirely.

46. Indeed, far from supporting the GGPPA Supporters' argument, the fact that the *GGPPA* only purports to create "national *minimum* standards" conclusively demonstrates that GHG emissions are not a single, indivisible subject matter that fall within the national concern doctrine.

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[21] Jean LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38:2 UBC L Rev 353 at 364 [ABOA Tab 30].
[22] As the Saskatchewan minority explained: see *SKCA Decision, supra* at paras 466-468 [ABOA Tab 21].
[23] See e.g. AGC Factum, para 116; IETA Factum, para 45.
[24] AGC and AGBC say that this is not a mere tautology, because GHG emissions have "extra-provincial effects"; but that is a different point, addressed below. AGC Factum, para 98; AGBC Factum, para 55.

47. As set out in the text of section 91, the POGG power includes "all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". The POGG national concern power is intended to allow the federal government to legislate over something that the provinces are unable to address, because it involves a single and indivisible matter that extends beyond the reach of the provinces.

48. By creating a regime in which the provinces exercise their jurisdiction subject to "national minimum standards", Canada acknowledges that the *GGPPA* attempts to regulate matters that come within the classes of subjects assigned exclusively to the jurisdiction of the provinces.

49. For instance, the logic of *Crown Zellerbach* was not that the federal government had a better policy on marine pollution, and therefore should be able to force the provinces to adopt it as a baseline, to be supplemented by provincial regulations over the very same subject matter.

50. Rather, it was that the provinces could not meaningfully regulate the indivisible subject matter *at all*, because of "the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state".[25] Therefore, because it could not be known with certainty at the time of dumping in which jurisdiction a particular act of dumping would fall, all aspects of the *indivisible* matter of marine pollution –"including its intra-provincial aspects" – had to be regulated by the federal government.

51. No similar problem arises from the regulation of GHG emissions, all of which are sourced in a particular physical location within each of the provinces.

52. Indeed, the *GGPPA* does not even attempt to create a single national GHG pricing or trading regime that *applies nationally* – the *GGPPA* permits various different types of carbon pricing systems, each of which operates *exclusively within each province*, whether as enacted by the province or imposed on individual provinces the federal government.

53. The *GGPPA* contemplates ten different carbon pricing systems, each restricted to the regulation of entities within the boundaries of each province. This proves that, contrary to AGC's assertion, there is no aspect of the matter that is "beyond provincial reach";[26] rather, it is an attempt by Canada to dictate how the provinces should address matters entirely *within* their reach.

[25] *Crown Zellerbach, supra,* paras 33, 38 [ABOA Tab 15].
[26] *Contra* AGC Factum, para 96.

C. The "Double Aspect" Argument

54. The GGPPA Supporters also say that the subject matter of GHG emissions has a "double aspect", such that Parliament has jurisdiction over the national aspects of GHG emissions, while provinces retain jurisdiction "over the local aspects of reducing GHG emissions".[27] With respect, this argument fundamentally misconceives the national concern analysis.

55. In *Crown Zellerbach*, the Court *specifically rejected* the exact same argument. It held that dividing the matter into its federal and provincial aspects "would appear to contemplate a concurrent or overlapping federal jurisdiction", which was impossible given the fact "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".[28]

56. It is precisely "because of the *interrelatedness of the intra-provincial and extra-provincial aspects of the matter* that it requires a *single* or *uniform* legislative treatment".[29] It creates "a need for *one* national law" regulating the matter,[30] not ten different regimes, each operating exclusively within each province but *subject to federal policy approval*, which is what the *GGPPA* contemplates.

57. Asserting that jurisdiction over the same essential subject matter can be divided into its national and provincial aspects defeats the entire logic underlying the national concern branch: that there is a *single* and *indivisible* matter subject to exclusive federal jurisdiction.[31] This is the key distinction between the national concern cases, which grant the federal government jurisdiction over the entire subject matter *including* its intra-provincial aspects, and the other types of cases relied on by the GGPPA Supporters, where a double aspect may be present.

58. Where a subject matter is found to fall within the national concern doctrine, it is "no longer subject to any provincial aspects", both because the subject matter itself is by definition a matter "not coming within" the classes of subjects assigned to the provinces, and because the subject matter must be "indivisible" and therefore that cannot be "subject to divisible aspects". [32]

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[27] AGC Factum, para 101
[28] *Crown Zellerbach, supra*, para 34 [ABOA Tab 15].
[29] *Crown Zellerbach, supra*, para 35 [ABOA Tab 15].
[30] *Crown Zellerbach, supra*, para 30 [ABOA Tab 15].
[31] *Crown Zellerbach, supra*, para 34 [ABOA Tab 15].
[32] Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187 ("**Newman**") at 197 [ASBOA Tab 40].

59. Permitting the provinces to "supplement" the federal government's regulation of security at nuclear power stations or air traffic control systems defeats the very purpose of finding that these matters fall within the national concern power, which is that only one level of government – necessarily national – must have jurisdiction over the entire, indivisible subject matter.

60. AGBC argues that there is a double aspect, because Canada and the provinces "share jurisdiction" over matters found to fall within the national concern branch.[33] With respect, that is incorrect. The cases cited by AGBC show that the provinces can *incidentally impact* these matters, if, in pith and substance, they are *addressing something else* entirely.[34]

61. This was also explained by Justice Beetz in the *Anti-Inflation Reference*: "the provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction."[35]

62. If the regulation of GHG emissions (or some variant thereof) is recognized as a new subject matter falling within exclusive federal jurisdiction, provincial legislation seeking to regulate GHG emissions will be in jeopardy. This is precisely what has happened with aeronautics and radiocommunications, rendering provincial legislation regulating these matters unconstitutional.[36]

63. Currently, jurisdiction over GHG emissions is *already* divided, in that both the provincial and federal governments have some jurisdiction in relation to GHG emissions. The provinces have jurisdiction to regulate the emissions of provincial entities, transportation, and undertakings operating solely within the provinces, while the federal government has jurisdiction in relation to criminal laws or federal matters, such as interprovincial undertakings or aeronautics.

64. However, finding a *new* matter that falls exclusively within federal jurisdiction would transfer the provincial aspects to the federal government, because the regulation of GHG emissions would become a singular, indivisible matter that falls entirely to the federal government.

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[33] AGBC Factum, para 68.
[34] See e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, in which the provincial legislation was "enacted in relation to consumer protection" rather than "in relation to television advertising". In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581, it was apparently not argued that the provincial laws providing for a provincial monopoly over liquor sales were enacted in relation to aeronautics; the argument was based on interjurisdictional immunity, not pith and substance.
[35] *Anti-Inflation, supra* at 444 (emphasis added) [ABOA Tab 17].
[36] See e.g. *Rogers* [ABOA Tab 27] and *COPA, supra* [ASBOA Tab 39]

65. Abandoning this core feature of the national concern power does not better protect provincial jurisdiction; rather, it would merely encourage Canada to set more "national minimum standards" in areas of provincial jurisdiction, wherever Canada thought the issue was sufficiently important and that it had a better policy solution than some of the provinces.

D. The "Flexibility" Argument

66. Some of the GGPPA Supporters argue that the *GGPPA* will not have a serious impact on provincial jurisdiction, because it operates by way of a federal "backstop" carbon pricing plan.[37] This feature of the *GGPPA* is constitutionally irrelevant.

67. Whether the federal government legislates by imposing its solution directly on the provinces, or by first saying "you can impose our solution, or we will impose it on you directly", makes absolutely no difference to the division of powers analysis. The end result – establishing federal control over matters falling within provincial jurisdiction – is the same.

68. Leaving aside other legislation that could be enacted pursuant to a new federal head of power to set national minimum standards for provincial GHG emissions policies, the *GGPPA* itself intrudes heavily into provincial jurisdiction, as Alberta previously submitted.[38]

69. First, the reality is that it is neither feasible nor sensible to have two separate carbon pricing regimes applying to the people and industries in a province; the federal regime will govern, to the extent the federal government wants it to, which deprives the provinces of their jurisdiction to have the GHG reduction policies, including carbon pricing mechanisms, of their choosing.

70. Second, the *GGPPA* does not specify or limit the scope of federal intrusion into provincial policy making; rather, it creates an elaborate federal carbon pricing policy, and then authorizes the federal government to impose that policy on the provinces, as and when it sees fit.

71. Which provincial plans will be permitted to operate is based entirely on what "the Governor in Council considers appropriate" from time to time, depending on federal cabinet's views of what type of plan and level of stringency is appropriate or preferable from a policy perspective.

72. This leaves as much or as little jurisdiction for Alberta and other provinces as the federal

[37] See e.g. AGC Factum, paras 117, 126; AFN Factum, para 33-34; DSF Factum, para 31.
[38] *Contra* AGBC Factum, para 67. See Factum of the Attorney General of Alberta, dated August 2, 2019 ("**AG Alberta Factum**"), paras 86-102.

government desires at any given moment, [39] giving the federal government unilateral control over the scope of provincial jurisdiction over GHG emissions, which it can expand or contract at will.

73. Third, as AGC concedes, the *GGPPA* takes one of the most popular types of carbon pricing plans – a cap-and-trade system – entirely off the table for Alberta,[40] despite the acknowledgement that Alberta would otherwise have the jurisdiction to implement it, as Quebec has done. A more thorough interference with provincial jurisdiction is difficult to imagine.

74. Fourth, the *GGPPA* interferes with other provincial policies, even when it is not taking over the entire policy field of carbon pricing. That is because GHG emissions policies interact in complex ways, particularly if the regulating jurisdiction is concerned about achieving meaningful reductions in a manner that accounts for the unique needs and concerns of the local population.

75. For instance, Alberta exempted small oil and gas facilities from its carbon pricing regime for a period of time to allow them to undertake the technological investments necessary to reduce methane emission. This was important in Alberta's unique context, in light of the relatively high level of methane emissions arising from Alberta's industries, and the fact that such emissions can have 25 to 34 times the impact on global warming as carbon dioxide emissions.[41]

76. By immediately imposing carbon pricing on those facilities, the *GGPPA* detracts from their ability to fund the necessary technological advances, while leading to "shut-in" and abandoned capacity, not to mention the risk of additional and avoidable job losses.[42]

77. This has been Alberta's point throughout this reference. The federal government either does not understand or is not concerned about the impact of its preferred policies on Alberta. Not only has it failed to appreciate the impact of the *GGPPA* on the viability and effectiveness Alberta's own GHG reductions plans, it has displaced and undermined policies currently in place and tailored to Alberta's unique local circumstances.

78. That is why Alberta needs to be able to control its own policies in this area, in the same way that BC has been able to design a policy that works for BC, and Quebec has been able to adopt a policy that works for Quebec. As Alberta's affiant explained, this is necessarily a dynamic

[39] As AGBC appears to acknowledge. See AGBC Factum, at para 46.
[40] AGC Factum, para 29; Affidavit of John Moffet, para 89 [Record of the Attorney General of Canada ("**CR**") R33]
[41] See AG Alberta Factum, paras 98-100, and the citations therein.
[42] *Ibid.* See also Transcript, Exhibits, and Answers to Undertakings from the Cross Examination of Robert Savage, dated October 21, 2019 ("**Savage Transcript**"), pp. 164 (line 24) to 167 (line 8).

process that requires constant re-evaluation based on local circumstances:

> [W]hen you're trying to use one-size-fits-all approaches, then you lose the ability to have nuance to your policy that allows you to respond to competitiveness issues in a given region… [W]e're trying to implement policies within the context of our economy and our society and the competitiveness situation we find ourselves in….
>
> So this is not a one-time develop a policy, look at competitiveness, and dust off your hands. This is an evolv[ing] landscape that we're constantly monitoring and checking in on the implementation on policies and how they're responding both for an environmental and social perspective…
>
> I think you obviously strive to achieve the maximum environmental outcome at the cheapest cost, but sometimes there are other factors that come into play from those other considerations, and that could be trade competitiveness, jobs, a number of other considerations [and] whether there are other policy tools that could be equally as effective or more effective is a consideration too… [43]

79. Instead of respecting the provinces' equal jurisdiction in this respect, Canada has adopted measures that could displace Alberta's carbon pricing plan, undermine Alberta's existing GHG reductions policies, and preclude Alberta from exercising its jurisdiction to the same extent as other provinces, solely on the basis of the federal government's policy judgment as to which policies are best in Alberta's unique context.

80. This is the assertion of a power to supervise the provinces' exercise of their own jurisdiction to ensure that they do so in a manner that meets the federal government's policy standards, on the assumption that the federal government knows best. Such an unprecedented power should be firmly rejected.

E. The "International Commitments" Argument

81. Contrary to the submissions of the GGPPA Supporters, it is not relevant to the national concern analysis that Canada has set aspirational targets it wants to meet in respect of a particular subject matter, even if those targets were set by Canada pursuant to international agreements.

82. It has been clear since 1937 that Canada cannot "merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the Constitution which gave its birth".[44] Similarly, the fact that Canada has unilaterally set targets, or that it has failed to meet

[43] Savage Transcript, pp. 85 (line 4-8, 24-26), 86 (lines 1-2, 10-12, 24-25), 87 (lines 1-5), 100 (lines 1-12).
[44] *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] J.C.J. No. 5, para 13 (QL) [ABOA Tab 26]; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para 66 [ABOA Tab 23].

other targets it has unilaterally set in the past, does not confer it with jurisdiction it does not have.[45]

83. Accepting either argument would allow Canada to expand the scope of its jurisdiction based on a unilateral act by the federal executive, eviscerating the division of powers in the process.

F. The "Provincial Inability" Argument

84. Contrary to the position of some GGPPA Supporters, the first branch of *Crown Zellerbach* – whether the essential subject matter is singular, indivisible, and distinct from matters falling under provincial jurisdiction – cannot be reduced to the so-called "provincial inability" test, or the question of whether a provincial policy has some foreseeable extra-provincial impacts.

85. Many provincial laws (or the absence thereof) will have some effect or impacts outside of the province. The failure to adopt inflation reduction polices may impact inflation in other jurisdictions; product safety standards may allow dangerous goods to be transported to other provinces; creating a more attractive investment climate may impact the level of investment in other provinces; and so on. But the mere existence of such extra-provincial effects does not confer jurisdiction on the federal government with respect to matters falling within provincial jurisdiction.

86. Justice Beetz did not dispute (or even address) the idea that provincial policies may have an impact on inflation on other provinces, because that fact alone would not give Canada the jurisdiction to impose national standards on the provinces. Rather, as Beetz J. stated:

> If the first submission is correct, then it could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject matters of national concern going beyond local provincial concern or interest and coming within the exclusive legislative authority of Parliament. It could equally be argued that older subjects such as the business of insurance or labour relations, which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever the business of insurance or labour have become national in scope. It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.[46]

87. Nor do the relevant national concern cases suggest that the federal government has plenary jurisdiction over "global pollutants" or pollution in a province that enters "the global commons",

[45] *Contra* AGC Factum, para 85; AGBC Factum, paras 48-49.
[46] *Anti-Inflation, supra* at 445 (emphasis added) [ABOA Tab 17].

as some GGPPA Supporters argue;[47] again, the case law says the opposite.

88. In *Crown Zellerbach* itself, the Court was clear that it was "*not* simply the possibility or likelihood of the movement of pollutants across" boundaries (i.e. the extra-provincial impacts), but rather the impossibility of determining by visual observation in which jurisdiction a particular act of pollution was committed, that led to the finding that marine pollution was sufficiently indivisible so as to fall within the national concern branch.[48]

89. For the same reason, the Court acknowledged the fact that "the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow" (i.e. an extra-provincial impact), but that did not bring freshwater pollution within a province under federal jurisdiction.[49]

90. Thus, the Court in *Crown Zellerbach* specifically rejected the idea that the mere existence of extra-provincial impacts is sufficient to demonstrate that the subject matter is indivisible or distinct from matters falling within provincial jurisdiction.

91. Rather, extra-provincial impacts may, in some circumstances, be an *indicia* of whether the matter is singular, indivisible, and distinct from matters of provincial jurisdiction; it may assist with that analysis, but is not the analysis itself, as the GGPPA Supporters effectively argue.

92. Properly understood, a provincial inability to regulate the matter in question is the corollary to the fact that the single, indivisible matter is subject to exclusive federal regulation. It is because the regulation of the indivisible subject matter necessarily falls outside of the jurisdiction of the provinces, and therefore requires a single national regulator, that the provinces are entirely unable to regulate it. That is clearly not the case here - the *GGPPA* specifically contemplates provincial regulation within the province, as long as the province meets Canada's policy standards.

93. Although the mere existence of extra-provincial impacts is clearly not sufficient to transfer jurisdiction over these matters to the federal government, it should be observed that the GGPPA Supporters point to no evidence demonstrating that any small difference between the anticipated reductions under Alberta's carbon pricing plan and Canada's proposed backstop carbon pricing plan will have any *tangible* impacts on other provinces, given the fact that neither Alberta nor

[47] See e.g. AGBC Factum, paras 59-63; AFN Factum, para 33.
[48] *Crown Zellerbach, supra*, para 38 [ABOA Tab 15].
[49] *Crown Zellerbach, supra*, para 39 [ABOA Tab 15]. And see para 36, where the Court emphasized that the *Interprovincial Cooperatives* case was not authority for the proposition that the extra-provincial impact of pollution was sufficient to establish an indivisible subject matter of national concern. *Contra* AGBC Factum, para 60.

Canada alone can prevent an inherently global problem like climate change. Nor have they attempted to prove that any marginal discrepancy could not be compensated for by *other* GHG emissions reductions policies, such as additional regulations or improvements in technology.

94. Ultimately, all jurisdictions in Canada agree on the importance taking urgent steps to reduce GHG emissions. But the fact that Canada thinks that it has a better policy solution to this global problem, and that it is a better judge of what policies are necessary or appropriate in the unique context of each province, does not give it jurisdiction to trample on the division of powers.

G. The "Carbon Leakage" Argument

95. A number of the GGPPA Supporters argue that transferring supervisory jurisdiction to the federal government is necessary to avoid a different type of extra-provincial harm, specifically the risk of "carbon leakage" – i.e., the movement of businesses or production, and hence GHG emissions, from jurisdictions that impose a carbon price, like BC, to those that either do not impose a carbon price at all, or do not impose one of equal stringency.

96. First, as AGC concedes, the *GGPPA* does not even purport to create a single uniform carbon price across Canada,[50] as would be necessary to avoid any alleged 'carbon leakage' between the provinces resulting from different carbon prices. Rather, it gives Canada the power to set policy 'stringency' standards in relation to carbon pricing, which power is then transferred to federal cabinet to decide what those policy standards may be from time to time, and whether those policy standards are met by a province. The outcome is not one carbon price across Canada, but rather a smattering of different carbon prices, both within and between the provinces.

97. In any event, and despite the volumes of material tendered in this case, there is no tangible evidence that the failure of one provincial jurisdiction to adopt carbon pricing – much less the failure of a province to adopt the precise form and stringency of carbon pricing dictated by Canada – will harm any other province due to the phenomenon of "carbon leakage".

98. There has been no evidence tendered by AGC or AGBC that there has been "carbon leakage" between BC and any other Canadian jurisdiction, despite the fact that BC has had a carbon tax for over a decade, and other jurisdictions either do not have a carbon pricing policy, or

[50] AGC Factum, para 29.

do not have a carbon pricing policy that is of equal stringency.[51]

99. The only evidence pointed to by the GGPPA Supporters is AGBC's claim that the failure of other provinces to adopt GHG emissions pricing somehow impacted BC's cement industry, but the evidence it cites deals with *international* carbon leakage, not interprovincial carbon leakage.[52]

100. Canada's expert says that carbon leakage generally is not a significant problem, and to the extent that it is a problem, it can be addressed by the jurisdiction enacting the carbon pricing plan.[53] The Ecofiscal report cited by AGBC says the same thing: that competitiveness pressures only exist in "a few sectors, representing a small share of total provincial economic activity", and that provincial "governments can design the carbon pricing policy to address these challenges".[54]

101. Notably, AGBC has not explained how or whether it has attempted to modify its carbon pricing policy to ensure its effectiveness or avoid the harms its policy is allegedly causing its own producers. That is, of course, BC's choice to make. But its choice to design its policy in a manner that does not mitigate these alleged impacts does not then give Canada jurisdiction to force Alberta (or any other province) to compensate for the impact of BC's policy decisions.

102. And that is the whole point – just as BC has the jurisdiction to adopt the policies it considers best within its jurisdiction, Alberta needs to have carbon pricing policies that are responsive to the industries that it is regulating, both in order to maximize the effectiveness of its GHG emissions policies and avoid unnecessary harms to its population.

103. While the number of industries vulnerable to carbon leakage may be small in most regions of the country, it is significantly higher in Alberta. For instance, Ecofiscal suggests that under a $60 per tonne carbon price, 28% of Alberta's economy is exposed to competitiveness pressures, compared with merely 3% of BC's economy.[55] Alberta needs to be able to take these unique

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[51] Although AGBC submits in its legal argument that, without a national approach dictated by Canada, BC's policy would be rendered "ineffective" (AGBC Factum, para 72), both Canada and BC rely heavily on the impact of BC's carbon pricing policy over the years to say that carbon pricing is effective.

[52] See AGBC Factum, para 13; IETA Factum, para 13, 46. In support of its claim of interprovincial carbon leakage in BC's cement industry, AGBC relies only on a draft, unpublished paper from a PhD student at UC, Santa Barbara marked "Draft – Do not cite or circulate". That report notes changes in BC's imports and exports of cement from the world and the US. It makes no findings of any change in BC's interprovincial imports or exports of cement. Affidavit of Olivia Lindokken, Exhibit 1, Affidavit of Tim Lesiuk ("**Lesiuk Affidavit**"), Ex. K [Record of the Attorney General of BC ("**BCR**"), at BC250-275].

[53] Expert Report of Nicholas Rivers, Ex. E, at 16-17 [CR, R1223-1224].

[54] Lesiuk Affidavit, Ex. J, at i, 17-18 [BCR, BC227, BC245-246], cited in AGBC Factum, para 13.

[55] Lesiuk Affidavit, Ex. J, at 8, 15 [BCR, BC236, 243]. See also AG Alberta Factum, paras 78-82.

circumstances into account in designing its GHG reductions policies, including carbon pricing.

104. Overall, far from demonstrating a provincial inability to regulate the matter in question, if anything, the evidence shows that there is a *federal* inability to fully and comprehensively account for the unique circumstances, situations, and needs in each jurisdiction. As Alberta's affiant explains, Alberta is able to take into account the specific needs of the specific industries in Alberta, even down to the facility-by-facility level:

> So Alberta has faced a pretty unique challenge around rapidly growing economy. About 55 percent of our emissions come from large industrial emitters, which is unique relative to other jurisdictions in Canada… And so we've catered our regulatory approach towards driving performance improvement at those facilities…
>
> And important consideration for Alberta is that a lot of our trade isn't east, west. It's north, south. And so we're constantly looking at the competitiveness of our industry relative to the U.S. and other global markets. I mean, we've got facilities in industry that are competing against -- you know, we've got a carbon black facility in Southern Alberta that competes against a facility in Africa. So it's not just -- it's not just a matter of even north, south. It's understanding the context globally and how that's changing…[56]

105. The federal government is unable to determine what policy balance works best within each jurisdiction given the vast amount of social and economic diversity across the country, and the fact that all of the policy levers in relation to the reduction of GHG emissions in the provinces otherwise fall to the provinces. That is why, under our federal system, the provinces have jurisdiction over aspects of this matter touching on local transportation, facilities, and industries.

106. This does not create a "gap" or "legal vacuum", much less "a gaping hole", in the division of powers,[57] any more than the absence of a federal power to impose national minimum policy standards in any other areas of provincial jurisdiction leaves a gap in the division of powers. It is simply a recognition of the fact that no party in this case disputes: that the provinces have the jurisdiction to regulate the sources of GHG emissions within the provinces.

III. REPLY TO OTHER HEADS OF POWER

107. AGC and AGBC rely solely on the national concern branch of POGG to uphold the *GGPPA*, and appear to concede that the *GGPPA* cannot be upheld under any other head of power. However, as other interveners have raised other heads of power, they are briefly addressed below.

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[56] Savage Transcript, pp. 18 (line 23) to 19 (line 2, 4-6); 173 (line 16) to 174 (line 2).
[57] See AGBC Factum, at paras 27, 72; AGC Factum, at para 95; CPHA Factum, at para 31.

A. Emergency Power

108. The POGG emergency power is both extreme and drastic, because it allows Canada to act "without regard to the ordinary division of legislative power under the Constitution".[58] Therefore, the power is strictly limited to "partial and *temporary*" deviations, in the clear expectation that the country will soon revert to the ordinary division of powers.[59]

109. This key requirement of the emergency power does not exist with respect to the *GGPPA*. The need to reduce GHG emissions is not an "inherently temporary" or "short term" objective. Rather, as found by the Saskatchewan majority, "the factual record before the Court cannot sustain a view that the climate change challenge is in any way short run or that the *Act* is intended to have, or is expected to have, a life of limited duration", and indeed, "Canada does not suggest the *Act* will operate in anything other than an indefinite or long-term timeframe".[60]

110. While climate change is recognized by all parties as being a matter of pressing concern, it is not a temporary problem, and the *GGPPA* is not temporary legislation that can be upheld using the emergency branch of the POGG power.

111. Nor should the various POGG powers be read "synergistically" or "cumulatively", as ACFN argues,[61] such that the Court should find, despite *none* of the relevant constitutional standards being met on their own terms, that the federal government has jurisdiction anyway. This attempt to circumvent the authorities would create an enormous amount of confusion and uncertainty in the division of powers, and it should be rejected.

B. Criminal Law and Trade and Commerce Power

112. Alberta adopts the submissions of Attorney General of Ontario ("**AGO**") regarding the general trade and commerce power. The fact that the *GGPPA* has economic impacts and uses market mechanisms is "wholly incidental to the core purpose and effect of the Act", which is to regulate for an environmental, not an economic, purpose.[62] It therefore cannot be supported using the general trade and commerce power.

113. Similarly, Alberta adopts AGO's submissions in relation to the claims that the *GGPPA* fall

[58] DSF Factum, para 28, citing *Crown Zellerbach, supra*, para 57 [ABOA Tab 15].
[59] *Anti-Inflation, supra* at 427, 437, 461 [ABOA Tab 17]; *Crown Zellerbach, supra,* para 33 [ABOA Tab 15].
[60] *SKCA Decision, supra* at para 202 [ABOA Tab 21].
[61] ACFN Factum, paras 32-41.
[62] *SKCA Decision, supra* at para 171-172 [ABOA Tab 21].

within the criminal law power. While the *GGPPA* contains administrative penalties for failing to comply with the regulatory scheme, those penalties result from a failure to comply with the regulatory scheme, not with a breach of a prohibition against emitting GHGs. [63]

114. If all that was necessary to bring legislation within the criminal law power was the inclusion of enforcement mechanisms in a statute, there would be no limit to the federal government's ability to regulate any matter or impose its policy preferences in areas of provincial jurisdiction.

C. Sections 7 and 35 of the *Constitution Act, 1982*

115. A number of GGPPA Supporters appear to suggest that s. 7 gives Canada jurisdiction to enact the *GGPPA*.[64] This argument can be fully answered by s. 31 of the *Charter*, which states that "(n)othing in this Charter extends the legislative powers of any body or authority". Similarly, section 35 does not confer upon Canada legislative jurisdiction that it does not otherwise possess.

116. And as the Saskatchewan majority held,[65] it is not possible to deal with the submissions of the interveners AFN and AFCN regarding s. 35 in the context of a reference such as this. Any claims regarding Canada's or Alberta's constitutional obligations to First Nations under s. 35 should be addressed in a separate proceedings with fully developed factual records on these points.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th DAY OF NOVEMBER BY

For:

Peter A. Gall, Q.C. &
Benjamin J. Oliphant

For:

Ryan Martin &
Steven Dollansky

For:

L. Christine Enns, Q.C.

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[63] *SKCA Decision, supra* at para 198 [ABOA Tab 21].
[64] CJ Factum, paras 30-40; CPHA Factum, para 15.
[65] *SKCA Decision, supra* at para 203 [ABOA Tab 21].

Table of Authorities

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