COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

COURT OF APPEAL FILE NUMBER: 1903-0157-AC

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

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: **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

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA

Counsel for the Attorney General of Alberta:

Peter A. Gall, Q.C. & Benjamin Oliphant
Gall Legge Grant Zwack LLP
Suite 1000
1199 W. Hastings St.
Vancouver, BC V6E 3T5
E-mail: pgall@glgzlaw.com
boliphant@glgzlaw.com
Telephone: 604-891-1152
Fax: 604-669-5101

Ryan Martin & Steven Dollansky
McLennan Ross LLP
600, 12220 Stony Plain Road
Edmonton, AB T5N 3Y4
E-mail: rmartin@mross.com
sdollansky@mross.com
Telephone: 780-482-9217
Fax: 780-482-9100

L. Christine Enns, Q.C.
Department of Justice and Solicitor General
10th Fl. Oxford Tower
10025 – 102A Avenue
Edmonton, AB T5J 2Z2
E-mail: Christine.Enns@gov.ab.ca
Telephone: 780-422-9703

Counsel for the Attorney General of Canada:

Department of Justice Canada
Prairie Region
301 – 310 Broadway
Winnipeg, MB, R3C 0S6

- and -

120 Adelaide Street West
Suite 400
Toronto, ON, M5H 1T1

Sharlene M. Telles-Langdon
Phone: 204-983-0862
Fax: 204-984-8495
Email: sharlene.telles-langdon@justice.gc.ca

Christine E. Mohr
Phone: 647-256-7538
Email: Christine.Mohr@justice.gc.ca

Ned Djordjevic
Phone: 647-256-0706
Fax: 416-954-8982
Email: ned.djordjevic@justice.gc.ca

J. Neil Goodridge
Phone: 204-984-7579
Fax: 204-984-5910
Email: neil.goodridge@justice.gc.ca

Mary C. Matthews
Phone: 647-256-0766
Fax: 416-954-8982
Email: mary.matthews@justice.gc.ca

Beth Tait
Phone: 204-983-2071
Fax: 204-984-6488
Email: beth.tait@justice.gc.ca

Counsel for the Intervenors:

Attorney General of Saskatchewan
Ministry of Justice and Attorney General of Saskatchewan
820-1874 Scarth Street
Regina, SK, S4P 4B3

P. Mitch McAdam Q.C.
Phone: 306-787-7846
Fax: 306-787-9111
Email: mitch.mcadam@gov.sk.ca

Alan F. Jacobson
Phone: 306-787-1087
Fax: 306-787-9111
Email: alan.jacobson@gov.sk.ca

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON, M7A 2S9
Phone: 416-326-3840
Fax: 416-326-4015

Padraic J. Ryan
Email: padraic.ryan@ontario.ca

Aud Ranalli
Email: aud.ranalli@ontario.ca

Attorney General of British Columbia
P.O. Box 9280 Stn Prov Govt
Victoria, BC, V8W 9J7

J. Gareth Morley
Phone: 250-952-7644
Fax: 250-356-9154
Email: gareth.morley@gov.bc.ca

Jacqueline D. Hughes
Phone: 604-660-4602
Fax: 604-660-6797
Email: jacqueline.hughes@gov.bc.ca

Attorney General of New Brunswick
Legal Services Branch
Constitutional Unit
P.O. Box 6000, Stn. A.
675 King Street, Suite 2018
Fredericton, NB, E3B 5H1

William E. Gould
Phone: 506-453-2222
Fax: 506-453-3275
Email: william.gould@gnb.ca

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Counsel for the Attorney General of Alberta:

Peter A. Gall, Q.C. & Benjamin Oliphant
Gall Legge Grant Zwack LLP
Suite 1000
1199 W. Hastings St.
Vancouver, BC V6E 3T5
E-mail: pgall@glgzlaw.com
boliphant@glgzlaw.com
Telephone: 604-891-1152
Fax: 604-669-5101

Ryan Martin & Steven Dollansky
McLennan Ross LLP
600, 12220 Stony Plain Road
Edmonton, AB T5N 3Y4
E-mail: rmartin@mross.com
sdollansky@mross.com
Telephone: 780-482-9217
Fax: 780-482-9100

L. Christine Enns, Q.C.
Department of Justice and Solicitor General
10th Fl. Oxford Tower
10025 – 102A Avenue
Edmonton, AB T5J 2Z2
E-mail: Christine.Enns@gov.ab.ca
Telephone: 780-422-9703

Counsel for the Attorney General of Canada:

Department of Justice Canada
Prairie Region
301 – 310 Broadway
Winnipeg, MB, R3C 0S6

- and -

120 Adelaide Street West
Suite 400
Toronto, ON, M5H 1T1

Sharlene M. Telles-Langdon
Phone: 204-983-0862
Fax: 204-984-8495
Email: sharlene.telles-langdon@justice.gc.ca

Christine E. Mohr
Phone: 647-256-7538
Email: Christine.Mohr@justice.gc.ca

Ned Djordjevic
Phone: 647-256-0706
Fax: 416-954-8982
Email: ned.djordjevic@justice.gc.ca

J. Neil Goodridge
Phone: 204-984-7579
Fax: 204-984-5910
Email: neil.goodridge@justice.gc.ca

Mary C. Matthews
Phone: 647-256-0766
Fax: 416-954-8982
Email: mary.matthews@justice.gc.ca

Beth Tait
Phone: 204-983-2071
Fax: 204-984-6488
Email: beth.tait@justice.gc.ca

Counsel for the Intervenors:

Attorney General of Saskatchewan
Ministry of Justice and Attorney General of Saskatchewan
820-1874 Scarth Street
Regina, SK, S4P 4B3

P. Mitch McAdam Q.C.
Phone: 306-787-7846
Fax: 306-787-9111
Email: mitch.mcadam@gov.sk.ca

Alan F. Jacobson
Phone: 306-787-1087
Fax: 306-787-9111
Email: alan.jacobson@gov.sk.ca

Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON, M7A 2S9
Phone: 416-326-3840
Fax: 416-326-4015

Padraic J. Ryan
Email: padraic.ryan@ontario.ca

Aud Ranalli
Email: aud.ranalli@ontario.ca

Attorney General of British Columbia
P.O. Box 9280 Stn Prov Govt
Victoria, BC, V8W 9J7

J. Gareth Morley
Phone: 250-952-7644
Fax: 250-356-9154
Email: gareth.morley@gov.bc.ca

Jacqueline D. Hughes
Phone: 604-660-4602
Fax: 604-660-6797
Email: jacqueline.hughes@gov.bc.ca

Attorney General of New Brunswick
Legal Services Branch
Constitutional Unit
P.O. Box 6000, Stn. A.
675 King Street, Suite 2018
Fredericton, NB, E3B 5H1

William E. Gould
Phone: 506-453-2222
Fax: 506-453-3275
Email: william.gould@gnb.ca

TABLE OF CONTENTS

I. OVERVIEW

1. The fundamental issue in this reference is whether the federal government can exercise its Peace, Order, and Good Government ("**POGG**") power to impose its preferred policy measures for regulating greenhouse gas ("**GHG**") emissions on the provinces if it disagrees with the measures taken by a province to reduce GHG emissions, as it has done in the *Greenhouse Gas Pollution Pricing Act* ("***GGPPA***").

2. There is no dispute that provinces have both the constitutional jurisdiction and practical ability to enact the full range of policy measures that exist to regulate GHG emissions within the province, including various forms of carbon pricing.

3. In fact, the federal government acknowledges this provincial jurisdiction, by only applying the *GGPPA* in those provinces that have not already exercised their provincial jurisdiction to regulate GHG emissions in a manner that meets federal standards.

4. The dispute is over whether the POGG power can be expanded to create a new federal supervisory power over the regulation of GHG emissions in the provinces.

5. Alberta says that this is an unwarranted and unprincipled intrusion into provincial jurisdiction, because it undermines the basic structure of our constitutional system and defeats the purpose and function of section 92A(1) of the *Constitution Act*.

6. Specifically, it enables the federal government to regulate all activities of persons and entities within the province, stripping the provinces of their constitutional powers over the provincial economy, natural resources and industries within the province, and day-to-day activities of residents of the province.

7. It also directly undermines the section 92A(1), which was added to the constitution in 1982 for the express purpose of confirming exclusive provincial jurisdiction over the development, conservation and management of natural resources and electricity generation within a province.

8. In this way, it effectively amends the *Constitution Act*, by transferring large swaths of provincial jurisdiction, including those exclusive powers expressly confirmed by section 92A(1), to the federal government.

9. This unconstitutional result cannot be avoided by characterizing the *GGPPA* as only setting "minimum" national standards for the reduction of GHGs or carbon pricing, as the majorities of the Ontario and Saskatchewan Courts of Appeal held.

10. The so-called "minimum" federal standards in the *GGPPA* are, by Canada's own admission, a detailed and complex regulatory framework imposing a specific method of dealing with GHG emissions, depriving the provinces of the power to regulate GHG in a manner responsive to local needs and circumstances.

11. Moreover, once this power to create federal GHG emissions standards is conferred, it can be used to set whatever standards the federal government deems appropriate from time to time, deeply intruding into many areas of provincial jurisdiction.

12. Not only is recognizing such a supervisory federal power destructive of the division of powers, it is also unnecessary to meaningfully regulate GHG emissions in Canada.

13. Enforcing the constitutional division of powers in this area, as legally required, does not prevent the federal and provincial governments from cooperatively addressing the issue of GHG emissions within their respective jurisdictions.

14. Rather, it upholds the fundamental nature of our federal system in which unity is achieved through a cooperative process that respects the diversity within our country and hence the need for local solutions to common problems.

15. That is the way our federal system of government is intended to operate in recognition of the great diversity within the country – and it is constitutionally required in the situation at hand to enable the provinces to meet the needs and circumstances of their residents.

II. FACTS

A. Alberta's Unique Circumstances

16. Alberta's economic and social circumstances are unique compared to other jurisdictions in Canada, primarily as a result of its abundance of natural resources, and in particular, its large deposits of crude oil and natural gas.[1]

17. Its economy is driven by goods-producing industries, including agriculture, forestry, fishing, mining, quarrying, oil and gas, utilities, construction, and manufacturing. Approximately 44% of Alberta's economy is derived from these goods-producing industries, which is a far greater share than Quebec (28%), British Columbia (24%) or Ontario (23%).[2]

18. Alberta also possesses the vast majority of total oil and gas reserves in Canada, and annually produces and exports significantly more crude oil and heavy crude oil than any other province. Alberta produced 80% of Canada's crude oil and 67% of its natural gas in 2016.[3]

19. Thus, it follows that Alberta's economy – and therefore the jobs and government services Albertans rely upon – is heavily dependent on these natural resource industries.[4]

20. The oil and gas sector alone employed 147,400 Albertans in 2018, and it is estimated that nearly one in seven jobs in the province are directly or indirectly supported by the sector. As a result, the Alberta government depends heavily revenues created through employment and businesses tied to the natural resource sector.[5]

21. Alberta's natural resource sector has experienced significant economic growth over the past few decades. Since 2005 Alberta's economy has grown, in real terms, by 35%, compared to the national average of 26.1%.[6]

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[1] Affidavit of Robert Savage (**"Savage Affidavit"**) sworn August 1, 2019, at para 165, Exhibit OO, Appeal Record and Evidence of the Attorney General of Alberta (**"AR"**) A 25, A811-A842.
[2] Savage Affidavit at paras 150-152, Exhibits FF, GG; AR A22-A23, A706-713.
[3] Savage Affidavit at para 165, AR A25.
[4] Savage Affidavit at paras 165-175, AR A25-A26.
[5] Savage Affidavit at paras 173-175 and Exhibit TT, AR A26, A862-A978.
[6] Savage Affidavit at para 147, 149 and Exhibit DD, AR A22, A702-A703.

22. This economic growth has not only benefitted Albertans. It has also benefitted Canadians as a whole, by creating jobs and economic opportunities within and outside Alberta.

23. In particular, Alberta's prosperity and abundance of natural resources has provided job opportunities for people from across Canada and in the world, which has resulted in substantial population growth in the province over the past several decades that has significantly outpaced the national average.

24. Since 1990, Alberta has seen its population grow by 73.1% compared to national population growth of 32.2%. Since 2005, Alberta's population has grown by 33.1%, which is more than double the national average. Alberta's population has grown approximately three times as much as Quebec's population, and approximately 10 times as much as New Brunswick and Nova Scotia, over the same period. [7]

25. Alberta's natural resource industries also provide jobs and opportunities elsewhere in Canada. It is estimated that 533,000 jobs across Canada are created and supported by the oil and gas industry alone.[8]

26. Alberta's economy and natural resources have also provided an important revenue base to help pay for the government services that Canadians depend on, from coast to coast. Revenues generated in Alberta have contributed significantly not only to Alberta, but also to federal revenues and those of other provinces both directly and indirectly, by driving overall GDP growth, individual and corporate taxes, and equalization payments.[9]

27. Alberta's net annual contribution to the federation, the difference between what is paid to the federal government and what is received in return, is by far the largest amongst the provinces on a per capita basis. Alberta's per capita net contribution in 2017 was $5,147. The net contribution of the next highest province, Ontario, is $1,179 per capita.[10]

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[7] Savage Affidavit at para 140-145, Exhibit AA, AR A21-22, A621-628.
[8] Savage Affidavit at para 176, 190-196, Exhibit WW, AR A26, A29, A1281-1285.
[9] Savage Affidavit at para 176, 190-196, Exhibit WW, AR A26, A29, A1281-1285.
[10] Savage Affidavit at para 196, AR A29.

28. This significant net fiscal contribution to the federation, driven in large part by Alberta's natural resources sectors, helps other provinces and the federal government to provide government services that the public depends on.

B. Alberta: A Leader in Dealing with Greenhouse Gas Emissions

29. Climate change is caused by rising levels of GHG emissions in the earth's atmosphere.[11] The sources of GHG emissions, both naturally occurring and anthropogenic, are many and varied. Anthropogenic GHG emissions in particular arise from a wide range of human activity touching upon nearly every sector of a modern economy.[12]

30. Over the past two decades, Alberta has been at the forefront of addressing the GHG emissions that have resulted from the significant growth of its population, economy, and natural resources sectors.

31. Indeed, Alberta has been a pioneer in Canada with respect to climate change initiatives, with a long history of innovative policy solutions as well as nation-leading investments in GHG related technology.[13]

32. Alberta was the first jurisdiction in Canada to create a comprehensive climate change plan, called *Albertans & Climate Change: Taking Action*, in 2002; the first jurisdiction in Canada to require large industrial emitters to measure and report their GHG emissions in 2004; and the first jurisdiction in Canada to adopt carbon pricing as part of its overall policy approach to address anthropogenic climate change in 2007.[14]

33. In light of Alberta's unique emissions profile, economic circumstances, and existing GHG emissions policies, Alberta's approach to addressing climate change over the past twenty

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[11] Savage Affidavit at paras 12 and 196-198, Appeal Record ("**AR**") A4, A29-A30.
[12] Savage Affidavit at para 12 and 199, and Exhibit AAA, AR A4, A30, A1646-A1648.; see also *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ("***SKCA Decision***") at para 127; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ("***ONCA Decision***") at para 227, 237, per Huscroft JA.
[13] Savage Affidavit at paras 15-139, A4-A21 and associated Exhibits.
[14] Savage Affidavit at paras 24-38, AR A5-A7.

years has constantly evolved as more is learned about the impact of GHG reduction policies on the population and economy, and about the effectiveness of various policy options.[15]

34. Alberta's ultimate goal is to create an overall suite of innovative, integrated and complementary policy measures responsive to the unique nature of Alberta's economy and industries, while also achieving meaningful global reductions in GHG emissions.

35. The centerpiece of Alberta's current GHG reduction strategy is the forthcoming Technology Innovation and Emissions Reductions ("**TIER**") program, which will impose a carbon price on large scale industry in a manner that accounts for the unique nature of Alberta's economy, industries, and emissions profile.[16]

36. The TIER program is in the final stages of development and consultation. It is forecast to reduce GHG emissions by 40 to 45 million tonnes from 2016 business as usual levels by 2030, down to close to 2005 levels.[17]

37. In addition to the TIER program, Alberta also has in place a wide range of other climate change policies, including coal phase out regulations, regulations directed at methane emission reductions, energy efficiency programs, carbon capture utilization and storage, and significant funding for technological improvements and research and development.[18]

38. Research and development has been an especially important feature of Alberta's climate change policies, which reflects Alberta's recognition that finding overall technological solutions can have a large impact in global terms. According to a 2010 report, Alberta had invested more in GHG emissions reduction technology than every other province combined.[19]

C. Interprovincial and International Cooperation to Reduce GHG Emissions

39. As part of its commitment to achieving meaningful global reductions in GHG emissions, Alberta has consistently worked with other provinces, federal government, and international

[15] Savage Affidavit at paras 19 and 32, AR A5, A7.
[16] Savage Affidavit at paras 126-132, 271, Exhibits X and Y, AR A19-A20, A50, A563-A615.
[17] Savage Affidavit at para 131 and Exhibit Y, AR A20, A587-A615.
[18] Savage Affidavit at paras 52-79, 82-88, 92-120, AR A10-A18 and associated Exhibits.
[19] Savage Affidavit at paras 58-60, 67-73 and Exhibits J-O, AR A10-A12, A348-A405.

groups to set common goals and exchange information regarding the reduction of GHG emissions, and to enable cooperative and concerted solutions.[20]

40. As part of its cooperative efforts, Alberta participated in the negotiations and discussions leading up to the *Vancouver Declaration on Clean Growth and Climate Change* the ("**Vancouver Declaration**"). Alberta, along with the other provinces and federal government, endorsed that declaration on March 3, 2016.[21]

41. The *Vancouver Declaration* reflects Alberta's strong commitment to cooperating with other jurisdictions to reduce GHG emissions, while at the same time respecting provincial jurisdiction to determine what measures to adopt in light of the unique social, economic, and industrial circumstances of each province.

42. Consistent with this approach, the *Vancouver Declaration* did not dictate any single policy solution to be enacted country-wide, much less one to be imposed unilaterally by the federal government. To the contrary, it expressly recognized:

> [...] the diversity of provincial and territorial economies, and the need for fair and flexible approaches to ensure international competitiveness and a business environment that enables firms to capitalize on opportunities related to the transition to a low carbon economy in each jurisdiction;[22]

43. The *Vancouver Declaration* also included a commitment to develop collaborative working groups to study a range of carbon reduction policies in four priority areas: carbon pricing; clean technology, innovation and jobs; specific mitigation opportunities; and adaptation and climate resilience.[23]

44. For example, the Working Group on Specific Mitigation Opportunities ("**Mitigation Working Group**") was tasked with developing a broad menu of policy options to reduce emissions across all sectors of Canada's economy. It developed 46 policy options intended to

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[20] Savage Affidavit at paras 133-139, 237-249, 264-265, AR A20-A21, A42-A47, A49-A50 and associated Exhibits.
[21] Savage Affidavit at para 240 and Exhibit BBBB, AR42, AR2597-AR2605.
[22] Savage Affidavit at para 241-242 and Exhibit BBBB, AR A42-A43, AR2597-AR2605.
[23] Savage Affidavit at para 242, AR A43.

function "as a broad menu or toolbox, from which Ministers can choose and adapt the most relevant options for future plans".[24]

45. Alberta participated in all four of the working groups, in order to collaborate with other jurisdictions on reducing and responding to GHG emissions, and to better understand the range of policy options available to governments to achieve meaningful reductions in emissions.

46. After the working groups submitted their final reports, Canada announced its planned pan-Canadian approach to carbon pricing on October 3, 2016. Alberta was not consulted prior to this announcement, and did not participate directly in the drafting of the *Pan Canadian Framework for Clean Growth and Climate Change*.[25]

47. However, that *Pan-Canadian Framework* stated that the federal government recognized the importance of ensuring policy flexibility to allow different jurisdictions to adopt a range of policies based on their unique needs and circumstances:

> The federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies and programs to meet emission-reductions targets, supported by federal investments in infrastructure, specific emission-reduction opportunities and clean technologies. This flexibility enables governments to move forward and to collaborate on shared priorities while respecting each jurisdiction's needs and plans, including the need to ensure the continued competitiveness and viability of businesses.[26]

48. Prior to the most recent provincial election, Alberta initially signed on to the *Pan-Canadian Framework*, but later announced that it would not be supporting Canada's proposed pan-Canadian approach due to an lack of serious concurrent progress on energy infrastructure.

49. Nevertheless, Alberta remains firmly committed to continuing to work with other jurisdictions in Canada to ensure that their combined policies are as effective as possible at

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[24] Savage Affidavit at paras 243-244, 247, 249, Exhibit DDDD, AR A42, A44-A47, A2685-A2686, A2762-2879.
[25] Savage Affidavit at para 250-256, 261, AR A47-A49.
[26] Savage Affidavit at paras 257-260 ,Exhibit JJJJ, AR A48-A49, A2919; See also Schwartz, BP, "The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (2018) 41 MLJ 211 ("**Schwartz**") at 223-224, **Book of Authorities of the Attorney General of Alberta** ("**ABBOA**") Tab 38.

reducing GHG emissions on a global basis, without giving up Alberta's jurisdiction to adopt solutions that make sense based on its own local circumstances.

50. In addition to its efforts to cooperate with other jurisdictions in Canada, Alberta has also engaged in a number of international initiatives, intended to further promote global cooperation and achieve emissions reductions on a global basis.[27]

51. This includes sending delegations to the United Nations Conference of the Parties ("**COP**"), the body responsible for the *Paris Agreement*, as well as participating in a wide range of international and interjurisdictional climate change groups and initiatives.[28]

D. A Suite of Policy Options for Addressing Greenhouse Gas Emissions

52. As noted in the Mitigation Working Group Report, there are many ways for governments to reduce greenhouse gas emissions. The suite of available policy options includes direct regulations and prohibitions, emissions intensity regulations, carbon pricing initiatives, economic incentives and subsidies, funding technological improvements to limit emissions or capture carbon, information campaigns, voluntary based tools, and investment in research and development, amongst others.[29]

53. Carbon pricing alone can be subdivided into various different forms, including levies on the demand side of the economy (such as buildings, construction, natural gas distribution, transportation, and waste); cap-and-trade systems that place an overall maximum on the amount of carbon emissions tied to emissions credits that can be traded on a marketplace; output-based pricing regimes designed to reduce emissions intensity through a price signal; or some combination of these measures.[30]

54. The appropriateness of each policy option, whether pricing or non-pricing based, depends on a number of factors, including a jurisdiction's economic and industry structure, the exposure of its key industries to international competition, and the other measures already in place in that

[27] Savage Affidavit at para 133-139, AR A20-A21.
[28] Savage Affidavit at para 133, AR A20.
[29] Savage Affidavit at paras 247, 249, and Exhibit DDDD, AR A45-A46, A2685-A2686, A2762-2879.
[30] See generally the Working Group on Carbon Pricing Mechanisms Final Report, Savage Affidavit Exhibit CCCC, AR A2606-A2672.

jurisdiction. Thus, the proper policy mix must be customized to each jurisdiction's specific circumstances.[31]

55. This is consistent with the fact that while there is broad international consensus about the importance of urgently addressing climate change – a commitment that Alberta shares – there has been no international agreement suggesting that there is a single, necessary, or best means of achieving reductions that all jurisdictions must adopt.

56. The *Paris Agreement* included a commitment to attempt to further limit the temperature increase to 1.5 degrees Celsius, without dictating any specific policy approach or national targets to achieve this overall global reduction.[32]

57. In particular, the parties to the *Paris Agreement* are not required to implement carbon pricing as part of their efforts to reduce GHG emissions. In fact, in Article 6.8 of the Paris Agreement the Parties specifically "recognize the importance of integrated, holistic and balanced non-market approaches being available to the Parties".

E. Alberta's Effective Approach: Responsive to Local Distinctiveness

58. Alberta's commitment to ensuring that it retains discretion over its GHG reductions policies, both in terms GHG emission objectives, and what policy approaches to adopt in light of their local circumstances, is therefore entirely consistent with the international agreements to which Canada has assented, and the targets Canada has adopted.

59. Alberta recognizes that carbon pricing is often an efficient way to discourage carbon consumption. That is why Alberta has used various forms of carbon pricing since it became the first jurisdiction in Canada to adopt industrial-side carbon pricing 2007, and has used it as part of its overall GHG reduction strategy ever since – including in its recently announced TIER program.

60. At the same time, Alberta also believes that carbon pricing is neither the only way, nor necessarily the most effective way, to achieve carbon reductions. Much will depend on the

[31] Savage Affidavit at paras 246, 248, AR A244-A246 and associated Exhibits.
[32] Savage Affidavit at para 239, AR A42. See also Schwartz, *supra,* at 219-221, 256, 270, ABBOA Tab 38.

specific type of carbon pricing imposed, and how effective it will be given the particular emissions profile and economic circumstances of particular jurisdictions.

61. In terms of efficacy, the preliminary evidence from Alberta suggests that its "demand side" or retail carbon levy in place over the 2018-2019 period imposed a significant cost on individuals and small businesses, but produced minimal actual reductions GHG emissions. Alberta's retail carbon tax was responsible for an estimated 2 Mt CO2e in GHG emissions reductions despite accounting for 71% of the revenues collected through carbon pricing in 2018-2019,.[33] This represents less than 0.73% of Alberta's total GHG emissions in 2017 of 273 Mt.

62. The bulk of Alberta's GHG emissions reductions have resulted from the suite of other policy options implemented by the province including carbon pricing on large emitters, emissions offset programs, investments in clean technologies, methane emissions regulations, the coal power phase-out, and carbon capture and storage.[34]

63. For instance, the estimated 2 Mt CO2e in reductions attributed to Alberta's demand side carbon levy over the 2018 to 2019 period compares to approximately 29.8 Mt of reductions from *Specified Gas Emitter Regulation* from 2007 to 2017, 52.6 Mt of reductions from Alberta's emission offset program from 2007-2019, 10 Mt of reductions from coal-fired power plants due to the *Climate Change Incentive Regulation* from 2016 to 2017, and the 287 Mt of GHG emissions expected to be avoided between 2030 and 2061 by the phase-out of coal-fired electricity generation.[35]

64. Alberta's experience is consistent with the evidence of the limited effectiveness of demand side carbon pricing in reducing overall emissions. For instance, CleanBC, British Columbia's climate change plan, projects that by 2030, British Columbia's carbon tax will reduce British Columbia's annual GHG emissions by 1.8 Mt CO2e, representing approximately 2.9% of British Columbia's current 2016 GHG emissions of 62.3 Mt CO2e.[36]

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[33] Savage Affidavit at para 122, AR A18.
[34] Savage Affidavit at paras 38, 45, 55, 75, 84, 94, 105, 114, AR A7-A8. A10, A14-A17.
[35] Savage Affidavit at paras 38, 45, 84, 105, AR A7-A8, A14, A16.
[36] Savage Affidavit at para 232, Exhibit KKK, AR A41, A2062.

65. Therefore, while carbon pricing can often lead to reductions in GHG emissions – and carbon pricing is part of Alberta's overall GHG reduction policy mix for that reason, as discussed above – it is at most a partial solution to the problem. The efficacy of various forms of carbon pricing will often differ depending on local circumstances.

66. In some circumstances carbon pricing may actually *contribute* to the problem of climate change, as a result of "carbon leakage" to other countries.[37]

67. In particular, if pricing GHG emissions in one jurisdiction increases the costs of production and causes production to shift to another, less carbon-efficient or less environmentally-stringent jurisdiction, this will increase emissions *globally*, though it may reduce Canada's emissions *nationally*.

68. Alberta's objective is to ensure that its overall suite of GHG reduction policies, including with respect to carbon pricing, will work together to effectively achieve emissions reductions not only from sources within Alberta, but on a global basis.

69. This approach is intended to both prevent unnecessary or avoidable economic harm and disruption to Alberta's population, and to ensure measures can and will be effective in light of Alberta's unique economic and industrial makeup.

70. The considerable economic diversity across Canada has implications in terms of both the ease with which GHG reductions can be reduced as compared to a 2005 baseline, which is the common reference date for emissions reductions, and the policies that will be most effective given the industrial and emissions profile of each jurisdiction.

71. Unlike some other Canadian jurisdictions, Alberta's GHG emissions have increased from 2005 levels, notwithstanding Alberta's significant progress in reducing emissions intensity and developing innovative solutions to reduce GHG emissions over the same period.[38]

[37] Savage Affidavit at paras 215, 216, 220, 246, 248, AR A33-A35, A44-A46 and associated Exhibits.
[38] Savage Affiavit at para 201, AR A30.

72. This overall increase in Alberta's emissions over 2005 levels is primarily the result of the unique nature of Alberta's economy, as well as the significant population and economic growth Alberta has experienced over this period, as discussed above.

73. Although Alberta's natural resources, population and economic growth has benefited Canada as a whole, it has created challenges in reducing GHG emissions from sources within the province as compared with 2005 levels specifically, given the emissions intensive nature of Alberta' natural resource industries.[39]

74. Alberta's overall emissions profile – i.e. the proportion of emissions from various sources within the province – is unique compared with other provinces. This means that policies that are especially effective in achieving emissions reductions in Alberta may not be helpful or necessary in other jurisdictions, and vice versa.

75. For instance, the proportion of emissions from the demand side of the economy is 72% in Prince Edward Island, 63% in Ontario, 62% in Quebec, 57% in British Columbia, and 52% in Manitoba and Newfoundland.

76. By contrast, only 19% of Alberta's GHG emissions come from the demand side of the economy, while approximately 49% of Alberta's emissions come from emissions-intensive oil and gas industry, which far outpaces any other province.

77. That means that Alberta's efforts and resources are better focused on GHG reductions in relation to its large industrial sector, or with respect to methane emissions from the oil and gas sector, rather than through demand-side initiatives.

78. Alberta's attempts to reduce GHG emissions compared to 2005 levels is further complicated by the fact that its key economic sectors are not only "emissions-intensive", but also "trade-exposed" ("**EITE**"), which has important implications for the viability and effectiveness of various GHG reductions policies.

79. EITE industries are particularly vulnerable to additional costs and levies, because they must compete on global commodities markets with foreign competitors who may not be bound

[39] Savage Affidavit at paras 200-206, AR A30-A31.

by the same emissions reductions policies and associated costs.[40] This is of particular concern to Alberta, given that it has the highest percentage of EITE industries in the country.[41]

80. This not only has implications for the effectiveness of certain types of carbon pricing initiatives on the provincial economy, jobs, and government revenues, it also impacts the effectiveness of those policies in reducing emissions on a global basis.

81. As noted above, increasing the production cost of Alberta's resources may allow Alberta's international competitors to take Alberta's market share, without achieving any actual GHG emission reductions on a global basis, if it shifts production to more emissions-intensive jurisdictions. Alberta needs to be in control of the policies that affect the competitiveness of its industries[42]

82. As the Standing Senate Committee on Energy, the Environment, and Natural Resources has explained, the end result of imposing carbon pricing initiatives on EITE industries "could be a shrunken Canadian industrial sector and loss of jobs, while at the same time not addressing global emissions".[43]

83. In this way, imposing carbon pricing initiatives without accounting for the unique nature of Alberta's industries and economy is unlikely to produce significant net benefit in terms of reducing global emissions. It could, in fact, achieve the opposite result.

84. Therefore, while Alberta does not oppose carbon pricing as among the suite of policy options – to the contrary, Alberta has used carbon pricing as part of its overall GHG reduction package since 2007 and will continue to do so in its new TIER program – it is unwilling to have the federal government impose carbon pricing measures that fail to account for the unique nature of Alberta's industries.

85. This is consistent with Alberta's overall objective to take meaningful steps to reduce GHG emissions in a manner that fits within Alberta's local economic circumstances, while at the

[40] Savage Affidavit at paras 213-223, AR A33-A36, and associated Exhibits.
[41] Savage Affidavit at paras 155 and Exhibit II, AR A24, A789-A791.
[42] Savage Affidavit at paras 159-164 AR A24-A25 and associated Exhibits.
[43] Savage Affidavit at para 219, Exhibit HH, AR A33-A34, A742.

same time continuing to provide jobs and government services for its population and to drive economic growth across the country.

F. The *Greenhouse Gas Pollution Pricing Act*; Unresponsive to Local Distinctiveness

86. As noted above, Alberta has had its own carbon pricing system on industrial emissions since 2007. Since then, various other provinces – such as Quebec and BC – have adopted their own unique carbon pricing regimes. Notwithstanding the existing provincial regimes, in 2018, the federal government passed the *Greenhouse Gas Pollution Pricing Act*,[44] which seeks to unilaterally impose Canada's preferred system of carbon pricing on all provinces.

87. The *GGPPA* allows the Governor in Council to "list" provinces if the carbon pricing systems of those provinces are not to Canada's liking.[45]

88. The Governor in Council's decision whether to "list" a province is based, primarily, on its analysis of the stringency of the province's pricing mechanism.[46] This empowers Canada to review and assess provincial carbon pricing plans against benchmark criteria to determine if they are sufficient to meet those criteria.

89. Canada's current benchmark criteria requires provinces to have either a demand-side carbon tax, a hybrid of a demand side carbon tax and an output-based pricing system ("**OBPS**") that prices industrial carbon emissions, or a cap and trade system. It does not require that these provincial plans actually achieve similar prices on carbon.

90. If a province does not have a carbon pricing plan, or if its carbon pricing plan does not meet Canada's benchmark criteria (whatever they may be from time to time), Canada will "list" the province and impose either the fuel charge set out in Part 1 of the *GGPPA*, the OBPS set out in Part 2 of the *GGPPA*, or both, on the residents, businesses, and industries in that province.

91. The Part 1 fuel charge imposes charges on various transport and heating fuels sold and consumed in listed provinces. This charge applies to fuel distributors in the provinces, as well as

[44] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 ("***GGPPA***"), **Book of Legislation of the Attorney General of Alberta** ("**ABBOL**") Tab 1.
[45] For an explanation of the operation of the GGPPA summarized in the following paragraphs, see the Regulatory Impact Analysis Statement, Savage Affidavit Exhibit DDD, A1738-A1750.
[46] *GGPPA*, s. 166(3), ABBOL Tab 1.

air carriers, marine carriers, rail carriers, and road carriers. It is expected that the charge will be passed on to end users and consumers.

92. Under Part 2 of the *GGPPA*, the Department of the Environment ("**ECCC**") evaluates the sectors of the provincial economy and sets different output based standards (emission standards based on the carbon intensity per unit of production) for different industries. ECCC has also set out different stringency levels for different industries, all of which are subject to change at the Governor in Council's discretion.

93. The OBPS therefore requires in in-depth evaluation of the performance of the listed province's economy on an industry-by-industry basis to develop the stringency level for that industry, and in-depth evaluation of each such industry on a facility-by-facility basis to determine the compliance of each facility.

94. The OBPS also creates a complex system of registration and reporting that all regulated facilities must comply with, to be administered by ECCC. The OBPS applies to all industrial emitters who emit more than 50,000 tonnes of CO2e per year. Smaller industrial emitters who emit between 10,000 and 50,000 tonnes of CO2e can also register to be regulated under Part 2.

95. Canada intends to subject provincial carbon pricing plans to an annual benchmark assessment process such that provincial plans will be subject to constant review and assessment by the federal government. If the stringency of the federal government's criteria changes or if the federal government decides to remove a pricing plan option such as the cap and trade option,

96. On June 13, 2019, Canada advised Alberta that, effective January 1, 2020, it would be applying the fuel charge established by Part 1 of the *GGPPA* in Alberta. It is unclear whether or not Canada will find that TIER meets its carbon pricing standards, or if Canada will impose Part 2 of the GGPPA on Alberta's industries when TIER goes into effect.[47]

97. If Canada is permitted to impose the *GGPPA* on Alberta, this will negate the policy choices made by Alberta when implementing its industrial emitter regime to reflect Alberta's

[47] Savage Affidavit at para 125, AR A19.

unique economic circumstances, as the only alternative would be for Alberta's heavy industry to face two separate carbon pricing regimes.

98. The *GGPPA* will have a significant effect on Alberta's ability to implement its provincial emissions-reduction policies in other ways. Most fundamentally, the implementation of an off-the-shelf, demand-side carbon price under Part 1 of the *GGPPA* will directly undermine Alberta's policy choice, endorsed in the recent provincial election, to focus its carbon pricing efforts on large scale emitters, in light of the relatively minimal impact of demand side emissions in the province.

99. Imposing a demand-side carbon price under Part 1 of the *GGPPA* will also directly undermine Alberta's policy choice to have small oil and gas facilities focus their GHG reduction efforts on the reduction of emissions of methane, a GHG with a greenhouse gas impact 25 to 34 times greater than that of carbon dioxide.[48]

100. That is because the *GGPPA* fuel charge applies to all small industrial facilities that emit less than 10,000 tonnes of CO2e per year, such as the more than 28,000 small oil and gas facilities in Alberta. Many of these facilities are already subject to other targeted provincial GHG reduction policies such as the *Methane Emission Reduction Regulation*.

101. In addition, unlike Alberta's policies, the OBPS contains no mechanism for individual facilities experiencing economic harm by the OBPS to apply for cost containment – modification of the standards or cost relief intended to protect against such competitiveness risks.[49]

102. In short, the *GGPPA* imposes a detailed supervisory regime on the provinces permitting the federal government to set overall reduction goals, to choose the policy means and systems to achieve those goals, to design those systems, to determine the comprehensiveness and stringency of the carbon pricing measures, and to administer and enforce those systems in the provinces.

[48] Savage Affidavit at para 106-115, 274, AR A17-18, A51.
[49] Savage Affidavit at para 273, AR A51.

G. Federal Intrusion into Provincial Jurisdiction and Section 92A

103. Historically, Alberta has been significantly impacted by federal intrusion into the regulation of non-renewable resources and electricity generation within Alberta.

104. In the 1970s and 80s, the federal government intervened heavily in the natural resources sector, through national policies that were viewed by many in Alberta as a "frontal assault on provincial powers in relation to resources".[50]

105. As Justice Laforest explained, "the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products, were a source of major concern to the provinces".[51]

106. This federal intrusion into a key pillar of Alberta's economy, coupled with restrictive Supreme Court decisions during the same era, caused Alberta and other western provinces to lead an effort to confirm and strengthen provincial jurisdiction over natural resources in the province.[52]

107. This led to the adoption of section 92A in 1982, the effect of which was described by former Saskatchewan Premier Roy Romanow and co-authors as follows:

> [I]f one considers the circumstances that led to section 92A being incorporated in the Constitution, the western provinces came out ahead. They not only obtained a favourable amending formula which protected provincial jurisdiction over natural resources and proprietary rights; they also managed to confirm and clarify their existing jurisdiction over natural resources. Perhaps most important of all, the provinces achieved an extension in the scope of their legislative authority over natural resources, without having to agree to greater federal jurisdiction over the economy.[53]

108. Section 92A(1) represents a clear, deliberate, and negotiated amendment to the constitution intended affirm exclusive provincial jurisdiction over the development,

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[50] WD Moull, "Natural Resources and Canadian Federalism: Reflections on a Turbulent Decade" (1987) 25 Osgoode Hall LJ 411 (**"Moull, "Natural Resources""**) at 412, ABBOA Tab 36.
[51] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 (***"Ontario Hydro"***) at para 80 (QL), ABBOA Tab 8.
[52] JP Meekison, RJ Romanow, WD Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: IRPP, 1985) (**"Romanow et al, *Section 92A*"**) at 3-29. See also *Ontario Hydro, supra* at paras 80-83 (QL), ABBOA Tab 34.
[53] Romanow et al, *Section 92A*, *supra* at 30, ABBOA Tab 34.

management, and conservation of its non-renewable natural resources, electricity generation, and related provincial industries.

109. Alberta submits that the adoption of section 92A, and the historical rationale and concerns underlying it, provides important constitutional and historical context through which the present reference should be understood.

III. ARGUMENT

110. Alberta understands that the Attorney General of Canada seeks to uphold the *GGPPA* on the basis of the national concern branch of the peace, order and good government ("**POGG**") power, and as such, Alberta will focus its submissions on addressing that argument.

A. Characterization of the Act: The Pith and Substance of the *GGPPA*

111. The "pith and substance" analysis involves characterizing the legislation in question through a close review of its purpose and effects, in order to determine its essential matter, "dominant purpose" or "true character".[54]

112. In this case, the pith and substance analysis is of less significance than in many other division of powers cases, as the fundamental question in this reference is whether there is a new federal POGG national concern power over GHG emissions into which the *GGPPA* can fall.

113. If there is no such POGG national concern power, as Alberta submits, it does not matter whether the pith and substance of the *GGPPA* is characterized as "cumulative dimensions of GHG emissions", "a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all sources in Canada",[55] or any of the other formulations adopted in the provincial references so far.[56]

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[54] *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14 (***"Re Gun Registry"***) at para 29, ABBOA Tab 10; *Canadian Western Bank v. Alberta*, 2007 SCC 22 (***"Canadian Western Bank"***) at para 26-27, ABBOA Tab 3.

[55] *ONCA Decision, supra* at para 73.

[56] See e.g. *SKCA Decision, supra*, at para 125, per Richards CJS, ABBOA Tab 21; *ONCA Decision, supra*, at para 77, per Strathy CJO, and at para 166, per Hoy ACJ, ABBOA Tab 20.

114. However, Alberta submits that the purpose and effect of the *GGPPA* is to regulate GHG emissions across the country, as Canada originally submitted in the Saskatchewan reference. As such, Alberta adopts the analysis and conclusion of Huscroft JA, who described the pith and substance of the *GGPPA* as "regulat[ing] GHG emissions".[57]

B. The Classification of the Act

i. Provincial Jurisdiction

115. It is undisputed that the provinces have the necessary jurisdiction to comprehensively regulate GHGs produced by individuals and businesses within the province.[58] This derives in large part from an important aspect of the Canadian division of powers, which is the exclusive jurisdiction conferred on the provinces to regulate economic activities, industries, and natural resources within the province.

116. As the Supreme Court of Canada explained in *Comeau*, Canadian federalism "is built upon regional diversity within a single nation", and a "key facet of this regional diversity is that the Canadian federation provides space to each province to regulate the economy in a manner that reflects local concerns".[59]

117. Similarly, in *Anti-Inflation Reference*, Justice Beetz observed that "(t)he control and regulation of local trade and of commodity pricing and of profit margins in the provincial sectors have consistently been held to lie, short of a national emergency, within exclusive provincial jurisdiction."[60]

118. All of the policy areas addressed by the *GGPPA*, and all of the sources of GHG emissions regulated by the *GGPPA*, presumptively fall within provincial jurisdiction.

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[57] *ONCA Decision, supra*, at para 213, per Huscroft JA, ABBOA Tab 20.
[58] *SKCA Decision, supra* at para 130, per Richards CJS, at para 339, per Ottenbreit & Caldwell JJA, ABBOA Tab 21; *ONCA Decision, supra* at paras 193, 230, 237, per Huscroft JA, ABBOA Tab 20. While the Ontario Court of Appeal majority did not opine directly on the independent scope of provincial powers to regulate GHG emissions, it did not disagree with Huscroft JA's analysis on this point.
[59] *R. v. Comeau*, 2018 SCC 15 (***"Comeau"***) at para 85, ABBOA Tab 14.
[60] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 (***"Anti-Inflation Reference"***) at 441, ABBOA Tab 17. See also *SKCA Decision, supra* at para 339, per Ottenbreit & Caldwell JJA, ABBOA Tab 21.

119. This includes the regulation of local transactions and contracts (such as for the sale and purchase of fuel), the regulation of local businesses and industries (including their emissions), and the management and development of non-renewable natural resources in the provinces (such as pricing measures tied to the amount of development and production that occurs).

120. Moreover, the fact that the *GGPPA* only applies in provinces that do not meet federal standards constitutes a recognition that the provinces have the jurisdiction necessary to impose the very same measures as those contained in the *GGPPA*.

121. The question in this reference is therefore *not* whether the provinces are constitutionally equipped or practically able to enact the full slate of policy tools mandated by the *GGPPA* – it is effectively conceded by Canada that they are.

122. Rather, the question is whether the federal government can impose its own policy solutions upon provinces who do not exercise their exclusive jurisdiction in the way that the federal government deems most appropriate at any given time.[61]

123. In effect, the federal government is seeking an extraordinary and overriding 'supervisory' power to ensure that provinces adopt policies in areas of exclusive provincial jurisdiction that the federal government deems most advisable from a policy perspective.

124. There is no such supervisory power conferred on the federal government in the constitution, and indeed, for the reasons set out below, creating one would effectively destroy the fundamental basis of our federal system, which is to recognize that each level of government is supreme within its own sphere of jurisdiction.

ii. The 'National Concern' POGG Power

125. The majority of the Saskatchewan Court of Appeal ("**Saskatchewan Majority**"), the majority of the Ontario Court of Appeal (the "**Ontario Majority**"), and the concurring judgment of Hoy ACJ ("**Ontario Concurrence**"), upheld the *GGPPA* on the basis of three differing articulations of a new POGG national concern power over GHG emissions.

[61] See *ONCA Decision, supra* at para 195, per Huscroft JA, ABBOA Tab 20.

126. It is significant that all three judgments adopted different formulations of this new federal head of power, because it illustrates the lack of a firm foundation for it. As a result, it is important at the outset to provide some grounding for the national concern doctrine in the fundamental principles underlying Canada's division of powers.

127. The POGG powers derive from the introductory language of section 91 of the *Constitution Act,* which provides that the federal Parliament has the power

> "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces"

128. This rather cryptic language provides little guidance as to the precise nature and contours of the power or powers conveyed on the federal Parliament, and has provoked historical controversy over whether it confers any additional power beyond matters that clearly or necessarily fall outside of provincial jurisdiction.[62]

129. The courts have since identified three 'branches' of the POGG power: the residual "gap" branch to cover matters clearly left out of the division of powers in ss. 91 and 92; the "emergency" branch to cover *temporary* legislation to address transitory national emergencies;[63] and the "national concern" branch at issue in this case.[64]

130. The POGG national concern branch has rarely been used. There are only a handful of cases since 1950 in which federal legislation has been upheld by the Supreme Court of Canada under the national concern branch. [65] The modern doctrine was set out in the 1988 case of *Crown Zellerbach*, which followed Justice Beetz' 1975 judgment in *Anti-Inflation Reference*.

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[62] See generally K Lysyk, "The Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531; J LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38:2 UBC L Rev 353 (**"Leclair"**), ABBOA Tab 32.
[63] See *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 (***"Crown Zellerbach"***) at 431-432 [paras 32-33 (QL)], ABBOA Tab 15.
[64] Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (looseleaf) (**"Hogg, *Constitutional Law*"**) at §17.1, ABBOA Tab 33. This roughly maps on to the three categories endorsed in *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 (***"Malmo-Levine"***) at para 69, ABBOA Tab 16.
[65] Most commonly cited are *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics), ABBOA Tab 5; *Munro v. National Capital Commission*, [1966] S.C.R. 663 (national capital region), ABBOA Tab 7; *Crown Zellerbach, supra* (marine pollution), ABBOA Tab 15; *Ontario Hydro, supra* (nuclear power), ABBOA Tab 8. Some also suggest that the decision in *R. v. Hauser*,

131. Notably, in the two most recent Supreme Court cases upholding federal jurisdiction under the POGG national concern branch – *Crown Zellerbach* and *Ontario Hydro*[66] – the Court was deeply divided as to the scope and application of the doctrine.

132. In the absence of definitive textual or unequivocal judicial guidance for the national concern branch of POGG, it is important to set out a number of key substantive and interpretive principles that can be used to place the POGG national concern branch within the context of the broader constitutional order.

a) Federalism: Divided Sovereignty and Subsidiarity

133. As the Supreme Court has explained, the Canadian federation rests on the fundamental organizing principle that the provincial and federal orders of government "are coordinate and not subordinate one to the other".[67]

134. This flows from the fact that the purpose of confederation was "not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority".[68] Rather, within its jurisdiction, "the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances".[69]

135. Thus, the principle of federalism in our constitutional system recognizes the diversity of the component parts of Confederation, the autonomy of provincial governments to develop

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[1979] 1 SCR 984, finding federal jurisdiction in relation to narcotics trafficking, properly falls within the national concern branch. However, as Peter Hogg notes, the reasoning in *Hauser* is "perfunctory and unsatisfactory", it makes no mention of the line of cases deemed to fall within the national concern branch, and was subsequently questioned by the Court in *Malmo-Levine, supra* at para 67-72. See Hogg, *Constitutional Law*, *supra* at §17.3(d).

[66] *Crown Zellerbach,* ABBOA Tab 15 and *Ontario Hydro,* ABBOA Tab 8, both *supra.*

[67] *Reference re Securities Act*, 2011 SCC 66 (***"Securities Reference"***) at paras 7, 71, ABBOA Tab 25; *Reference re Secession of Quebec*, [1998] 2 SCR 217 (***"Secession Reference"***) at paras 32, 58, ABBOA Tab 24.

[68] *Secession Reference, supra*, at para 58, citing *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at 942, ABBOA Tab 24.

[69] *Reference re: Liquor License Act of 1877 (Ont.)*, [1883] J.C.J. No. 2 at para 36 (QL) (*sub nom Hodge v. The Queen* (1883), 9 App Cas 117, (P.C.) at 131), ABBOA Tab 22, cited in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (***"Pan-Canadian Securities"***) at para 52, ABBOA Tab 23.

societies within their respective spheres of jurisdiction, and the importance of the courts enforcing the division of powers.[70]

136. Related to this notion of equal and divided sovereignty is the concept of "subsidiarity", i.e., that decisions are often best made at "a level of government that is not only effective, but also closest to the citizens affected",[71] so as to be most responsive to their needs, to local distinctiveness, and to population diversity.[72]

137. This principle enables the development of diverse societies and economies by allowing provincial governments to develop policies and programs that are specifically tailored to the unique circumstances of individual provinces. This diversity can in fact benefit the nation as a whole, by allowing for policy innovation in different jurisdictions.[73]

138. Both the underlying nature of Canadian federalism, and the key elements of it, such as the principles of divided sovereignty and subsidiarity, are important prisms through which to view the legal issues in this reference.

b) Constitutional Reconciliation

139. Given the vague textual guidance and uncertain scope of the POGG national concern power, it should also be understood and applied in light of the express provisions in the *Constitution Act,* which can inform its overall place within the constitution.

140. This flows from the need to reconcile all aspects of the constitution by reading it as an integrated whole,[74] and to ensure that federal heads of power are not interpreted in a way that significantly undermines a provincial legislative competence.[75] In undertaking this analysis,

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[70] See further *Securities Reference, supra,* at paras 58-62, 71, ABBOA Tab 25.
[71] *Canadian Western Bank, supra* at para 45, ABBOA Tab 3.
[72] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para 3, ABBOA Tab1; *Canadian Western Bank, supra* at para 45, ABBOA Tab 3; see also Hogg, *Constitutional Law, supra,* at §5.1(g), ABBOA Tab 33, and D Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21, ABBOA Tab 37.
[73] See generally A Bélanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21, ABBOA Tab 29; Hogg, *Constitutional Law, supra* at §5.2, ABBOA Tab 33.
[74] See e.g. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 at para 16, ABBOA Tab 12; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para 25, ABBOA Tab 28.
[75] *Securities Reference, supra* at para 71, ABBOA Tab25.

courts should identify the underlying purposes of constitutional provisions, particularly where those provisions are express and adopted for a clear purpose.[76]

141. It follows that the POGG analysis must take into account express constitutional provisions that might by impacted by the adoption of the asserted POGG power, most notably here, section 92A.

142. In contrast to the vague and disputed nature of the national concern POGG power, section 92A was a clear and deliberate amendment to the constitution. By its express terms, the purpose of section 92A(1) was to confirm the provinces' *exclusive* jurisdiction over the exploration, development, conservation and management of non-renewable resources and the generation and production of electricity.

143. The legal effect of this provision was to confirm exclusive provincial jurisdiction "in relation to all phases of the resource development process",[77] and "to grant exclusive authority to the provinces to regulate their natural resources".[78]

144. These are the very subject matters most directly impacted by federal legislation designed to regulate the GHG emissions within the provinces. In Alberta especially, non-renewable resource development and electricity generation are the primary sources of GHG emissions.[79]

145. The POGG national concern analysis should therefore be conducted in a way that does not undermine this important, clear, and modern constitutional expression of the provinces' exclusive jurisdiction over their natural resources industries.

c) "Constitutional Compliance, Not Policy Desirability"

146. Finally, it is important to emphasize that in conducting a division of powers analysis, a court should not be swayed by its view of the best or most efficient policy to adopt in a particular context.

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[76] See e.g. the analysis in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at paras 37-47, ABBOA Tab 19.
[77] Moull, "Natural Resources", *supra* at 418, ABBOA Tab 36.
[78] See also PJ Monahan, B Shaw, and P Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2018) ("**Monahan et al, *Constitutional Law***") at 334, ABBOA Tab 35.
[79] See Savage Affidavit para 205, AR A30-A31.

147. Alberta and Canada disagree on the best way to reduce GHG emissions on a global basis. In particular, although both include carbon pricing mechanisms within their overall policy approaches, they disagree on how carbon pricing should be applied to consumers, industries, and businesses in Alberta.

148. However, whether one or the other approach to reducing GHG emissions, or to carbon pricing specifically, is viewed as preferable, should not enter into the constitutional analysis. As the Supreme Court noted in the *Securities Reference*:

> The courts do not have the power to declare legislation constitutional simply because they conclude that it may be the best option from the point of view of policy. The test is not which jurisdiction—federal or provincial—is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.[80]

149. This point was recently emphasized by the Supreme Court in *Comeau*, where the Court noted that the federalism principle "does not allow a court to say 'This would be good for the country, therefore we should interpret the Constitution to support it.'".[81]

150. As elaborated upon below, the belief that a national approach to carbon pricing, as dictated, administered and enforced by the federal government, is an "essential" or "necessary" ingredient of any viable approach to addressing GHG emissions,[82] seems to rely on the very types of contested policy judgments that the Supreme Court has expressly prohibited.

iii. POGG National Concern Analysis

a) Understanding the Two Step *Crown Zellerbach* Test

151. POGG powers recognized by the Supreme Court under the national concern branch cover inherently *limited* subject matters that are clearly distinguishable from areas of provincial jurisdiction, where the recognition of such power does not heavily intrude into provincial jurisdiction.

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[80] *Securities Reference, supra* at para 90 [emphasis added], ABBOA Tab 25.
[81] *Comeau, supra* at para 83, ABBOA Tab 14.
[82] See e.g. *SKCA Decision, supra* at paras 31, 174, ABBOA Tab 21; *ONCA Decision, supra* at para 27, ABBOA Tab 20.

152. Such subject matters must have a "natural unity that is quite limited and specific in its extent",[83] with "ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned".[84]

153. Therefore, in order to constitute a POGG power under the national concern branch under the *Crown Zellerbach* test, the proposed 'subject matter' in question must itself be a matter of national concern, and it must also have both (a) "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern", and (b) a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".[85]

154. As Justice Beetz explained in his judgment in the *Anti-Inflation Reference*, which served as the basis for the *Crown Zellerbach* national concern analysis, strict adherence to these criteria is necessary to maintain the fundamental balance of the federation:

> if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (*Parsons'* case) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.[86]

155. In applying these principles to the federal legislation seeking to control inflation, Justice Beetz provides key guidance as to the meaning of the POGG power:

> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.[87]

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[83] WR Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can B Rev 597 at 610, ABBOA Tab 31.
[84] *Crown Zellerbach, supra* at 438 [para 39 (QL)], ABBOA Tab 15.
[85] *SKCA Decision, supra* at para 117, per Richards CJS, at paras 404-406, per Ottenbreit & Caldwell JJA, ABBOA Tab 21; *ONCA Decision, supra*, at paras 98, 102, per Strathy CJO, at para 222, per Huscroft JA, ABBOA Tab 20.
[86] *Anti-Inflation Reference, supra* at 458 [p. 39 (QL)]; *Crown Zellerbach, supra*, at 426-427 [para 28 (QL)], ABBOA Tab 17.
[87] *Anti-Inflation Reference, supra* at 458 [p. 39 (QL)], ABBOA Tab 17.

156. At a conceptual level, "inflation", like the concept of "greenhouse gas emissions", was entirely "singular and distinct", in the sense that its causes and effects were known and ascertainable. It was also "indivisible", in the sense that "national inflation" is a concept with its own integrity, and that inflationary pressures in one part of the country contribute to inflationary pressures on a national level.

157. However, because the *sources* of inflation were diffuse, pervasive, and could not be clearly distinguished from matters falling within provincial jurisdiction, the concept of "inflation" did not have the type of singularity, distinctiveness, and indivisibility to support the extraordinary step of creating a new POGG power under the national concern branch.

158. As this shows, the notion of "singleness, distinctiveness, and indivisibility" is not understood with reference to an asserted subject matter in a vacuum. Rather, it is to be understood *with reference to matters that already clearly fall within provincial jurisdiction.* This ensures that creating a new federal power under the national concern branch will not upset the balance of federalism in Canada.

159. Similarly, the second step in the *Crown Zellerbach* test requires that the court ensure that any new subject matter sought to be brought under federal jurisdiction has a "scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".[88]

160. As can be seen, retaining balance in the division of powers is not only an important interpretive principle, it is the central organizing principle of the POGG national concern analysis – both in relation to the "singleness, distinctiveness, and indivisibility" aspect of the test, and in requiring that it does not intrude heavily into matters of provincial jurisdiction.

b) Subject Matters of National Concern Become the Exclusive Jurisdiction of the Federal Government

161. Another important characteristic of the national concern branch of POGG branch is that once a new subject matter is recognized as falling under federal jurisdiction, that jurisdiction is both *plenary* and *exclusive.* It does not allow for concurrent provincial and federal fields of

[88] *Crown Zellerbach, supra* at 431-432 [para 33 (QL)], ABBOA Tab 15.

jurisdiction over the same matter;[89] rather, it confers exclusive federal jurisdiction over the entire subject matter, "including its intra-provincial aspects".[90]

162. After the recognition of a new POGG national concern subject matter, provincial legislation that would otherwise have clearly fallen within provincial jurisdiction may be deemed invalid as, in pith and substance, in relation to the new federal matter.[91]

163. In this way, a finding that a matter falls within federal jurisdiction under the national concern branch necessarily results in a fundamental change to the division of powers by shifting jurisdiction over provincial matters to federal Parliament.

164. As the Saskatchewan majority explained in the context of the *GGPPA*, "if GHG emissions are recognized as a matter of exclusive federal jurisdiction... provincial legislatures would be significantly denied the authority to deal with GHG emissions."[92]

165. That is why the Supreme Court has urged "great caution" in this area,[93] and since *Crown Zellerbach,* has warned against the "enthusiastic adoption" of the national concern doctrine.[94] As the Privy Council recognized long ago, to construe the power broadly would "practically destroy the autonomy of the provinces".[95]

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[89] *Crown Zellerbach, supra* at 432-433 [para 34 (QL)] ABBOA Tab 15.
[90] *Crown Zellerbach, ibid*; *R v Hydro-Quebec*, [1997] 3 SCR 213 (***"Hydro Quebec"***).at para 115, ABBOA Tab 13.
[91] See e.g. *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at paras 20-23, ABBOA Tab 11; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras 43-47, ABBOA Tab 27.
[92] *SKCA Decision, supra* at paras 131-132, ABBOA Tab 21. See also *Bell Canada v. Quebec (Commission de la Sante et de la Securite du Travail)*, [1988] 1 SCR 749 at paras 37 and 298-300, ABBOA Tab 2; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 186, per LeBel & Deschamps JJ, ABBOA Tab 18.
[93] *Crown Zellerbach, supra*, at 423 [para 24 (QL)], ABBOA Tab 15, citing *Ontario Liquor License Case (Re)*, [1896] J.C.J. No. 1 at para 13 (QL) (*sub nom Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 at 361) (***"Local Prohibition"***).
[94] *Hydro-Quebec, supra* at paras 67, 116, ABBOA Tab 13. See also Monahan et al, *Constitutional Law, supra*, at 279, 35.
[95] *Local Prohibition* case, *supra* at 360-361, ABBOA Tab 9.

c) POGG Analysis Must Focus on the POGG Subject Matter

166. Another important aspect of the national concern branch of POGG is that the *Crown Zellerbach* test must be understood and applied with reference to the asserted POGG power, rather than the particular piece of legislation before the Court.

167. That is because the existence or non-existence of an extraordinary and permanent POGG power cannot depend on the contingency of a particular piece of legislation. A permanent power conferred by the constitution does not appear and disappear based on how it is exercised by any particular government at any point in time.

168. Under the *Crown Zellerbach* analysis, the question is therefore not whether the *GGPPA*, as currently constituted and implemented, covers a single, distinct, and indivisible matter falling outside of provincial jurisdiction, nor whether the *GGPPA* intrudes too heavily into provincial jurisdiction.

169. Rather, the relevant questions are whether the POGG subject matter identified and relied upon to justify the *GGPPA* is sufficiently distinct from matters within provincial jurisdiction, and whether that POGG subject matter authorizes legislation that intrudes too heavily into provincial jurisdiction.

170. This approach is necessary because finding a subject matter to fall within the POGG national concern doctrine permanently adds a new federal head of power into the constitution. Thereafter, the legislation initially leading to the recognition of the power can always be replaced, amended, or supplemented with other legislation addressing the same subject matter. That must be kept firmly in mind in conducting the national concern analysis.

171. Moreover, the POGG power national concern must be articulated in such a way to permit both a range of legislative objectives, and a range of policy options for achieving them. That flows from the concept of parliamentary sovereignty, which allows the empowered legislative body to make or unmake any law whatsoever within its constitutional jurisdiction.[96]

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[96] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para 36; *Pan-Canadian Securities, supra* at paras 53-55, ABBOA Tab 6.

172. As such, legislative powers are generally not limited to specific policy means or outcomes, but rather give the power to enact any legislation in relation to a matter coming within a class of subjects.[97]

173. Consistent with this principle, the Courts have defined the national concern powers at a level of abstraction equivalent to most of the enumerated powers in sections 91 and 92,[98] rather than as a power to seek to achieve specific policy objectives by specific policy means.

174. For instance, the POGG power over aeronautics does not confer a power only to "*increase* the number of airports", or to "address airline emissions *by means of a pricing mechanism*", even though specific pieces of legislation may seek to accomplish those objectives or employ those means.

175. Rather, it gives a plenary power to regulate aeronautics generally, through measures that may increase or decrease the number of airports, and to regulate airline emissions by any policy means available, amongst many other aspects of regulating the subject matter of aeronautics. Were it otherwise, the courts would be dictating particular policy outcomes or approaches under the guise of recognizing a new federal head of power.

176. As elaborated upon below, this demonstrates the error of creating a new POGG power that is based on a particular policy outcome or that purports to dictate particular policy tools (e.g. carbon pricing) that can or must be used in relation to the new POGG power.

177. Therefore, if a new POGG national concern subject matter exists in this case, it must be to *regulate GHG emissions* generally, as Canada initially asserted, not to do so through particular policy means or towards particular substantive objectives.

178. With these principles established, it is possible to turn to an analysis of the arguments in favour of adopting a new POGG national concern power in the case at hand.

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[97] See e.g. the analysis in *Re Gun Registry*, *supra* at paras 33, 37, 38, 43, ABBOA Tab 10.
[98] Schwartz, *supra* at 252, ABBOA Tab 38.

iv. Canada's Initial Characterization of the POGG Subject Matter

179. Canada's initial characterization of the asserted POGG subject matter – i.e. the regulation of "GHG emissions" (or "cumulative dimensions of GHG emissions", which amounts to the same thing)[99] – is consistent with the level of generality in every POGG case to date.[100]

180. None of the Ontario and Saskatchewan Court of Appeal judges accepted that regulating GHG emissions is a singular, distinct and indivisible subject matter for the purposes of the national concern doctrine, nor did they accept that conferring such a power would have acceptable implications for the division of powers.

181. That is because, just like the causes of "inflation" or various harms to the "environment",[101] cumulative GHG emissions are an "aggregate" concept produced as a result of an indefinably broad range of activities that are already properly divided between federal and provincial heads of power in sections 91, 92, and 92A.

182. On the provincial side, GHG emissions can be regulated through legislation that, in pith and substance, falls within property and civil rights, direct taxation, matters of a local nature, the regulation of local industries and undertakings, or the management and development of natural resources and electricity within the province, to name a few.[102]

183. On the federal side, regulation of GHG emissions can occur through legislation that is in pith and substance criminal law, direct or indirect taxation, an exercise of the federal spending power, or the regulation of interprovincial or international undertakings, as long as it conforms to the necessary criteria for those powers.[103]

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[99] *ONCA Decision, supra* at para 74, 196, 209-2010, ABBOA Tab 20; *SKCA Decision, supra* at paras 134-137, 424-26, ABBOA Tab 21.
[100] *ONCA Decision, supra* at para 226, per Huscroft JA, ABBOA Tab 20; Schwartz, *supra* at 252, ABBOA Tab 38.
[101] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at paras 85-86 (QL), 4; see also *Hydro-Quebec, supra*, at paras 64-79, 115-116 ABBOA Tab 13; *Crown Zellerbach, supra*, at 447-8 [para 62 (QL)], ABBOA Tab 15.
[102] See *Constitution Act*, 1867, ss. 92(2), (5), (8), (10), (13), (16).
[103] See *Constitution Act*, 1867, ss. 91(1A), (3), (10), (13) (27), 92A(1).

184. Therefore, due to the inherently diffuse and pervasive nature of GHG emissions, the regulation of GHG emissions is inherently unsuitable for inclusion within the exclusive jurisdiction of either level of government. It is clearly not a subject that is distinguishable from matters falling within provincial competence.

185. Indeed, the *GGPPA* itself recognizes that the provinces can enact legislation identical to the detailed scheme of regulation in the *GGPPA* under the provinces' existing powers.

186. Even if it could be said that the subject of GHG emissions was singular, discrete and indivisible in such a way that that clearly distinguishes it from matters of provincial concern, granting exclusive power to the federal government to "regulate GHG emissions" would constitute a far too serious intrusion into core areas of provincial jurisdiction at the second step of the *Crown Zellerbach* test.

187. As explained by the majority of the Saskatchewan Court of Appeal, "the production of GHGs is so intimately and broadly embedded in every aspect of intra-provincial life that a general authority in relation to GHG emissions would allow Parliament's legislative reach to extend very substantially into traditionally provincial affairs".[104]

188. However, instead of concluding that, as a result, the subject matter of regulating GHG emissions did not properly fall under the POGG power, but was rather properly divided between levels of government, the both the Ontario and Saskatchewan majorities adopted an artificial and unprecedented approach that is inconsistent with the nature of the POGG power and the fundamental need to maintain the division of powers.

v. An Artificially Narrow Power to Create National Minimum Standards

189. The majority and concurring decisions of the Ontario and Saskatchewan Courts of Appeal seek to avoid the consequences of the conclusion just stated, by constitutionalizing a particular policy approach (national standards) designed to achieve a particular policy outcome (the reduction of GHG emissions) in a particular way (through a pricing mechanisms with specific defined characteristics and stringency levels).

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[104] *SKCA Decision, supra* at para 128-129, ABBOA Tab 21.

190. Specifically, the three judgements each characterized the alleged new POGG subject matter differently, as the power to establish "minimum national standards to reduce GHG emissions" (the Ontario Majority);[105] "minimum national standards of price stringency for GHG emissions" (the Saskatchewan Majority),[106] and "minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (the Ontario Concurrence).[107]

191. On this analysis, the federal government was not given jurisdiction over a discrete, indivisible and limited subject matter clearly distinguished from matters of provincial competence, as required under the *Crown Zellerbach* test.

192. Rather, it was authorized to unilaterally impose a particular policy solution on the provinces in a manner that overtakes existing provincial legislation and policies, to the extent that a province does not meet federal standards, whatever they may be from time to time.

193. These majority and concurring judgements reached this conclusion on the basis of three core premises:

a. Such a narrowly defined POGG subject matter was consistent with the standard for identifying a new POGG national concern power at the first stage of the *Crown Zellerbach* analysis;

b. Creating such a POGG power would not unduly intrude into areas of provincial jurisdiction at the second stage of the *Crown Zellerbach* analysis;

c. Such a national power was *necessary* to effectively address the problem of greenhouse gas emissions leading to climate change.

194. With respect, these premises are not defensible.

a) The First Branch of *Crown Zellerbach*

195. First, the analysis of the majority and concurring judgments of these Courts of Appeal is fundamentally inconsistent with the way that the Supreme Court of Canada has defined subject matters of national concern, at the first stage of the *Crown Zellerbach* analysis.

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[105] *ONCA Decision, supra* at para 124, per Strathy CJO, ABBOA Tab 20.
[106] *SKCA Decision, supra* at para 11, per Richards CJS, ABBOA Tab 21.
[107] *ONCA Decision, supra* at para 188, per Hoy ACJ, ABBOA Tab 20.

196. That is, rather than requiring that Canada identify a subject matter that is inherently limited, singular, distinct and indivisible in a manner that clearly distinguishes it from provincial powers, the majorities of these Courts sought to *divide* jurisdiction over the *same* subject matter.

197. They did so by purporting to limit the federal power to the creation of "national minimum standards", while allowing the provinces to "top up" GHG emissions regulations through the exercise of existing provincial powers.

198. By attempting to *divide* the jurisdiction over the regulation of GHG emissions in this way, these judgements have effectively created concurrent or overlapping jurisdiction over a subject matter that the provinces are constitutionally and practically able to regulate within their jurisdiction.

199. This approach is fundamentally inconsistent with the national concern branch of the POGG power, which exists confer *plenary* federal jurisdiction over a single and *indivisible* subject matter, exactly because it is *beyond* the power of the provinces to regulate.

200. Moreover, this attempt to create concurrent jurisdiction over GHG emissions results in provincial governments retaining jurisdiction to enact legislation directed at reducing GHG emissions within the province, but only to the extent that the federal government agrees with the provincial policies. In effect, provincial governments must go cap in hand to the federal government, and hope to be left with enough jurisdiction to impose their own solutions in light of their unique economic and social circumstances.

201. The result is to confer on the federal government an overarching *supervisory* role over the provinces, allowing it to impose its specific policy preferences on a national level in areas otherwise subject to provincial jurisdiction. This is fundamentally inconsistent with both the purpose and nature of the POGG national concern power, and the basic principles of the federation.

202. Further, the so-called "provincial inability" factor, which is an indicia of whether a POGG national concern power is required due to practical or legal limits on the ability of provinces to address a subject, does not alter this conclusion.

203. The Ontario Majority held that the creation of minimum national standards for the regulation of GHG emissions was a singular, distinct, and indivisible matter that fell within the POGG national concern power, because "(n)o one province acting alone or group of provinces acting together can establish minimum national standards to reduce GHG emissions".[108]

204. With respect, this is a tautology that has no bearing on the division of powers. The fact that only a *national* government can legislate *nationally* does not give it the power to do so in areas that otherwise fall within provincial jurisdiction. As the minority decision in the Saskatchewan Court of Appeal observed:

> [439] The Attorney General of Canada argued that only Parliament can set *national* standards for the mitigation of carbon emissions. Put this way, provincial inability becomes a self-fulfilling prospect in all cases. Indeed, a Province may only act intra-provincially. Putting the issue in such terms is not helpful because there will always be a "national aspect" to a matter that the Provinces are unable to address under s. 92, allowing Parliament to claim it has become a matter of national concern. The real question is whether the Provinces are *capable* of dealing with the matter and whether a uniform law is clearly and unequivocally needed in the circumstances.[109]

205. The "provincial inability" test must look to the constitutional and practical ability to address a particular subject matter, as such; it cannot be based on the need to ensure the efficacy of the federal government's chosen policy solution, or the unwillingness of provinces to exercise their exclusive jurisdiction in a manner the federal government prefers.

206. To use a related example, the Canadian economy is thoroughly integrated, in the sense that economic activities and policies in one province can impact other provinces, and the "national economy" as a whole. The failure of one province to adopt inflation control measures, or stimulus measures in response to a recession, can impact the success of national policies favoured by the federal government.

207. However, that does not give the federal government supervisory control over all aspects of the economy wherever economic activity within a province may have national or international effects, or where the federal government disagrees with the policy approach of certain provinces

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[108] *ONCA Decision, supra* at para 118, ABBOA Tab 20.
[109] *SKCA Decision, supra* at para 439, ABBOA Tab 21.

and believes national standards would be more efficient or effective way of achieving the federal government's policy goals.

208. Thus, the fact that a complete failure of provincial regulation, however hypothetical, may have some extra-provincial impacts, is not enough to create federal jurisdiction over the matter. That is particularly so where the provinces have history of regulating the matters in question. As the Supreme Court observed in the *Securities Reference*:

> [115] No doubt, much of Canada's capital market is interprovincial and indeed international. Trade in securities is not confined to 13 provincial and territorial enclaves. Equally, however, capital markets also exist within provinces that meet the needs of local businesses and investors. While it is obvious that the securities market is of great importance to modern economic activity, we cannot ignore that the provinces have been deeply engaged in the regulation of this market over the course of many years. To make its case, Canada must present the Court with a factual matrix that supports its assertion of a constitutionally significant transformation such that regulating every aspect of securities trading is no longer an industry-specific matter, but now relates, in its entirety, to trade as a whole.[110]

209. This logic applies with equal force in this context, given that the power to set national minimum GHG emissions standards would effectively give the federal government the power to regulate all economic activities and industries within the province, matters that historically (and currently) fall within provincial jurisdiction.

210. The basic rationale for identifying such an exceptional and permanent federal POGG power is that the provinces could not effectively address a subject matter on their own, due to a lack of jurisdiction or practical ability.

211. However, that rationale clearly does not exist here, as recognized by Parliament in providing that the *GGPPA* will not apply to certain provinces that have exercised their jurisdiction in a manner that meets federal standards.[111]

212. Nor does the fact that the international community, including Canada, has committed to addressing greenhouse gas emissions improve the case for the creation of a new national concern power, as the Ontario Majority held.[112]

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[110] *Securities Reference, supra* at para 115, ABBOA Tab 25.
[111] See *Hydro-Quebec, supra* at paras 57, 77, per Lamer CJ & Iacobucci J, ABBOA Tab 13.

213. Even if these international agreements did require specific national policies, which they do not, it would have no effect on the division of powers. As was clearly articulated in the *Labour Conventions* case,[113] and recently affirmed in the *Pan Canadian Securities Reference*,[114] a decision of the federal executive to assent to a treaty does not create a legislative power to enact those measures across the country.

214. To base the creation of a new national concern power on the decision of the federal government to assent to an international agreement directly undermines this fundamental principle of Canadian constitutionalism, as it would give the federal executive the unilateral power to amend the constitutional division of powers, and to intrude heavily into the provincial sphere.[115]

215. Finally, the case for recognizing a new national concern power in this case is not bolstered by the fact that many of the provinces and the federal government worked together through initiatives such as the *Vancouver Declaration* and working groups.

216. According to the Ontario Majority, the *GGPPA* "is the product of extensive efforts... to develop a pan-Canadian approach to reducing GHG emissions and mitigating climate change", which "reflects the fact that minimum national standards to reduce GHG emissions are of concern to Canada as a whole".[116]

217. To the extent that this passage implies that the federal *GGPPA* is the necessary or consensus end-point of intergovernmental cooperation, it provides a mistaken account of the purpose and effect of these pan-Canadian cooperative initiatives.

218. The purpose of participating in these intergovernmental initiatives was not to cede jurisdiction to the federal government to impose its solutions on the provinces, nor could such collaboration ever have the legal effect of altering the division of powers.

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[112] *ONCA Decision, supra*, at paras 107-108, ABBOA Tab 20.
[113] *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] J.C.J. No. 5 at paras 11-15 (QL) (*sub nom Attorney General for Canada v Attorney-General for Ontario,* [1937] A.C. 326 (P.C.), at 348) (***"Labour Conventions"***), ABBOA Tab 26.
[114] *Pan-Canadian Securities, supra* at paras 59-60, 66, ABBOA Tab 23, citing *Labour Conventions, supra* and *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 611-12.
[115] Schwartz, *supra* at 268, ABBOA Tab 38.
[116] *ONCA Decision, supra* at para 107, ABBOA Tab 20.

219. Rather, the purpose to engage in genuine cooperation between coordinate levels of government, all equally sovereign within their respective spheres, and to express shared goals and discuss approaches to deal with a common problem, that could be adopted by each jurisdiction in light of their respective legislative authority.

220. Moreover, to adopt such reasoning creates unfortunate and perverse incentives that may have the effect of *reducing* interprovincial and intergovernmental cooperation in Canada, contrary to the spirit of cooperative federalism.[117]

221. If the Ontario Majority's reasoning is adopted, this will clearly discourage provinces from cooperating in such initiatives in the future, lest they be seen to have unwittingly ceded their constitutional jurisdiction to the federal government in the form of a new POGG power merely by attempting to collaborate with a coordinate level of government.

222. In short, finding a federal power to enact minimum standards in areas the provinces can (and do) comprehensively regulate is wholly inconsistent with the POGG national concern case law to date, and confuses a tautology – only a national government can create national standards – for a demonstration that the federal government has the jurisdiction to impose those standards in areas of provincial jurisdiction.

b) The Second Stage of *Crown Zellerbach*

223. Second, the majority and concurring decisions of the Ontario and Saskatchewan Courts of Appeal held that the narrowed POGG power leaves ample scope for provincial legislation in relation to the environment, climate change and GHGs, and therefore does not unduly trench into areas of provincial jurisdiction.[118]

224. As noted above, a consideration of the degree of intrusion into provincial jurisdiction must be based on the extent to which the POGG subject matter identified would authorize intrusions into areas of provincial jurisdiction. The approaches adopted by the majority and concurring judgments in Saskatchewan and Ontario fail this test, albeit for slightly different reasons.

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[117] *Pan-Canadian Securities, supra* at para 18, ABBOA Tab 23.
[118] *ONCA Decision, supra* at para 4. See also *SKCA Decision, supra* at para 161, ABBOA Tab 20.

(i) The Ontario Majority's Approach

225. In addressing the second stage of the *Crown Zellerbach* test, the Ontario Majority held that the new POGG power minimally intrudes upon matters of provincial jurisdiction because the *impact of the GGPPA* was found to be minimal.[119]

226. As noted above, however, that is not the correct approach. It conflates the POGG power being created (which necessarily can authorize various pieces of legislation as long as they relate to the constitutional subject matter at hand) with a particular piece of legislation.[120]

227. Therefore, even assuming that the Ontario Majority was correct in its assessment of the limited impacts of the *GGPPA* on provincial jurisdiction (which it was not, as discussed below), that is not the relevant inquiry in deciding whether to create an exclusive and plenary power.

228. On a proper analysis, the POGG subject matter created by the Ontario Majority – the "creation of minimum national standards for the reduction of greenhouse gas emissions" – would fundamentally disrupt the balance of the federation in the same way as conferring exclusive federal jurisdiction over GHG emissions generally.

229. Once conferred on the federal government, this power would authorize any "minimum national standard", however exacting, specific or intrusive, in respect to any matter that involved the "reduction" of GHG emissions.

230. This necessarily includes the power to regulate nearly every aspect of intra-provincial life – from the heavy industrial sector and natural resource development, to the economic activities of small businesses, to the day-to-day transportation, electricity, and home heating needs of the average family in the province. [121]

231. That is because unlike the discrete activity of dumping of substances into marine waters,[122] GHG emissions are "generated by virtually every activity regulated by provincial

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[119] *ONCA Decision, supra* at paras 127-138 ABBOA Tab 20.
[120] Leclair, *supra*, at 363-364, 369, ABBOA Tab 30.
[121] *ONCA Decision, supra* at para 237, per Huscroft JA, ABBOA Tab 20.
[122] *Crown Zellerbach, supra*, ABBOA Tab 15.

legislation, including manufacturing, farming, mining, as well as personal daily activities including home heating and cooling, hot water heating, driving, and so on".[123]

232. Similarly, as the Saskatchewan Majority recognized, "almost every kind of human action generates GHG emissions", and these sources are "intimately and broadly embedded in every aspect of intra-provincial life".[124]

233. The power to reach into and regulate every aspect of the provincial economy and day-to-day consumption choices of provincial residents through "national minimum standards" is not in substance different than simply creating the jurisdiction to regulate GHG emissions generally, which all judgments to date have rightly rejected.

234. The POGG power created by the Ontario Majority therefore authorizes the very intrusions into provincial jurisdiction that the Saskatchewan majority correctly observed would allow "Parliament's legislative reach to extend very substantially into traditionally provincial affairs".[125]

235. Providing the federal government with the authority to enact a complete, complex, and detailed code regulating GHG emissions necessarily allows it to reach into and regulate all aspects of the provincial economy and day-to-day life of its citizenry, effectively gutting provincial jurisdiction in the process.

236. In summary, the addition of the phrase "national minimum standards" to the "regulation of GHGs" results in the same expansion of federal jurisdiction, and the same degree of intrusion into provincial jurisdiction, as a general power over GHG emissions. As such, it should be rejected for the same reasons.

(ii) The SKCA Majority and Hoy ACJ POGG Power

237. While the new POGG powers created by the Saskatchewan Majority and Ontario Concurrence – the establishment of minimum national "standards of price stringency", or

[123] ONCA Decisionat para 227, per Huscroft JA, ABBOA Tab 20; Schwartz, *supra* at 260, ABBOA Tab 38.
[124] *SKCA Decision, supra* at para 127, ABBOA Tab 21.
[125] *SKCA Decision, supra* at para 128, ABBOA Tab 21.

minimum national "pricing standards", respectively – at least purport to limit federal jurisdiction to a greater extent than the general power to set national standards in relation to GHG emissions, they do so at the further expense of coherence in the POGG analysis.

238. First, these analyses fundamentally conflate the means or policy of the *GGPPA* with the POGG power identified. As Canada noted in its reply factum in the Ontario case, to suggest that the POGG power in question is the creation of a national pricing regime "conflates Parliament's chosen means to address the matter (a minimum national GHG emissions pricing standard) with the matter itself."[126]

239. Further, the judgments do not explain why other legislation would not, on the same assumption of the need to adopt minimum national standards to make the federal policy more effective, extend beyond "price stringency standards" to include any other policies that were deemed important or more effective if implemented on a national level.

240. In this way, this approach fails to identify any workable standard for future cases, and instead suggests a case by case, *ad hoc* constitutionalization of particular pieces of legislation, based on the deemed importance of the policies underlying it.

241. Such an approach would not only be inconsistent with any POGG national concern subject matter recognized to date, but would embroil the courts in identifying an ever widening range of exceptional "POGG legislation", on the basis of the courts' view of the policy benefits or efficiency of each particular piece of federal legislation.

242. Second, even if the asserted POGG subject matter could be limited to price standards in a principled way, it would necessarily authorize any federal regulation of intra-provincial affairs, as long as it was achieved through a price mechanism, which is always a possible alternative to direct regulation.

243. Finally, and in any event, even if the POGG power could be limited to this particular legislation (or to minimum pricing standards the federal government chooses to impose from time to time), it still constitutes an extraordinary intrusion into provincial jurisdiction.

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[126] Factum of the Attorney General of Canada in Response to Intervenors, dated April 5, 2019, at para 29. See also *ONCA Decision, supra* at paras 225-226, per Huscroft JA, ABBOA Tab 20.

244. The setting of minimum national carbon pricing standards does not leave the province of Alberta with the room necessary to take the steps that it believes are required to balance the effective reduction of GHG emissions with the unique economic circumstances and interests of the residents of Alberta.

245. As noted above, Canada describes the *GGPPA* as constituting "a complete, complex, and detailed code of regulation". Alberta agrees completely with this characterization, and that is why the *GGPPA*, and the proposed POGG power said to underlie it, are so problematic from a division of powers perspective.

246. The problem is that it is a complete, complex, and detailed code of regulation with respect to matters *that fall within exclusive provincial jurisdiction* – in particular local fuel purchases and usage, the regulation of provincial industries and businesses, and the development and management of natural resources.

247. The *GGPPA* therefore substitutes Alberta's policy choices for regulating GHG emissions within its jurisdiction with the federal government's preferred policies.

248. Moreover, by imposing its specific policy choices on the provinces, the federal *GGPPA* has the effect of effectively negating or crowding out provincial initiatives designed to achieve meaningful reductions in GHG emissions in a manner that is specifically suited to the circumstances within the province.

249. That is precisely what makes the *GGPPA* unconstitutional, and the proposed POGG powers, however they are framed, an enormous intrusion into Alberta's jurisdiction to determine what, in its view, best meets the needs of its population.

(iii) Conclusion on Step Two of Crown Zellerbach

250. Contrary to the view of the majority and concurring judgments in Ontario and Saskatchewan, the *GGPPA* – and subsequent legislation relying on the new POGG head of power – will constitute a significant and constitutionally unacceptable intrusion into provincial jurisdiction.

251. This conclusion is strengthened by a consideration of section 92A(1), which should inform the Court's analysis of any proposed POGG power in this context. The exclusive jurisdiction to regulate the exploration, development, conservation and management of non-renewable resources and sites and facilities for electricity generation cannot be separated from the regulation of the emissions those industries and sites produce.

252. Providing the federal government with the power to enact national standards in these areas, whether exercised for "economic" or "environmental" or any other reason, directly contradicts the underlying purpose and objective of a recent and significant constitutional amendment.

253. Indeed, the effect of creating a new federal POGG national concern power, that is itself nowhere expressly listed in the constitution, would be to effectively undo this important amendment, which was expressly included in the constitution to *avoid* federal intrusion into the management and regulation of these critical sectors of the provincial economy. This is a step that the courts should not take.

c) The Alleged Necessity of a National Minimum Pricing Measure

254. The third fundamental premise of the majority and concurring decisions in Ontario and Saskatchewan is that a national minimum pricing standard is *necessary* or *essential* to deal with the problem of GHG emissions.

255. Indeed, this may be the core premise underlying the reasoning of the judgments upholding the *GGPPA*. They did not define the matter of national concern as the regulation of GHG emissions generally, but the establishment of *national minimum standards* for the reduction of GHG emissions or for specific policies to achieve that result.

256. Nor did these judgments assert the necessity of having a single regulator for an inherently singular and indivisible subject matter falling outside of provincial jurisdiction, as the underlying logic of the national concern doctrine requires.

257. Rather, they relied on the supposed necessity of the federal government's preferred policy measure – a detailed national carbon-pricing mechanism as set out in the *GGPPA* – which

led them to conclude that this policy measure itself required constitutional recognition in the division of powers.

258. Even if it were appropriate for the Court to base the constitutionality of legislation on its views of the wisdom or importance of legislation in this way, which it is not,[127] the assumption that the measures adopted in the *GGPPA* are necessary or "essential" to the reduction of GHG emissions is fundamentally misguided.

259. As discussed above, there are many policy options for achieving meaningful reductions in GHG emissions, and indeed many different ways of imposing carbon pricing, as the differing approaches of Alberta and Canada demonstrate.

260. The best choices among those policy options will often vary in light of local circumstances and economies, the other types of GHG emissions reduction measures in place in a particular jurisdiction, and the extent to which the policies complement, overlap, or contradict one another.

261. Indeed, even presuming that meeting whatever standards the federal government adopts from time to time is itself a matter of national concern, which it is not, the evidence suggests that carbon pricing initiatives, which are themselves very diverse, are at most a very partial and limited solution to a global problem.[128] As such, they can be replaced by other policy solutions that achieve similar or greater reductions.

262. Moreover, as noted above, imposing carbon pricing measures – whether on a provincial or national basis – may actually *contribute to* the problem of global warming, to the extent that it results in the movement of carbon emissions to other more emission-intensive jurisdictions internationally.

263. To suggest that *national* minimum pricing standards in *Canada* is *necessary* to address the problem ignores the fact that businesses, capital, and carbon emissions can not only move between provinces, but even more significantly, can move between countries.

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[127] See above, at section section III(B)(i)(c).
[128] See above, at paras 60-67.

264. If a national approach to carbon pricing is necessary to avoid interprovincial carbon leakage, as Canada asserts, applying a carbon price *nationally*, in the absence of a common global or regional price on carbon, may just shift production to other *international* jurisdictions. This would not only be harmful to Canada, but counterproductive, to the extent that it maintains or increases global emissions.

265. The argument that a national carbon price is necessary to reduce GHG emissions also ignores the fact that the *GGPPA* does not actually create a single national carbon price. There is no requirement in the *GGPPA,* or in the POGG powers suggested by the Ontario and Saskatchewan majorities, to ensure that the price of carbon per tonne is equivalent in the direct carbon tax regions, such as BC, as compared with the pure cap-and-trade regions, as in Nova Scotia and Quebec.

266. In short, there is considerable debate about the best policies to adopt on a local, national, regional, or global basis. There is also considerable doubt as to what policy mix within each jurisdiction will best achieve *global* reductions, in light of the very different emissions profiles across the country based on different circumstances and economies, and the risks of international carbon leakage.

267. In the face of this complex policy debate, it cannot be said that the federal government's preferred policy is a "necessity", even if it were permissible for the court to make such a policy determination. Alberta submits that the majorities of Ontario and Saskatchewan Courts of Appeal erred in relying on this analysis.

268. More fundamentally, however, Canada's constitutional order does not provide the federal government with a supervisory role over the provinces, enabling it to enact measures coming within clear and unquestioned provincial jurisdiction, merely based on a policy preference on the part of the federal government.

269. This was explained in the minority decision in Saskatchewan Court of Appeal, which noted that the "real issue underpinning the expressed need for uniformity is a policy dispute between the two orders of government". As a result:

> A finding of provincial inability in these circumstances would improperly require the Court to choose between the policies, benchmarks and approaches of the Provinces and those of the federal government as they apply to the people and economy of the Provinces that do not meet the federal idea of stringency. In this way, the unilateral imposition of national uniformity based on Parliament's notion of proper stringency in an area of Provincial jurisdiction would deny the very notion of federalism, which entails the possibility of different legislative solutions to the same problem across Canada, taking into account cultural or regional particularities.[129]

270. Put simply, the fact that the federal government (or a court) may think the federal government has developed better policy solutions than those adopted by Alberta or New Brunswick or Quebec does not give it the authority to impose its solutions on local populations and industries.

d) A Cooperative Solution

271. Moreover, even assuming – contrary to the evidence and the assumption of the international community – that a single, national policy approach was *necessary* in order to achieve meaningful reductions in GHG emissions, this can be practically achieved in various ways without fundamentally disrupting the balance of the federation by a wholesale transfer of provincial authority to the federal government.

272. Under our constitution, such a result must be achieved through the agreement of all of the provinces and the federal government with respect to matters within their respective jurisdictions. As the Court observe in the *Securities Reference*, in terms that apply equally to the regulation of GHG emissions:

> [130] While the proposed Act must be found *ultra vires* Parliament's general trade and commerce power, a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available. (...)

273. As in that case, the key is to seek "cooperative solutions that meet the needs of the country as a whole *as well as its constituent parts*":

> [133] Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government

[129] *SKCA Decision, supra,* at para 451, ABBOA TAB 21.

> has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.[130]

274. Finding the *GGPPA* unconstitutional for want of jurisdiction would not deprive the federal government of its power to directly legislate in relation to GHG emissions in areas of exclusive federal jurisdiction. Nor does it preclude a truly cooperative solution made between Canada and the provinces as co-equal levels of government, each acting within their own jurisdiction.

275. Indeed, Canadian history has shown that many of our country's greatest challenges have been met by genuine cooperation and political compromise, rather than transferring provincial jurisdiction to the federal government. Such solutions have been achieved in areas of shared federal and provincial jurisdiction, such as with respect to the pan-national securities regulator, farm marketing, and environmental management.

276. Indeed, to the extent that there is a genuine consensus of a need for federal jurisdiction to impose its preferred policy solutions nationally – as the Ontario Majority implied – it can be achieved through a constitutional amendment, as occurred with adding employment insurance in 91(2A) to the list of exclusive federal powers, and adding non-renewable resources and electricity generation under section 92A(1) to the list of exclusive provincial powers.

277. There is no reason why these types of genuinely cooperative solutions cannot work as a means of adopting a cooperative or integrated approach to addressing GHG emissions, to the extent that there is a genuine consensus that such a national or integrated approach is necessary.

278. What cannot occur under our constitutional division of powers is to allow the federal government to dictate to the provinces the policy means or measures they must impose on their local population, businesses, and industries.

279. In summary, the division of powers under the Canadian constitution does not allow for an *ad hoc* and unprincipled use of the POGG power to enable the federal government to usurp

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[130] *Securities Reference, supra* at paras 130, 132-133, ABBOA TAB 25. See also *Malmo-Levine, supra*, at para 72, ABBOA TAB 16, citing *Crown Zellerbach, supra*.

provincial jurisdiction over a matter whenever there is a perceived national interest in how that matter is dealt with by the provinces.

280. There is no POGG national concern power over the regulation of "GHG emissions" generally, nor is there any federal supervisory power to enact "national minimum standards" in relation to matters that otherwise fall within provincial jurisdiction.

281. Therefore, and because there is no other federal head of power into which the *GGPPA* can legitimately fall, it is unconstitutional in its entirety.

C. Conclusion

282. All ten appellate court judges who have opined on the constitutionality of the *GGPPA* to date have refused to grant the federal government the exclusive jurisdiction to regulate GHG emissions, which would fundamentally disrupt the balance of the federation.

283. However, granting the federal government the power to set national minimum standards for the regulation of GHG emissions, as the Ontario Majority did, is no different from granting it the power to regulate GHG emissions generally.

284. Once the power to set "national minimum standards" for GHG emissions is conferred, it can be exercised by the federal government however it sees fit.

285. This empowers the federal government to reach into and regulate almost every aspect of the economic and day-to-day lives of provincial residents and businesses, displacing long-standing provincial jurisdiction over the local economy and industries.

286. This conclusion cannot be avoided by parceling out or subdividing the power to regulate GHG emissions, such as by purporting to grant only the power to set national minimum standards for "price stringency", as the Saskatchewan Majority and Ontario Concurrence found.

287. This approach is inconsistent with the fundamental nature of the POGG power, which does not grant partial and divided jurisdiction of a matter that can be effectively regulated by the provinces, but exclusive and plenary jurisdiction over an entire subject matter that can only be regulated federally.

288. Finally, even if the POGG subject matter could be manipulated to ensure that only the *GGPPA* is deemed to be constitutionally valid, this still constitutes an enormous and constitutionally unacceptable intrusion into provincial jurisdiction.

289. The ultimate effect of the *GGPPA* is to create a federal supervisory power which can be used by the federal government to ensure that its preferred policies for matters within provincial jurisdiction be either enacted by the provinces or imposed on them through federal legislation like the *GGPPA*. Such a power is fundamentally inconsistent with the Canadian constitutional order, and should be rejected.

IV. RELIEF SOUGHT

290. Alberta seeks the Court's opinion that the *GGPPA* is unconstitutional in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF AUGUST BY

For _____	_____	For _____
Peter A. Gall, Q.C. & Benjamin Oliphant	Ryan Martin & Steven Dollansky	L. Christine Enns, Q.C.

Counsel for the Attorney General of Alberta

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