**COURT OF APPEAL OF ALBERTA**

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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 OF LAW OF THE ATTORNEY GENERAL FOR SASKATCHEWAN**

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

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# FACTUM OF LAW OF THE ATTORNEY GENERAL FOR SASKATCHEWAN

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## PART I - OVERVIEW

1. The Attorney General of Saskatchewan intervenes in this *Reference* case to support the position of the Attorney General of Alberta that the *Greenhouse Gas Pollution Pricing Act* is unconstitutional in its entirety.

2. Saskatchewan submits that the *Act*, as defended by Canada, represents a serious and illegitimate attempt at displacing provincial jurisdiction over subject matters reserved for the provinces under sections 92 and 92A of the *Constitution Act, 1867*.

3. Saskatchewan submits that the self-described "backstop" mechanism of the *Act* represents an illegitimate interference with provincial jurisdiction and makes provincial sovereignty over provincial subject matters illusory. A backstop model in which provinces may exercise ordinary jurisdiction, but only subject to a "national standard" is an affront to Canadian federalism.

4. Provincial sovereignty over a subject matter means nothing unless it means total policy discretion to legislate as a province sees fit. The nature of the Canadian federation is that unified action on any particular issue requires negotiated cooperation on a matter that crosses jurisdictional boundaries.

5. Canada and the provinces together are fully equipped to address climate change or any other issue in a concerted way according to their respective spheres of jurisdiction. Cooperative federalism allows for creative approaches that respect – rather than jettison – the division of powers.

6. Saskatchewan argued in previous challenges in the Saskatchewan and Ontario Courts of Appeal that Part I of the *Act* was, in pith and substance, a taxation measure and one that fails for the reasons described in the minority opinion of the Saskatchewan Court of Appeal in its analysis of Part I of the *Act*. In this reference, where neither Alberta nor Canada raise the question of the taxation power, Saskatchewan argues primarily why the *Act* cannot be authorized by the national concern branch of the Peace, Order and Good Government power, rather than why it must be understood as a failed attempt at taxation, but offers arguments on both aspects.

7. Canada's insistence on the National Concern doctrine implies necessarily that the subject matter would be within provincial powers but for extraordinary circumstances.

8. Canada fails to satisfy the high degree of reluctance demanded of the Canadian Constitution to disrupt the balance of the federation to carve out a new niche of federal jurisdiction away from the provinces.

9. Canada's attempt to carve out such a niche by insisting, as did the majorities of the Saskatchewan and Ontario Courts of Appeal, on there being a national standard must fail the test for the National Concern doctrine's application because a "national standard" cannot be understood to be a subject matter at all. It instead simply assumes that the federal government's view on an issue matter must prevail over all provinces, simply because of the importance of the issue. It can never be the case that the notion of a national standard can interfere with the policy discretion of a province over subject matters within its own jurisdiction.

10. Global concerns and international commitments have no bearing on this division of powers question. Just as Canada remains sovereign in the face of international movements, so do sovereign provinces.

11. Canada argues that provincial powers and national standards for provincial powers are not mutually exclusive and relies on the double aspect doctrine. This doctrine does not avail to allow the federal government to insist that a particular head of power be exercised according to a particular mechanism or according to a particular minimum standard.

## PART II - FACTS

12. Saskatchewan adopts the facts as set out by the Attorney General of Alberta. In addition, Saskatchewan sets out the following facts which provide the context for Saskatchewan's intervention. Saskatchewan joined with the federal government and all other provinces and territories in supporting the Vancouver Declaration on Clean Growth and Climate Change in March, 2016. The Declaration committed the federal government, provinces and territories to

work towards achieving reductions in national greenhouse gas emissions to 30% below 2005 levels by 2030. Saskatchewan remains committed to this goal. However, Saskatchewan did not accept the Pan-Canadian Framework on Clean Growth and Climate Change that was announced in December, 2016 because it referred to carbon pricing as one of the central pillars of the federal government's plan to address climate change. Saskatchewan opposes a carbon tax on fuel because of its geography and its economy. Saskatchewan is a rural province with a cold climate. Saskatchewan's economy, like Alberta's is resource based and export dependent. Saskatchewan's agricultural producers, miners and oil and gas producers have little ability to pass on their costs of production to customers. Therefore, a carbon tax in Saskatchewan will result in increased costs for essential commodities like gasoline and home heating fuel with little to no real reductions in emissions.

13. In December, 2017 Saskatchewan released its own climate change strategy, *Prairie Resilience: A Made-In Saskatchewan Climate Change Strategy.*[1] This strategy outlines the steps that Saskatchewan is taking to address climate change. These steps include a wide range of policies. However, the strategy does not include introducing a carbon tax on consumers and small businesses. Since *Prairie Resilience* was issued, Saskatchewan has imposed an output based pricing system (a type of carbon pricing) on heavy emitters under *The Management and Reduction of Greenhouse Gases Act.*[2] Saskatchewan has also introduced regulations to limit methane emissions in the oil and gas industry.[3] Saskatchewan is doing its part to reduce greenhouse gas emissions. Saskatchewan is not looking for a free ride.

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[1] A.G. Saskatchewan Record, TAB 1.
[2] SS 2010, c. M-2.01.
[3] *The Oil and Gas Emissions Management Regulations*, RRS c.0-2, Reg. 7.

## PART III – ARGUMENT

### A. Irrelevant Considerations

14. This case is not about the risks posed to the country or the world by climate change; nor is it about whether putting a price on carbon is an effective policy tool to combat global warming caused by greenhouse gas emissions. It is improper to frame the jurisdiction question as turning on whether something will be done about a serious issue. The decision to tackle climate change is a political one. The strength of the collective will of Canadian society to act will play out politically. It is constitutionally impermissible to short-circuit the proper pathways of legislative action by ripping policy discretion from the provinces in favour of the federal government. In Canada, for over 150 years, policy issues have been divided by central and regional governments according to our constitution to reflect and accommodate our enormous geographic space and diversity. This circumstance, and the fundamental fact of federal variety and freedom, is the bedrock of our legal structure.

15. The federal government insists on the urgency and heightened importance of the climate change challenge in order to invite the courts to alter the balance of powers in our country. Such arguments may be relevant to an emergency power analysis but are irrelevant in a National Concern branch case.

16. The circumstances of international agreements are also wholly irrelevant to a division of powers case as found in *A.G. Canada* v. *A.G. Ontario (Labour Conventions)*,[4] recently affirmed by the Supreme Court in *Pan-Canadian Securities*.[5] Canada has a long history of successfully concluding treaties, notably in trade agreements, by first ensuring the concurrence of the provinces in matters over which they have jurisdiction.

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[4] [1937] A.C. 326 (P.C.)

[5] *Reference Re Pan-Canadian Securities* 2018 SCC 48 at para. 66.

B. Canada's Jurisdictional Reach

17. The *Act* is unprecedented in Canadian history. The federal government recognizes that provinces have the legislative jurisdiction to combat climate change by imposing their own carbon pricing regimes. However, the *Act* provides that when provinces (like Saskatchewan) have not imposed their own carbon taxes or when Provinces (like Manitoba) have not imposed sufficiently stringent carbon taxes, then the federal government will step in and impose carbon taxes in these provinces. This results in a federal legislative regime imposing carbon taxes in some provinces but not others. Saskatchewan says that this is fundamentally inconsistent with the principles of federalism which underlie our Constitution and, therefore, is *ultra vires*.

18. It is important to be clear about the scope of the power Federal Attorney General is asserting. The new power is painted as modest, but is in fact less determinate than how it may appear superficially. Canada accepts the formulation of the pith and substance of the *Act* as described by the majority of the Saskatchewan Court of Appeal. This formulation was the "establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions".

19. The power that Canada is asking to be transferred from the provinces, however, is much broader than minimum standards of "pricing stringency". The proposed transferred power demanded by the Attorney General of Canada is "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions". Canada asserts total "backstop" supervision and imposition powers over any initiative that it sees as an "integral" minimum standard to reduce GHG emissions. It is a subtle expansion that is of enormous scope. This is consistent with Canada's assertion that carbon pricing is necessary but not sufficient to meet all of Canada's goals. Canada is asking for more than backstop pricing in its interference with provincial powers. We do not yet know what this will further entail.

20. A power to set minimum standards over provincial jurisdiction makes provincial sovereignty meaningless. There are proper constitutional limits to provincial powers to be sure. Some are *Charter* related. Others relate to neighbouring federal powers and the doctrine of paramountcy, where there is some overlap in the proper exercise of different powers. None of the

proper limitations over provincial powers assert that Ottawa has a parental role of supervising the provinces. The closest concepts to this would be the emergency power, where provincial powers are temporarily displaced and, perhaps, the archaic disallowance power – also qualitatively and mechanically different.

C. Peace, Order and Good Government

21. The Peace, Order and Good Government power ("POGG") represents room for limited departure from the enumerated lists of respective powers found in sections 91 through 95 of the *Constitution Act, 1867*. As summarized by Professor Hogg in his text, the POGG power is potentially manifested in three ways.[6]

22. The first is the emergency power. The power is exercised in times of particular emergency, such as war or pestilence or economic catastrophe, where there must be a special coordination of authority that can no longer be exercised with regional variance and local significance. The central feature of the exercise of such power is its temporary nature. Canada does not seek to invoke the emergency power, and the *Act* is intended to operate indefinitely, not temporarily.

23. The second is the gap branch. This power acknowledges that there are subject matters uncontemplated by the enumerated powers and therefore fall to the federal government within the residual language of section 91. The courts have been generally loathe to fill this category, but offshore mineral rights are an example. As professor Hogg observes, many of the "national concern" branch subject matters (such as aeronautics, atomic energy or the national capital region) could have been usefully explained by the residual quality of the text of section 91.[7]

24. The third branch is the National Concern branch. The courts have repeatedly sounded caution with respect to expanding the exercise of this branch. For, unlike the other two branches, its exercise necessarily entails a transfer of power from the provinces to the federal government. And that, exclusively and permanently.[8]

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[6] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Chapter 17
[7] *Ibid* at p. 17-7
[8] See, *e.g.*, *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 at 453 ff.

25. Saskatchewan observes that resort to the national concern branch ought to be all the more suspect in an age where Canada enjoys its own patriated constitutional amending formula. A judicial mechanism for altering the division of powers was practical in the absence of the amending mechanism. But now the legitimacy of such tinkering from the judiciary is less justifiable.

26. It is notable that in the case of a negotiated amendment to the division of powers under Part V of the *Constitution Act, 1982*, the provinces would have the right to opt out under the mechanism of s. 38(3); and yet a judicial amendment via the National Concern doctrine includes no such provincial right to dissent.

D. Provincial Autonomy

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

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Province should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.[9]

[9] [1919] AC 935, at p. 942.

E. National Standards

28. Fundamentally problematic is that in order to justify this transfer of legislative authority, both Canada and the recent majority decisions from the Saskatchewan and Ontario Courts of Appeal, hold not that there is a genuine new power to describe, but that there be a national standard over what would otherwise be provincial powers.

29. Such a conclusion is not only radical, but deceptive. A three-stage sleight-of-hand is performed. First, a mechanism is described: "pricing stringency" for example (which if not a tax must be understood as interference with local retail markets within provincial jurisdiction). Second, because authority to enact this interference would be provincial, the federal measure is said to be merely a national standard, and therefore distinct - a minimum requirement for the provinces as they exercise their own powers to enact the very same mechanism the federal government favours. Third, because the pith and substance of the measure is said to be a national standard, then by definition, no province is able to enact such a standard. It therefore falls to the federal government under National Concern. And all the while, the sleight-of-hand succeeds because of the pressure of the high importance of the problem being addressed, and because of the charged word "pollution" in the *Act* distracting from the reality of the regulation of ordinary daily activities and industrial pursuits in Canada.

30. National standards are undoubtedly a desirable thing in many areas. The *National Building Code* is an example. Provinces however remain sovereign in the establishment of construction standards within their territories and adopt the standard as they see fit. It is not surprising that there is wide conformity with or adoption of a good document that persuades the relevant authorities. There is never a question of imposing the Code onto provinces against their will. That is constitutionally impermissible.

31. A national standard over a provincial power must honestly be recognized to be in fact a federal takeover of a provincial power. There is nothing distinct about a national standard that separates it from the subject matter it qualifies. If a province has exclusive jurisdiction over property and civil rights in the province, but is subject to national standards, then it no longer has

exclusive jurisdiction[10]. The same could be said for its exclusive jurisdiction over the management of natural resources under section 92A. Exclusive jurisdiction must include the right of a province to go in any direction that its elected legislature chooses, regardless of the views of Parliament that are constitutionally irrelevant with respect to that subject matter.

32. Similarly, there is nothing inherently modest about a minimum standard. The minimum is whatever the federal government wishes it to be, is as large as the federal government wishes it to be, and may at any time represent direct opposition to the will of a provincial legislature.

F. Backstop Legislation

33. The history of Canadian jurisdictional squabbles reveals the periodic necessity of checking the centralist instinct (the Ottawa-knows-best instinct) to encroach on provincial powers.

34. Back-stopism is a new form of federal overreach that has no accepted precedent in Canadian history. It is deceptive to claim that mere back-stopism is modest and minimally intrusive. It is invasive and an affront to provincial sovereignty. It is all the more insidious given the false appearance of modesty. It says to the provinces, "you may act as you wish, provided you satisfy federal preferences". It says, "you may choose any direction you wish, provided it is our direction and provided you go as far as we say you must in that direction".

35. Back-stopism goes on to posit that not only is a province strait-jacketed by the policy mandates of Ottawa, but that Parliament is authorized to enter in and displace at any given time provincial will with a federal statute and that this is triggered simply by the failure of a province to satisfy the federal Cabinet in the exercise of provincial jurisdiction.

36. Canada seeks to cloak this problem by dressing the issue in the language of urgency and meta-importance. All of this would be relevant in an emergency power debate, not a National Concern debate.

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[10] See generally, Hamish Telford, "The Federal Spending Power in Canada: Nation Building or Nation-Destroying?" (2003) 33 Journal of Federalism 23, at p. 42 and Alexis Belanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const. F. 21.

37. Back-stopism makes a mockery of modern co-operative federalism. Co-operative federalism is the freedom that the respective governments have to enter into creative arrangements in order to advance common goals.[11] Back-stopism instead represents coercive federalism which relies not on the power of persuasion and negotiated solutions favourable to all parties, but a mere show of flexibility that relies instead on the threat of direct interference by Ottawa. This is not a constitutional innovation that the courts should encourage.

38. A province that asserted a power to strait-jacket federal policy in a similar way would be transparently absurd. A different reaction to this federal illegitimate invasion, where the shoe is on the other foot, simply betrays a false assumption that the federal government has a primary role, even over provincial heads of power. This is contrary to Canadian federalism.

G. The Exclusive Nature of Canadian Legislative Powers

39. The Supreme Court recognized that environmental protection is not a subject matter that is exclusively within the jurisdiction of the provinces or of the federal Parliament. It also recognized that this is the very reason why the Courts must be very wary of an expansive view of the POGG power as a tool for federal environmental protection.[12]

40. The exclusive nature of the POGG National Concern branch was confirmed in *R.* v. *Crown Zellerbach Ltd.* where Le Dain J. for the majority (in approval of the conclusions drawn by Beetz J. in the *Anti-Inflation Act Reference*) emphasized:

> Where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.[13]

41. The concern of the courts has been that neither level of government should be found to have exclusive jurisdiction in the domain of environmental protection. The importance of this

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[11] See, *e.g.*, *Reference Re Securities Act* 2011 SCC 66 at paras 9, 62, 133
[12] *R.* v. *Hydro-Quebec*, [1997] 3 SCR 213, at paras. 112-116.
[13] [1988] 1 S.C.R. 401 at para. 34.

subject matter is such that both levels must have space within their respective heads of power to regulate within their respective policy interests as they relate to their proper areas of jurisdiction.

42. The operating word in sections 91 and 92 of the *Constitution Act, 1867* is the word "exclusively". There are a small number of concurrent areas of jurisdiction, such as agriculture and immigration in section 95. These are the exceptions that prove the rule. The doctrine of paramountcy and the doctrine of double aspects are mechanisms that exist only because of occasional overlap around the margins of the powers.

43. Canada's argument in this case, and the premise of the *GGPPA*, is that Canada and the provinces could have concurrent jurisdiction over a matter that Canada asserts is of "National Concern" in the POGG sense. This is impossible, according to the *Crown Zellerbach* authority and all relevant others. The alternate notion - that the jurisdiction is different in that the federal government can be said only to have jurisdiction over national minimum standards integral to GHG emission reduction - is meaningless and constitutionally pernicious for reasons set out above. It cannot be the case that the National Concern power gives to Parliament and the provinces the power to impose the exact same burdens for the exact same reasons.

44. None of the National Concern cases present the notion of concurrent jurisdiction over the exact same matter as the *GGPPA* does. Both the preamble to the Act and the consistent arguments of the federal Attorney General insist that the federal government has authority to impose on the people and industries in a province the exact kinds of burdens the federal government expects the provincial governments to impose directly. Again, this is the novel mechanism of back-stop legislation. In *Crown Zellerbach*, by contrast, the federal government narrowly won jurisdiction over marine pollution, removing it altogether from provincial reach.

45. Finally, it is to be emphasized that the double aspects doctrine does not rescue the *GGPPA*. This doctrine does not do away with exclusive jurisdiction by allowing two levels of government to do the exact same thing for the exact same reason. As observed by Justice Beetz in *Bell Canada* v. *Quebec*:[14]

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[14] [1988] 1 S.C.R. 749 at 766.

> The double aspect theory is neither an exception nor even a qualification to the rule of exclusive jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the same aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.

46. Saskatchewan submits that this exactly describes as forbidden what the *Act* wishes to assert is possible.

H. The *Crown Zellerbach* Test

47. The federal Attorney General properly relies on the *Crown Zellerbach* decision's summary of the test for the National Concern doctrine.

48. In his review of the POGG power, Justice LeDain for the majority begins by identifying early descriptions of the doctrine, first in the *Local Prohibition* case, an 1896 decision of the Privy Council, in which the power is discussed and particularly the caution that is required when considering its application (at 423).

49. LeDain J. cites as more recent authority the minority decision of Beetz J. (dissenting, but not on the proper analysis and description of the national concern doctrine) in the *Anti-Inflation Reference*. The opinion of Beetz J. remains the authoritative source in this area. In discussing the need for cautious POGG recognition, Beetz J. wrote:

> [I]f 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 (*Parson's* 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.[15]

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[15] *Re Anti-Inflation Act* [1976] S.C.R. 373 at p. 458.

50. LeDain J. in *Crown Zellerbach* summarized the principles of POGG national concern at 432-433. For such a matter to be identified as a national concern, strict parameters were identified in order to prevent the POGG power from simply being a tool of endless jurisdictional erosion of provincial powers.

51. These parameters were described as the requirement for "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." On this last point, LeDain J. described the "provincial inability test" as particularly relevant.

52. The judicial reticence identified as critical is less necessary where POGG is invoked to fill in for "new matters which did not exist at Confederation" (such as aeronautics). But there is properly a heavy burden of persuasion on Canada where there is a call for a permanent transfer of jurisdiction. In this case, a matter currently of provincial jurisdiction is sought to be removed permanently from such provincial reach through the invocation of the POGG power. At risk is the fundamental constitutional sovereignty of the provinces within their own legislative sphere as negotiated in 1867.

53. The ordinary way to change the balance of the division of powers, of course, is not through judicial means but through constitutional amendment. An illustrative example of this is the addition to section 91 of the *Constitution Act, 1867* of head number 2A – unemployment insurance. This was achieved after both the Supreme Court and the Privy Council found that subject matter to be within provincial competence notwithstanding the economic crisis of the Great Depression.[16]

54. While conceding that neither "the environment" nor "pollution generally" nor "air pollution at large" are distinct matters, Canada posits that GHG emissions, or the cumulative effects thereof, are sufficiently distinct to authorize Canada's displacing jurisdiction, or at least to the degree that they are merely imposing minimal national standards integral to reduction.

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[16] See *A.G. Canada v. A.G. Ontario (Employment and Social Insurance)* (1937) A.C. 355.

Saskatchewan disagrees and submits that Canada's argument is based on a misunderstanding of both how "matters" are defined for constitutional purposes and the role of the POGG power.

55. The proposed power "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions" is unworkable and illegitimate for several reasons. First, reducing emissions is a policy goal – not a subject matter. Second, integrality add nothing. There cannot be a test of effectiveness of a policy within the definition of a subject matter. Third, there is nothing single, indivisible or distinct about a subject matter that is defined as national, integral or minimal. Canada relies on *Ontario Hydro* v. *Ontario (Labour Relations Board)*[17] as a precedent for introducing the concept of integrality into the definition of a subject matter. "Integrality" in that case was about whether labour standards were incidental to the already established federal power over atomic energy. This has no precedential value in creating a new POGG power.

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

57. In *Crown Zellerbach*, the Court found that marine pollution satisfied the test because of its "predominantly extra-provincial as well as international character and implications". It arrived at this conclusion not because there happened to be an international preoccupation with the question, but because coastal waters are geographically interprovincial and international in nature.[18] The *GGPPA* does not aim to prevent inter-provincial and international pollution from Saskatchewan blowing downwind into and harming other jurisdictions. Instead, it aims to create a system of intra-provincial pricing disincentives to incrementally affect demand through different

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[17] [1993] 3 SCR 327.
[18] *Crown Zellerbach, supra*, note 13 at pp. 436-437.

mechanisms across Canada in such a way as to reduce the use of certain fuels in favour of other forms of energy or power.[19]

58. Canada argues that a province's failure to apply a tax or a charge on fuel prices (rather than reducing emissions in other ways) harms other provinces[20]. Even if the absence of the backstop will result in more emissions from Saskatchewan, and this difference would represent a meaningful volume that would have a measurable effect (premises which Saskatchewan does not admit), there is no analogy to be drawn between the direct actions of one province upon a downstream or downwind neighbour. In this case, what is at stake are simply levels of imposed financial burdens designed to have incremental effect on fuel demands. It is the global aggregate of emissions that has any meaningful effect on Canadian climate, rather than anything generated from Saskatchewan or Alberta specifically.

59. Canada is positing that Saskatchewan harms her provincial neighbours not by polluting their air directly, but by refusing to have an identical policy standard.

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

61. Furthermore, the nature of the *GGPPA* is instructive. Canada, under its criminal law power, could presumably set limits of emissions beyond which they are prohibited under pain of criminal sanction. The Act however does not purport to limit emissions or even to require permission to emit. Instead it requires interference with the retail economy in order to have an

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[19] Contrast *Interprovincial Co-operatives* v. *The Queen*, [1976] 1 S.C.R. 477.
[20] See generally, Jean LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38 UBCLR 353, at p. 370.

indirect effect. This is far too broad and indirect to be seriously considered as single, distinct and indivisible from provincial authority.

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

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

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

65. Saskatchewan submits the impact of the *GGPPA* on Saskatchewan's legislative authority and flexibility is irreconcilable. While Saskatchewan happens to be proud both of its own track record and further plans to deal with intra-provincial carbon emissions,[21] the fundamental question is whether it has authority to set its own policies and legislation in the area of price controls – to do much, to do little, or to do nothing. Canada has nothing to say about this impact other than, "Saskatchewan is free instead to introduce new taxes as certain other provinces have."

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[21] A.G. Saskatchewan Record, TAB 1.

66. As Professor Hogg points out, "The requirement of "distinctness" is a necessary but not a sufficient condition for a matter to be admitted to the national concern branch... A distinct matter would also have to satisfy the provincial inability test..."[22]

67. Le Dain J. explained that this test is a subset of the "distinctiveness" requirement[23]. In this regard, it is relevant to consider the extra-provincial effects of a province's actions. Where one province is not able to control the interprovincial aspects of another province's actions to its detriment and to the detriment of the country, the matter may be said to raise the situation of a provincial inability. That is not the case here, where, as acknowledged by Canada, the intended effect of reduction of GHG emissions is globally cumulative in the aggregate.

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

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

70. The attempt to define its new jurisdictional space as "minimal national standards" does not meaningfully fulfill the provincial inability test. This is a tautological exercise. By definition, a national standard can never be imposed by a province. It would be an intolerable trick to the balance of the federation if Ottawa can simply take over an area of jurisdiction by asserting the necessity of a national standard. The notion of a national standard itself, divorced from the subject matter, will always result in a provincial inability test falling Ottawa's way.

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[22] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. at 17-16.
[23] *Supra*, note 13 at 432.

I. The Pith and Substance of Carbon Pricing

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

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

73. Another instructive decision that illustrates the proper characterization of market regulation with a claim at national concern justification is to be found in the *Reference Re Natural Products Marketing Act*.[24] As in the *Anti-Inflation Reference*, the Supreme Court found a federal intra-provincial price scheming to be *ultra vires* the federal Parliament despite POGG claims to the contrary.

74. This judgment and analysis subsequently received unqualified approval by the Judicial Committee of the Privy Council.[25] In a companion case, relating to Employment and Social Insurance, another sweeping federal statute was considered. Again, Parliament felt it was necessary to deal with a larger issue than the local interests necessarily interfered with that were within provincial jurisdiction. Lord Atkin dealt also with the question of mixed jurisdiction where there were elements of federal competence:

> Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other

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[24] [1936] S.C.R. 398; see also, *Re Board of Commerce Act, 1919* [1921] 1 AC 191 at p. 197 and *Fort Francis Pulp and Power Co. v Manitoba Free Press Co.* [1923] AC 695, at p. 703.
[25] *AG BC v. AG Canada (Natural Products Marketing)* [1937] AC 377.

> classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.[26]

75. Saskatchewan says that the pith and substance of Part II of the Act is the regulation of industries within the province such as steel manufacturers. The regulation of these industries is a matter that falls under provincial jurisdiction over "local works and undertakings" and "property and civil rights" under sections 92(10) and (13) of the *Constitution Act, 1867*. As noted by Professor Hogg in his text book, *Constitutional Law of Canada*[27], ever since the *Parsons* case in 1881[28], it has been recognized the regulation of specific industries, including the prices at which their products are sold, is a matter falling within provincial, not federal, jurisdiction.

76. There is no doubt that the federal government could impose greenhouse gas emission limits on businesses that are otherwise within federal jurisdiction like aviation, railways, shipping and interprovincial pipelines. However, it is submitted that the federal government has no jurisdiction to impose emission limits or pricing structures on businesses otherwise within provincial jurisdiction. A similar issue arose in *Reference re: Anti-Inflation Act.* [29] The federal government attempted to impose wage and price controls on both the federal private sector and the provincial private sector. Justice Beetz in his dissenting judgment (but not on this point) was very clear in stating that the control and regulation of local trade and of commodity pricing in the provincial private sector has consistently been held to lie within exclusive provincial jurisdiction. He concluded that the *Act* interfered with provincial jurisdiction on a large scale and was *prima facie ultra vires*. It is submitted that similar reasoning is applicable in this case. By including the provincial private sector under Part II of the *Act*, the legislation exceeds federal jurisdiction and is *ultra vires*.

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[26] *Supra*, note 16.
[27] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. at pp. 20-1 to 20-2 and at pp. 21-8 to 21-10.
[28] *Citizens' Insurance Company v Parsons* (1881-82) 7 AC 96; see also, *Home Oil Distributers Ltd. v Attorney General of British Columbia* [1940] SCR 444, at p. 451.
[29] *Supra*, note 15.

77. The Attorney General of Canada argues that all greenhouse gas emissions have national and global implications. While Saskatchewan does not dispute the scientific evidence which suggests that "emissions anywhere have effects everywhere", Saskatchewan submits that this does not justify ignoring the impacts of the *Act* on local industry who will be faced with difficult choices about cutting production or increasing prices. As indicated in cases like the *Natural Products Marketing Act Reference*[30], the fact that a company's products might be sold outside their province of origin does not justify the federal government taking over regulation of the local aspects of the business such as the prices at which the product is sold. It is submitted that similar reasoning is applicable in this case. The fact that greenhouse gas emissions have extra provincial effects cannot override the fact that the *Act* is primarily about regulating local industries.

J. Section 92A of the *Constitution Act, 1867*

78. It is also submitted that the Act interferes with provincial jurisdiction over non-renewable natural resources guaranteed by section 92A(1) of the *Constitution Act, 1867*. The provincial powers over these subjects are described in the widest of terms – the provinces may exclusively make laws in relation to the development, conservation and management of non-renewable natural resources. The Act constitutes a direct attack on these powers. The purpose of the Act is to reduce demand for fossil fuels produced from non-renewable natural resources like coal, oil and natural gas. These resources are owned by the provinces and the provinces have the exclusive right to develop, conserve and manage them. Section 92A specifically gives the provinces the right to determine the "rate of primary production" of these resources. The Act interferes with this power and therefore is *ultra vires*.

K. Taxation

79. It is Saskatchewan's position that the fuel charges imposed by Part One of the *Act* are in reality a carbon tax. All of the hallmarks of taxation are present – the fuel charges are enforceable by law, they are imposed under the authority of Parliament, they are imposed by a public body and

[30] *Supra*, note 25.

they are intended for a public purpose.[31] The fuel charges are imposed on wholesalers and distributors with the intention that they will pass along the cost to their customers. The fuel charges operate as a classic indirect tax. This was the conclusion reached by the minority in the Saskatchewan Court of Appeal.

80. The Attorney General of Canada argues that the charges are not taxes, but rather are regulatory charges. In order to be considered a regulatory charge, the Attorney General has to show that there is a regulatory regime and that there is a sufficient nexus between the charges and the regulatory regime. The Supreme Court has identified the following indicia of a regulatory regime – a complete and detailed code of regulation; a specific regulatory purpose which seeks to affect the behavior of individuals; actual or properly estimated costs of the regulation and a relationship between the regulation and the person being regulated.[32]

81. Saskatchewan submits that there is no regulatory regime associated with the fuel charges under Part One of the *Act.* At best, only one of the four required criteria is present – an intention to alter behavior. But consumers of fuel are not regulated in anyway. There is no required or prohibited conduct under Part One. Consumers aren't told to do anything except to pay additional money when they purchase fuel.

82. The Attorney General of Canada says that a complete regulatory code and determinable costs of regulation are not required simply because the charges themselves have a regulatory purpose. The Attorney General of Canada also says that a nexus between the revenues raised by the charges and the regulatory regime is not required for the same reason. However, it is submitted that these requirements cannot be overlooked or so easily cast aside. To do so, will give the Government of Canada too easy an escape route to avoid its constitutional obligations when it comes to levying taxes.

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[31] *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, at p. 363; See also, *Re: Eurig Estate* [1998] 2 S.C.R. 565, at para 15; *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 S.C.R. 134 at para 21 and *Quebec (Attorney General) v. Alqonquin Developpements Cote-Ste-Catherine Inc. (Developpements Hydromega Inc.)* 2011 QCCA 1942.

[32] *Westbank First Nation, ibid.* at para. 24 and *620 Connaught Ltd. v. Canada (Attorney General)* 2008 SCC 7.

83. The Attorney General of Saskatchewan says that the carbon tax imposed by Part 1 of the *Act* is unconstitutional for two reasons. First, because it applies in some provinces, but not others and thereby violates the principles of federalism and the rule of law. Second, because it violates the principle of "no taxation without representation" enshrined in section 53 of the *Constitution Act, 1867*.

84. The Attorney General of Saskatchewan submits that there is a constitutional rule requiring uniformity in the application of federal tax laws which flows out of the principles of federalism and the rule of law. Constitutional principles have full legal force under our Constitution. They can be relied upon to hold laws to be *ultra vires*[33]. This point was made clear in the *Quebec Secession Reference*,[34] the *Prince Edward Island Provincial Court Judges Reference*[35] and the *Manitoba Language Rights Reference*[36]. Constitutional principles are not just interpretive tools[37].

85. The rule of uniformity of federal tax laws was accepted by the minority in the Saskatchewan Court of Appeal. They relied on a number of considerations. First, the potential for misuse of a power to tax in one province, but not others, is manifestly apparent. Second, the principle that federal taxes should not vary from province to province based on the particularities of provincial law was accepted by the Privy Council in *Minister of Finance v. Smith*[38]. Third, sections 92A(2) and 92A(4) of the *Constitution Act, 1867* recognize this principle. They authorize provinces to enact laws dealing with the export of natural resources and the taxation of those resources so long as those laws do not discriminate or differentiate between provinces. Fourth, the wisdom of such a rule is demonstrated by the fact that the United States Constitution expressly

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[33] See Beverly McLachlin, "Unwritten Constitutional Principles: What's Going On" (2006) 4 NZJPIL 147; Bryan P. Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals" (2018) 41 Man. L.J. 211 and *Miller v. The Prime Minister* [2019] UKSC 41, at para 39.
[34] [1998] 2 SCR 217.
[35] [1997] 3 SCR 3.
[36] [1985] 1 SCR 721.
[37] See also, *Quebec (Attorney General) v. Canada (Attorney General)* 2015 SCC 14, at paras 144 – 147 and at para 190, per LeBel, Abella, Wagner and Gascon JJA dissenting.
[38] [1927] AC 193.

provides that federal taxation must be applied uniformly throughout the country and cannot vary along state lines.[39]

86. The carbon tax imposed by Part 1 of the Act only applies in some provinces. It does not apply nationally. Therefore, it is unconstitutional.

87. Second, the power to tax carries with it special constitutional responsibilities embedded in section 53 of the *Constitution Act, 1867*. These principles were described by Major J. in *Eurig Estate* as follows:

> The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.[40]

88. Section 53 reflects the fact that the imposition of taxation is one of the most powerful tools possessed by governments[41]. Section 53 stands for the proposition that taxes must be imposed by Parliament, not the executive. In order to make section 53's guarantee meaningful, taxation legislation must set out the essentials of the taxation scheme such as where geographically the tax applies and only "details and mechanisms", such as the tax rate, can be left to the executive[42]. Any delegation of the details and mechanisms of taxing powers must be "clear and unambiguous". Citizens are entitled to have the essential features of tax legislation debated in Parliament and decided by Parliament.

89. In this case, it is submitted that section 53 is violated in three ways.

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[39] Ronald D. Rotunda and John R. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 5th ed. (Thomson Reuters, 2012), Vol. 1, para 5.4.
[40] [1998] 2 SCR 565 at para 30.
[41] *Reference re: Goods and Services Tax* [1994] 2 SCR 445, at p. 497.
[42] See Peter W. Hogg, "Can the Taxing Power Be Delegated?" (2002) 16 SCLR (2d) 305.

90. First, the Act delegates the authority to impose "charges". Once this Court determines that the charges are in fact taxes, as in *Eurig Estate*, the requirement for a clear and unambiguous delegation is violated. The *Act* cannot delegate taxing powers but pretend to do something else.

91. Second, the *Act* delegates far more than the "details and mechanisms" of the tax. It provides that the determination of which provinces and territories the tax will apply in is a decision to be made by the Governor in Council. This is an essential component of any taxation scheme and is not merely a matter of "details and mechanisms." Therefore, Parliament's failure to set out in the *Act* itself which provinces and territories the tax will apply in is, constitutionally, a fatal flaw.

92. Third, as pointed out by the minority in the Saskatchewan Court of Appeal, the *Act* authorizes the executive to impose taxes on its own accord because it hands over total control to determine all aspects of the tax to the Governor in Council. The excessive delegation in this case means that Parliament has abdicated its responsibility for determining the nature and extent of carbon taxes across the country.

93. The Governor in Council is authorized by the *Act* to change the very nature of the taxes. Ordinarily, the terms of a statute prevail over subordinate legislation. However, in rare and exceptional cases, legislatures have delegated the power to make regulations that amend the statute or which prevail over the statute in the event of conflict. This is known as a Henry VIII clause[43]. In this case, the Governor in Council has almost unlimited regulation making power. As noted by the minority in the Saskatchewan Court of Appeal, the word "prescribed" is used in the *Act* more than 430 times. Section 26 which imposes the fuel charge uses the word "prescribed" seven times.

94. Furthermore, the *Act* includes a Henry VIII clause. Section 168(4) deals with the fuel charges and provides that where a regulation states that it applies despite the provisions of the *Act*, in the event of conflict between the *Act* and the regulation, the regulation prevails.

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[43] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., at p. 363.

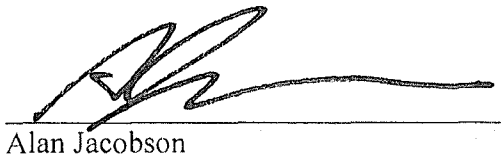
95. To put it bluntly, the combination of a delegation of taxing powers with a Henry VIII clause renders the *Act* unconstitutional. Both the delegation of taxing powers and the use of Henry VIII clauses are constitutionally suspect on their own[44]. In combination, they are blatantly unconstitutional. The presence of these two features in a single statute does exactly what this Court has said is forbidden by section 53 – it allows the executive, by reliance on the Henry VIII clause, to alter the terms of the statute and to impose taxes on its own accord.

## PART IV - ANSWER REQUESTED

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

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

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



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Counsel for the Government of
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[44] See *Ontario Public School Boards Association v. Ontario (Attorney General)* (1997), 151 DLR (4th) 346, 1997 CanLII 12352 (Ont. Gen. Div.), at paras 49 to 51.

## PART V – AUTHORITIES

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