Court File Nos.: 38663 and 38781

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c. 12, s. 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL TO THE COURT OF APPEAL FOR ONTARIO UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C.43, s. 8

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF QUEBEC, PROGRESS ALBERTA COMMUNICATIONS LIMITED, ANISHINABEK NATION AND UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING, CANADIAN LABOUR CONGRESS, SASKATCHEWAN POWER CORPORATION AND SASKENERGY INCORPORATED, OCEANS NORTH CONSERVATION SOCIETY, ASSEMBLY OF FIRST NATIONS, CANADIAN TAXPAYERS FEDERATION, CANADA'S ECOFISCAL COMMISSION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL, AMNESTY INTERNATIONAL CANADA, NATIONAL ASSOCIATION OF WOMEN AND THE LAW AND FRIENDS OF THE EARTH, INTERNATIONAL EMISSIONS TRADING ASSOCIATION, DAVID SUZUKI FOUNDATION, ATHABASCA CHIPEWYAN FIRST NATION, SMART PROSPERITY INSTITUTE, CANADIAN PUBLIC HEALTH ASSOCIATION, CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL COOPERATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKATOON CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE AND YOUTH OF THE EARTH, CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT ET ÉQUITERRE, GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD AND YOUTH

CLIMATE LAB, ASSEMBLY OF MANITOBA CHIEFS, CITY OF RICHMOND, CITY OF VICTORIA, CITY OF NELSON, DISTRICT OF SQUAMISH, CITY OF ROSSLAND AND CITY OF VANCOUVER

Interveners

AND

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM COURT OF APPEAL FOR SASKATCHEWAN)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c. 12, s. 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER THE *CONSTITUTIONAL QUESTIONS ACT*, 2012, SS 2012, c. C-29.01

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF QUEBEC, PROGRESS ALBERTA COMMUNICATIONS LIMITED, ANISHINABEK NATION AND UNITED CHIEFS AND COUNCILS OF MNIDOO MNISING, CANADIAN LABOUR CONGRESS, SASKATCHEWAN POWER CORPORATION AND SASKENERGY INCORPORATED, OCEANS NORTH CONSERVATION SOCIETY, ASSEMBLY OF FIRST NATIONS, CANADIAN TAXPAYERS FEDERATION, CANADA'S ECOFISCAL COMMISSION, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL, AMNESTY INTERNATIONAL CANADA, NATIONAL ASSOCIATION OF WOMEN AND THE LAW AND FRIENDS OF THE EARTH, INTERNATIONAL EMISSIONS TRADING ASSOCIATION, DAVID SUZUKI FOUNDATION, ATHABASCA CHIPEWYAN FIRST NATION, SMART PROSPERITY INSTITUTE, CANADIAN PUBLIC HEALTH ASSOCIATION, CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL COOPERATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV, COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF

CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKATOON CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE AND YOUTH OF THE EARTH, CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT ET ÉQUITERRE, GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD AND YOUTH CLIMATE LAB, ASSEMBLY OF MANITOBA CHIEFS, CITY OF RICHMOND, CITY OF VICTORIA, CITY OF NELSON, DISTRICT OF SQUAMISH, CITY OF ROSSLAND AND CITY OF VANCOUVER

Interveners

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ALBERTA
(pursuant to Rule 33(4) of the *Rules of the Supreme Court of Canada*)

GALL LEGGE GRANT ZWACK LLP
Suite 1000 - 1199 West Hastings Street
Vancouver, BC V6E 3T5

Peter A. Gall, Q.C / Benjamin J. Oliphant
Tel: 604-891-1152 / 604-891-1181
Fax: 604-669-5101
E-mail: pgall@glgzlaw.com
boliphant@glgzlaw.com

MCLENNAN ROSS LLP
600, 12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Steven A. A. Dollansky
Tel: 780-482-9217
Fax: 780-482-9100
Email: sdollansky@mross.com

DEPARTMENT OF JUSTICE AND SOLICITOR GENERAL
10th Floor, Oxford Tower
10025 – 102A Avenue
Edmonton, AB T5J 2Z2

L. Christine Enns, Q.C
Tel: 780-422-9703
Fax: 780-638-0852
Email: Christine.Enns@gov.ab.ca

Counsel for the Attorney General of Alberta

CAZASAIKALEY LLP
220 Laurier Avenue West, Suite 350
Ottawa, ON K1P 5ZP

Alyssa Tomkins
Tel: 613-565-2292
Fax: 613-565-2087
E-mail: atomkins@plaideurs.ca

Agent for the Attorney General of Alberta

COPIES TO:

SUPREME COURT OF CANADA
Office of the Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

ATTORNEY GENERAL OF CANADA

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

Sharlene Telles-Langdon, Christine Mohr, Mary Matthews and Neil Goodridge
Tel: 204-983-0862
Fax: 204-984-8495
E-mail: Sharlene.Telles-Langdon@justice.gc.ca

Counsel for the Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 O'Connor Street – Suite 500, Room 557
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: 913-670-6290
Fax: 613-954-1920
E-mail: Christopher.rupar@justice.gc.ca

Agent for the Attorney General of Canada

MINISTRY OF JUSTICE AND ATTORNEY GENERAL OF SASKATCHEWAN
820 – 1874 Scarth Street
Regina, SK S4P 4B3

P. Mitch McAdam, Q.C. / Alan Jacobson
Tel: 306-787-7846
Fax: 306-787-9111
E-mail: mitch.mcadam@gov.sk.ca
alan.jacobson@gov.sk.ca

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Saskatchewan

MLT AIKINS
1500 Hill Centre – 1874 Scarth Street
Regina, SK S4P 4EP

Deron Kuski
Jodi Wildeman
Tel: 306-347-8404
Fax: 306-352-5250
E-mail: dkuski@mltaikins.com
jwildeman@mltaikins.com

Counsel for the Attorney General of Saskatchewan

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
4th Floor – 720 Bay Street
Toronto, ON M7A 2S9

Joshua Hunter, Padraic Ryan, and Aud Ranalli
Tel: 416-908-7465
Fax: 416-326-4015
E-mail: Joshua.hunter@ontario.ca
Padraic.ryan@ontario.ca
Aud.ranalli@ontario.ca

Counsel for the Attorney General of Ontario

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8855
Email: mfmajor@supremeadvocacy.ca

Agent for the Attorney General of Ontario

MINISTRY OF JUSTICE OF BRITISH COLUMBIA
6th Floor – 1001 Douglas Street
PO Box 9280, STN PROV GOVT
Victoria, BC V7W 9J7

J. Gareth Morley
Tel: 250-952-7644
Fax: 250-356-0064
E-mail: Gareth.morley@gov.bc.ca

Counsel for the Attorney General of British Columbia

MICHAEL SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael Sobkin
Tel: 613-282-1712
Fax: 613-288-2896
Email: msobskin@sympatico.ca

Agent for the Attorney General of British Columbia

ATTORNEY GENERAL OF MANITOBA
Constitutional Law
1230 – 405 Broadway
Winnipeg,MB R3C 3L6

Michael Connor
Allison Kindle Pejovic
Tel: 204-945-6723
Fax: 304-945-0053
E-mail: michael.conner@gov.mb.ca
alison.pejovic@gov.mb.ca

Counsel for the Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Manitoba

ATTORNEY GENERAL OF NEW BRUNSWICK
Legal Services Branch, Constitutional Unit
PO Box 6000, Stn A
675 King Street, Suite 2018
Fredericton, NB E3B 5H1

William E. Gould
Tel: 506-453-2222
Fax: 453-3275
E-mail: William.gould@gnb.ca

Counsel for the Attorney General of New Brunswick

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of New Brunswick

MINISTÈRE DE LA JUSTICE DU QUÉBEC
Direction du droit constitutionnel et Autochtone
1200, route de 1'Église, 4 étage
Québec, QC G1V 4M1

Jean-Vincent Lacroix
Laurie Anctil
Phone: 418-643-1477, poste 20779
E-mail: laurie.anctil@justice.gouv.qc.ca
Jean-vincent.lacroix@justice.gouv.qc.ca

Avocats de la Procureure générale Québec

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1

Pierre Landry
Tel: 819-503-2174
Fax: 819-771-5397
E-mai: p.landry@noelassocies.com

Correspondant pour les Avocats de la Procureure générale Québec

NANDA & COMPANY
3400 Manulife Place
10180 – 101 Street N.W
Edmonton, AB T5J 4K1

Avnish Nanda
Martin Olszyncki
Tel: 780-801-5324
Fax: 587-318-1391
E-mail: avnish@nandalaw.ca

Counsel for Progress Alberta Communications Limited

MCGUINTY LAW OFFICES
1192 Rockingham Avenue
Ottawa, ON K1H 847

Dylan Jr. McGuinty
Tel: 613-526-3858
Fax: 613-526-3187
E-mail: dylanjr@mcguintylaw.ca

Agent for Progress Alberta Communications Limited

WESTAWAY LAW GROUP
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Cynthia Westaway
M. Patricia Lawrence
Tel: 613-722-6339
Fax: 613-722-9097
E-mail: cynthia@westawaylaw.ca

Counsel for the Anishinabek Nation and United Chiefs and Councils of Mnidoo Mnising

WESTAWAY LAW GROUP
55 Murray Street, Suite 230
Ottawa, ON K1N 5M3

Geneviève Boulay
Tel: 613-702-3042
Fax: 613-722-9097
E-mail: genevieve@westawaylaw.ca

Agent for the Anishinabek Nation and United Chiefs and Councils of Mnidoo Mnising

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Steven M. Barrett
Simon Archer
Mariam Moktar
Tel: 416-977-6070
Fax: 416-597-7333
E-mail: sbarrett@goldblattpartners.com

Counsel for the Canadian Labour Congress

GOLDBLATT PARTNERS LLP
500 – 30 Melcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
E-mail: cbauman@goldblattpartners.com

Agent for the Canadian Labour Congress

MCKERCHER LLP
374 Third Avenue South
Saskatoon, SK S7K 1M5

David M. A. Stack, Q.C.
Tel: 306-664-1277
Fax: 306-653-2669
E-mail: d.stack@mckercher.ca

Counsel for the Saskatchewan Power Corporation and SaskEnergy Incorporated

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Saskatchewan Power Corporation and SaskEnergy Incorporated

ARVAY FINLAY LLP
1512 – 808 Nelson Street
Vancouver, BC V6Z 2H2

David W.L. Wu
Tel: 604-696-9828
Fax: 888-575-3281
E-mail: dwu@arvayfinlay.ca

Counsel for the Oceans North Conservation Society

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613-691-1224
Fax: 613-691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for the Oceans North Conservation Society

ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON KIP 6L5

Stuart Wuttke
Julie McGregor
Adam Williamson
Victor Carter
Tel: 613-241-6789 ext. 228
Fax: 613-241-5808
E-mail: swuttke@afn.ca

Counsel for the Assembly of First Nations

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613-691-1224
Fax: 613-691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for the Assembly of First Nations

CREASE HARMAN LLP
Barristers and Solicitors
800-1070 Douglas Street
Victoria, BC, V8W 2C4

R. Bruce E. Hallsor, Q.C.
Hana Felix
Tel: 250-388-9124
Fax: 250-388-4294
E-mail: bhallsor@crease.com

Counsel for the Canadian Taxpayers Federation

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8560
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Canadian Taxpayers Federation

UNIVERSITY OF OTTAWA
Faculty of Law
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Stewart Elgie, LSM
Tel: 613-562-5800 ext. 1270
Fax: 613-562-5124
Email: stewart.elgie@uottawa.ca

Counsel for Canada's Ecofiscal Commission

CHAMP AND ASSOCIATES
43 Florence Steet
Ottawa, ON K2P 0W6

Bijon Roy
Tel: 613-237-4740
Fax: 613-232-2680
E-mail: broy@champlaw.ca

Agent or Canada's Ecofiscal Commission

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

1500-55 University Avenue
Toronto, ON M5J 2H7

Joseph F. Castrilli
Richard Lindgren
Tel: 416-960-2284 ext. 7218
Fax: 416-960-9392
Email: castrillij@sympatico.ca

Counsel for the Canadian Environmental Law Association, Environmental Defence Canada Inc. and Sisters of Providence of St. Vincent de Paul

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
E-mail: jeff.beedell@gowlingwlg.com

Agent for the Canadian Environmental Law Association, Environmental Defence Canada

Inc. and Sisters of Providence of St. Vincent de Paul

STOCKWOODS LLP
TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

Justin Safayeni
Zachary Al-Khatib
Tel: 416-593-7200
Fax: 416-593-9345
E-mail: justins@stockwoods.ca

Counsel for the Amnesty International Canada

CONWAY BAXTER WILSON LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Tel: 613-691-0368
Fax: 613-688-0271
E-mail: dtaylor@conway.pro

Agent for the Amnesty International Canada

UNIVERSITY OF OTTAWA
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Nathalie Chalifour
Anne Levesque
Tel: 613-562-5800 ext. 3331
Fax: 613-562-5124
E-mail: Nathalie.chalifour@uottawa.ca

Counsel for the National Association of Woman and the Law and Friends of the Earth

CONWAY BAXTER WILSON LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Marion Sandilands
Tel: 613-288-0149
Fax: 613-688-0271
E-mail: msandilands@conway.pro

Agent for the National Association of Woman and the Law and Friends of the Earth

DEMARCO ALLAN LLP

333 Bay Street, Suite 625
Toronto, ON M5H 2R2

Elisabeth DeMarco
Jonathan McGillivray
Tel: 647-991-1190
Fax: 888-734-9459
Email: lisa@demarcoallan.com

Counsel for the International Emissions Trading Association

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa , ON , K1P 6L5

Sophie Arseneault
Tel: 613-696-6904
Fax: 613-230-6423
Email: sarseneault@fasken.com

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
Faculty of Law – Common Law
216-1 Stewart Street
Ottawa, ON KIN 6N5

Joshua Ginsberg
Randy Christensen
Tel: 613-562-5800 ext 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Counsel for the David Suzuki Foundation

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
Faculty of Law – Common Law
216-1 Stewart Street
Ottawa, ON KIN 6N5

Amir Attaran
Tel: 613-562-5800 ext. 3382
Fax: 613-562-5319
E-mail: aattaran@ecojustice.ca

Counsel for the Athabasca Chipewyan First Nation

UNIVERSITY OF OTTAWA
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Jeremy de Beer
Tel: 613-562-5800 ext. 3169
E-mail: Jeremy.debeer@uottawa.ca

Counsel for the Smart Prosperity Institute

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
E-mail: guy.regimbald@gowlingwlg.com

Agent for the Smart Prosperity Institute

GOWLING WLG (CANADA) LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON, M5X1G5

Jennifer King,
Michael Finley
Liane Langstaff
Tel: (416) 862-7525
Fax: (416) 862-7661
E-mail: jennifer.king@gowlingwlg.com

Counsel for the Canadian Public Health Association

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613-786-0171
Fax: 613-788-3587
E-mail: jeff.beedell@gowlingwlg.com

Agent for the Canadian Public Health Association

KOWALCHUK LAW OFFICE
18 Patton Street
Regina, SK S4R 3N9

Larry W. Kowalchuk
Tel: 306-529-3001
E-mail: larry@kowalchuk.ca

Counsel for the Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613-691-1224
Fax: 613-691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for the Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV

KOWALCHUK LAW OFFICE
18 Patton Street
Regina, SK S4R 3N9

Larry W. Kowalchuk
Tel: 306-529-3001
E-mail: larry@kowalchuk.ca

Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians:

SUPREME LAW GROUP
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel: 613-691-1224
Fax: 613-691-1338
E-mail: mdillon@supremelawgroup.ca

Agent for Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New-

Saskatoon Chapter, New-Brunswick Anti-Shale Gas Alliance and Youth of the Earth

Brunswick Anti-Shale Gas Alliance and Youth of the Earth

MICHEL BÉLANGER AVOCATS INC.
454, avenue Laurier Est
Montreal, QC, H2J 1E7

David Robitaille
Marc Bishai
Tel: 514-844-4646
Fax: 514-844-7009
Email: david.robitaille@uottawa.ca

Counsel for Centre Québécois de l'environnement et Équiterre

JURISTES POWER
130 rue Albert, bureau 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5560
Fax: 613-702-5561
E-mail: mvincelette@juristespower.ca

Agent for Centre Québécois de l'environnement et Équiterre

RATCLIFF & COMPANY LLP
221 West Esplanade, Suite 500
North Vancouver, BC V7M 3J3

Nathan Hume
Emma Hume
Cam Brewer
Tel: 604-988-5201
Fax: 604-988-1452
E-mail: nhume@ratcliff.com

Counsel for the Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
E-mail: dbosse@juristespower.ca

Agent for the Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child and Youth Climate Lab

PUBLIC INTEREST LAW CENTRE
200-393 Portage Avenue
Winnipeg, MB R3B 3H6

Joëlle Pastora Sala
Byron Williams
Katrine Dilay
Tel: 204-985-8540
Fax: 204-985-8544

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5560
Fax: 613-702-5560
E-mail: mvincelette@juristespower.ca

E-mail: jopas@powerlaw.ca

Counsel for the Assembly of Manitoba Chiefs

Agent for the Assembly of Manitoba Chiefs

LIDSTONE & COMPANY
Sun Tower, Suite 1300
128 Pender Street West
Vancouver, BC V6B 1R8

Paul A. Hildebrand
Olivia French
Tel: 604-899-2269
Fax: 604-899-2281
E-mail: hildebrand@lidstone.ca

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5560
Fax: 613-702-5560
E-mail: mvincelette@juristespower.ca

Counsel for the City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland and City of Vancouver

Agent for the City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland and City of Vancouver

TABLE OF CONTENTS

PART I – OVERVIEW AND INTRODUCTION

A. Overview

1. In a case like this with profound implications for the division of powers, the court's overriding concern must be maintaining the structure of our federal system of government.

2. The court cannot and should not base its decision on what it considers necessary to address a global problem such as climate change or what it believes are the best policy solutions for reducing greenhouse gas ("**GHG**") emissions, particularly in light of genuine and reasonable policy disputes as to what approaches strike the right balance in particular contexts.

3. With respect, this was lost sight of in the majority decisions of the Courts of Appeal below. The majority judges in these cases appeared to conclude that the importance of addressing climate change justified the federal government controlling how the provinces exercise their jurisdiction over the regulation of GHG emissions under the national concern branch of the Peace, Order and Good Government ("**POGG**") power.

4. However, what they failed to appreciate is that this requires transforming Parliament's *residual* and *exclusive* power over matters *not* falling within provincial jurisdiction into a *supervisory* and *overlapping* power over matters that clearly *do* fall within provincial jurisdiction.

5. This constitutes a far reaching and radical alteration of the balance of legislative powers in Canada, subordinating the provinces' sovereign legislative role in our federal system to the control and direction of the federal government. The result is that the provinces are deprived of the power to address matters within their exclusive jurisdiction in the manner that best meets their individual economic, social, and environmental circumstances, as is required in our federal system.

B. Introduction

6. Under the *Greenhouse Gas Pollution Pricing Act* ("***GGPPA***"), the federal government can impose within a province the federal government's preferred policy for reducing GHG emissions, on the basis that the province has not regulated the emissions of wholly intraprovincial activities and entities in a manner deemed most appropriate by the federal government.

7. The majority decisions in the Courts of Appeal below held that this can be justified under

the federal government's residual national concern POGG power. That is simply not so.

8. The federal residual power was never intended to confer a supervisory jurisdiction over the provinces' exercise of their exclusive powers. It only applies to matters that cannot be regulated by the provinces, such as temporary emergencies and narrow, discrete, and indivisible matters that are inherently national in scope, like aeronautics and radiocommunications.

9. In addition, because subject matters coming within the residual national concern power are, by definition, not in relation to the exercise of the exclusive jurisdiction of the provinces, those matters necessarily come within the exclusive and plenary jurisdiction of the federal government.

10. This creates a perfect symmetry in the division of powers: if an inherently national and indivisible matter cannot be regulated by the provinces under existing provincial powers, it necessarily must be regulated exclusively by Parliament under the national concern power. However, if the matter or provincial aspects of a divisible matter can be regulated by the provinces under existing provincial powers, it does not fall within the federal government's jurisdiction under the national concern power – exclusively or at all.

11. Moreover, the exclusive federal power over matters of national concern is both permanent and not limited to a particular federal act or policy. It applies generally to the subject matter that has been found to be inherently outside of provincial jurisdiction, and thus can be exercised in any manner the federal government sees fit in the future.

12. Treating the POGG powers as purely residual – as the courts historically have done, without exception – is absolutely critical to maintaining the underlying division of powers.

13. Emergency legislation addresses a temporary matter that effectively transcends the ordinary division of powers under ss. 91 and 92 for the duration of the emergency. However, once the temporary emergency passes, the ordinary balance of powers once again governs, and no permanent harm is done to the underlying division of powers.

14. Similarly, the national concern power can be reconciled with the division of powers within our federal system, exactly because it only applies to narrow and discrete subject matters that are inherently and indivisibly national, and that do not fall within provincial powers at all. It

necessarily follows that the federal government's residual national concern power cannot be used to give it an overlapping, supervisory power over matters falling within the exclusive jurisdiction of the provinces, regardless of whether the federal government believes it has, at any particular time, a better policy for dealing with a matter of importance to all Canadians.

15. The national concern doctrine is not triggered by the desire of the federal government to have all provinces adopt a particular policy approach to address a subject matter that is of importance in all regions of the country – such as the environment, the economy, employment, education, health care, and other matters that impact people across the country. Rather, it is triggered by the inability of the provinces to deal with a matter that is inherently indivisible and national – which is not the case with the GHG emissions of intraprovincial activities and entities.

16. Attempting to redefine the subject matter as establishing "national minimum standards" to achieve "nationwide" objectives does not change this conclusion. With respect, it is a sleight of hand that obscures the reality of the situation: the creation of permanent supervisory federal jurisdiction in relation to matters that come within the exclusive jurisdiction of the provinces.

17. By ignoring the fundamental and necessary restrictions on the scope of the national concern power, the majority decisions in the Courts of Appeal below effectively turned this federal *residual* power into a federal *supervisory* power over the exercise of exclusive provincial jurisdiction. This fundamentally distorts and upsets the balance of legislative powers in our federal system.

18. Under our federal system, the provinces have the power to fashion their own policies within their exclusive jurisdiction to address their own circumstances and needs. The exercise of this jurisdiction cannot be made subject to federal control through the enactment of "national standards" whenever there is a subject matter that affects individuals across the country that the federal government thinks should be dealt with in its preferred manner.

19. In the situation at hand, the *GGPPA* is both an extremely pervasive and extremely invasive encroachment on provincial jurisdiction. It is extremely pervasive because it covers virtually all activities, businesses, and industries within the provinces, and extremely invasive in that it significantly constrains the jurisdiction of the provinces to adopt their own preferred GHG emission regulations for these intraprovincial activities and entities.

20. Moreover, regardless of the extent of the effect of the so-called minimum national standards on the scope of provincial jurisdiction, which is left entirely to the discretion of the federal government, the fundamental constitutional principle is that the residual national concern power can only be used in rare situations where the provinces are not able to regulate an inherently narrow, discrete, indivisible and national matter, in which case the matter must necessarily be regulated exclusively by the federal government.

PART II – POSITION ON CONSTITUTIONAL QUESTION

21. The Attorney General of Alberta submits that the *GGPPA* is unconstitutional in its entirety.

PART III – ARGUMENT

A. The Residual Nature of the National Concern Power

22. The power to address a matter of national concern, like other POGG powers, is purely residual in nature. This is set out expressly in s. 91 of the *Constitution Act, 1867*, in granting the federal government legislative authority over "all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

23. This means that if subject matters or aspects of a matter clearly and comfortably fall within the enumerated provincial powers, and hence can be regulated by the provinces under their existing jurisdiction, they necessarily do not come within the residual POGG power. Indeed, as Professor Lysyk explained, the residual federal power may be more accurately called the "not coming within" power, rather than the "peace, order and good government" power, as it necessarily and only applies to matters that cannot be found to fall within provincial jurisdiction.[1]

24. Justice Beetz elaborated on this point on behalf of the majority in *Anti-Inflation*, by noting that matters of national concern involve "clear instances of distinct subject matters which *do not fall within any of the enumerated heads of s. 92* and which, by nature, are of national concern".[2]

25. Professor Lederman makes the same point in the following terms:

---

[1] K Lysyk, "The Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531, 538-543.
[2] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 ("***Anti-Inflation***"), 457 (emphasis added).

> I have complained by way of example of the sweeping character of "labour relations" as a single category and have said that it should in effect be treated as outside the distribution-of-powers system and broken down into several more particular parts. These parts are then each allotted, some one way and some the other, according to their particular relevance to some of the thirty-one specific federal categories and the fifteen specific provincial ones. But in breaking down one of these all-pervasive classes or subjects, we may find one or more of the resulting parts left over, so to speak. We may find that we have one or more of the several parts that do not have relevance to one of the thirty-one specific federal categories or the fifteen specific provincial categories. Now, with respect to these left-over parts, we are down to interpretative competition between the two residuary clauses. In these circumstances, the federal general power then embraces the left-over part or parts of inherent national significance or importance. The provincial residuary power in section 92(16) would likewise embrace any left-over part or parts of a merely local or private nature in the provinces.[3]

26. This point was also emphasized in *Crown Zellerbach*, where the Court stated that the national concern doctrine only captures matters that "have a singleness, distinctiveness and indivisibility *that clearly distinguishes it from matters of provincial concern*".[4]

27. It follows that the national concern power can only apply to subject matters that are narrow and discrete, and hence do not intrude heavily (or at all) into matters that could otherwise be regulated by the provinces. As Professor Lederman explained, it should be "very difficult" to find that a subject matter falls within the national concern power, as it can only be applied to a matter with an inherent or natural "unity that is *quite limited and particular* in its extent".[5]

28. The final characteristic of the federal national concern power is that matters falling within this power are necessarily subject to the *permanent, plenary and exclusive* jurisdiction of the federal government.[6] They are, *by definition*, not subject to overlapping or concurrent provincial jurisdiction over the same matter or matters.

29. This means that while provinces may be able to pass legislation incidentally affecting a matter of national concern, they cannot pass legislation for the purpose of addressing that matter, which by definition falls outside of provincial competence. Beetz J put it this way in *Anti-Inflation*:

---

[3] WR Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can Bar Rev 597 ("**Lederman**"), 612-613 (emphasis added).
[4] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 ("***Crown Zellerbach***"), 432 (emphasis added).
[5] Lederman, *supra*, 606-610.
[6] *Anti-Inflation, supra*, 443-444; *Crown Zellerbach, supra*, 433.

> Furthermore, all those powers would belong to Parliament permanently; only a constitutional amendment could reduce them. Finally, the power to regulate and control inflation as such would belong to Parliament to the exclusion of the Legislatures if, as is contended, that power were to vest in Parliament in the same manner as the power to control and regulate aeronautics or radio communication or the power to develop and conserve the national capital (…); the provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction.[7]

30. In a recent article dealing with the *GGPPA* references, Professor Newman explains why federal jurisdiction over matters of national concern is both exclusive and plenary, as follows:

> On this text itself, something that this clause encompasses cannot be within the classes of subjects within s. 92 or other sections enumerating provincial powers. Second, consistent with the subsidiarity principle undergirding the division of powers, the legal test for the national concern branch of POGG indicates that it applies only in contexts where a matter is single, distinctive, and indivisible, with an indivisible matter logically not being subject to divisible aspects…. If any matter is to be regulated under the national concern branch of POGG, based on the underlying constitutional text and the cases that have stated the law on the point, the matter must be indivisibly regulated by the federal government and is no longer subject to any provincial aspect.[8]

31. As can be seen, the fact that a subject matter of national concern comes within federal jurisdiction on an exclusive and plenary basis follows necessarily from the very nature of the POGG powers. If the matter or aspects of the matter fall within provincial jurisdiction, it is by definition not 'residual' and hence does not come within the national concern power.

32. These restrictions on the scope of the national concern power are essential to maintaining the underlying structure of the division of powers. As explained by Justice Beetz in *Anti-Inflation*:

> … [I]t could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject matters of national concern going beyond local provincial concern or interest and coming within the exclusive legislative authority of Parliament. It could equally be argued that older subjects such as the business of insurance or labour relations, which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever the business of insurance or labour have become national in scope. It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature

[7] *Anti-Inflation, supra*, 444 (emphasis added).
[8] D Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187, 196-197 (emphasis added).

> of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.[9]

33. Thus, the national concern power is only reconcilable with the division of powers if it is confined to its purely residual role. This residual power can only apply to inherently national, specific, narrow, and discrete matters that are "left over" once broad and pervasive subject matters are distributed according to the enumerated list of provincial and federal powers.

B. The Subject Matter of the *GGPPA*

34. With that background in place, the first step in the national concern analysis is the identification of the subject matter alleged to be a national concern. Significantly, and unlike in the present case, there was no fundamental dispute in the previous POGG cases regarding the subject matter over which the federal government was attempting to assert jurisdiction.

35. In the previous cases, the courts simply asked whether the essential subject matter being regulated by the federal legislation – such as "marine pollution", "toxic substances", "atomic energy", "aeronautics", "radiocommunications", or "inflation" – were matters that came within the national concern branch of the federal government's POGG power.

36. The courts focused on the essential subject matter being regulated because, in order to come within the residual national concern power, the matter must from its "*inherent*" or "*intrinsic*" nature meet the standards for matters of national concern.[10] As Professor Lederman explained:

> I said earlier that, in normal circumstances, leaving aside true emergencies, to qualify under the federal general power a new subject should genuinely need regulation at the national level, and should also have a natural unity that is quite limited and specific in its extent - a natural unity that can be given quite particular definition philosophically. Aviation meets this test. It was a new form of transportation with a natural industrial and technological unity necessarily nation-wide in scope so far as need for legislative action was concerned. Also, as a subject, aviation is quite limited and specific in extent, relatively speaking.[11]

37. Thus, in identifying the subject matter alleged to fall within the national concern doctrine, the courts look to whether there is a subject matter that has a *natural* and *inherent* unity and

---

[9] *Anti-Inflation*, *supra*, 445 (emphasis added).
[10] *Crown Zellerbach*, *supra*, 424, 428, 430-431 (emphasis added).
[11] Lederman, *supra*, 610 (emphasis added).

indivisibility, as well as an *inherently* national character that takes it outside of provincial concern.

38. In discussing the subject matter of the *GGPPA,* the Attorney General of Canada ("**AGC**") relies heavily on the role played by GHG emissions *generally* in causing global warming, which it correctly says affects all Canadians (as it affects all people globally).

39. For instance, the AGC submits that the relevant subject matter is inherently national because GHG emissions generally, "regardless of their origin, have extra-provincial and global impacts", and that the matter is single, distinct, and indivisible because GHG emissions generally "are a discrete and distinct form of air pollution".[12]

40. However, the AGC now accepts – as did all members of the Courts hearing the Ontario and Saskatchewan cases – that the regulation of GHG emissions is not and cannot be a matter that comes within the federal residual power. That is so for a number of fundamental reasons.

41. First, the regulation of the GHG emissions of the activities of persons and businesses within the province, through the regulation of wholly intraprovincial transactions, businesses, and industries, is clearly in relation to matters coming within the exclusive jurisdiction of the provinces. As Professors Hsu & Elliot have explained, this is "trite law", adding as follows:

> The industries that fall within provincial jurisdiction under this arrangement are numerous, and include many of the industries that emit large amounts of carbon into the atmosphere and are therefore good candidates for a cap-and-trade or intensity-based trading regime, such as oil and gas, manufacturing, mining, forestry, construction, and intraprovincial truck and bus lines. Moreover, the power of the provincial legislatures to regulate the business activities of those industries has been understood broadly by the courts. In particular, that power has been held to permit the regulation of those activities for a range of different purposes: to protect consumers from fraudulent dealings; to protect the health and safety of consumers; to establish quality standards; to ensure adequate supply; and to protect the economic and other interests of employees. It has also been held to permit their regulation for the purpose of protecting the environment.[13]

---

[12] Factum of the Attorney General of Canada, dated December 3, 2019 ("**AGC Factum**"), paras 80, 88.
[13] SL Hsu & R Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54 McGill LJ 463, 486-487. See also BP Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (2018) 41 MLJ 211 ("**Schwartz**"), 230-231; *Anti-Inflation, supra*, 441-442; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ("***SKCA Decision***"), paras 128-131, 339-342; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, paras 193, 215, 230, 237, Huscroft J.; *R. v. Comeau*, 2018 SCC 15 ("***Comeau***"), para 85.

42. In *Anti-Inflation*, it was precisely because the federal legislation sought to regulate such intraprovincial activities and entities – albeit in furtherance of a national inflation reduction objectives rather than national pollution reduction objectives – that the Court found that the federal legislation regulated matters coming within exclusive provincial jurisdiction.[14]

43. In addition, the entities most directly affected by the regulation of GHG emissions will be natural resource development and electricity producing industries situated wholly within a province. Section 92A(1) was added to the *Constitution Act* for the express purpose of confirming exclusive provincial jurisdiction over the regulation of these entities and their activities.

44. The AGC concedes that the *GGPPA* regulates matters falling within provincial jurisdiction, by asserting that the provinces can continue to regulate GHG emissions within the province, as long as they do so according to the federal government's preferred policies. Indeed, the AGC says that the *GGPPA* could achieve its objectives "without the federal pricing system operating in any jurisdiction in Canada"[15] – i.e., through the operation of provincial GHG pricing regimes alone.

45. The *GGPPA* is therefore premised on the existence of comprehensive provincial jurisdiction to regulate the matters regulated by the *GGPPA*. This confirms that the regulation of GHG emissions is not a residual matter that is "distinct" or separate from matters falling within provincial jurisdiction, as required to come within the national concern branch of POGG.

46. It also confirms that this is not a case, like *Crown Zellerbach*, where an inherently singular and indivisible matter comes entirely within exclusive federal jurisdiction because a "significant aspect" of the problem is "beyond provincial reach".[16] Rather, it is an attempt by Canada to dictate how the provinces should address matters that are *entirely within* provincial reach.

47. Second, the AGC's submission that the regulation of GHG emissions can be *shared* or *divided* between the different orders of government – with wholly intraprovincial regimes operating to the extent that the federal government approves of provincial policies – confirms that this matter is not inherently *indivisible*, much less a narrow and discrete matter that can be

[14] *Anti-Inflation*, *supra*, 441.
[15] AGC Factum, *supra*, paras 64, 89.
[16] *Contra* AGC Factum, *supra*, para 92.

separated from provincial jurisdiction entirely, as required to be a matter of national concern.

48. The AGC attempts to avoid this well-established constitutional limitation by trying to fit the regulation of GHG emissions within the "double aspect" doctrine; it argues that Parliament has jurisdiction over the "national aspects" of GHG emissions, while provinces retain jurisdiction over the provincial aspects of that same subject matter.[17]

49. That is not the case. The regulation of GHG emissions, like other pervasive forms of pollution or the environment more generally, is not a single subject matter with a double aspect; it is an aggregate of matters that are *already* divided between the levels of government.

50. The federal government can regulate GHG emissions through the proper exercise of its enumerated powers – such as over the criminal law or interprovincial works and undertakings. However, what the federal government cannot do is use the national concern power to *also* regulate the aspects of GHG emissions that fall exclusively within the enumerated provincial powers, such as the regulation of local commercial transactions and pricing, provincially regulated works, undertakings, and industries, and intraprovincial natural resources and electricity generation.

51. With respect, the argument that the national concern power can be used to alter this existing allocation of constitutional authority, empowering the federal government to both exercise its own exclusive powers *and* supervise or supplant the exercise of exclusive provincial powers, fundamentally misunderstands the national concern doctrine.

52. As explained in *Crown Zellerbach,* attempting to divide a matter of national concern into its federal and provincial aspects "would appear to contemplate a concurrent or overlapping federal jurisdiction", which is impossible under the national concern doctrine.[18] It is precisely "because of the *interrelatedness of the intra-provincial and extra-provincial aspects of the matter* that it requires a *single* or *uniform* legislative treatment". This gives the federal government permanent and exclusive jurisdiction over the *entire* indivisible matter, "including its intra-provincial aspects".[19]

53. By contrast, the *GGPPA* is expressly based on the creation of *overlapping* jurisdiction over the GHG emissions of intraprovincial activities and entities, with both the federal and provincial

[17] AGC Factum, *supra*, paras 77, 96, 112-117.
[18] *Crown Zellerbach*, *supra*, 433.
[19] *Crown Zellerbach*, *supra*, 434 (emphasis added).

regimes regulating the exact same activities and entities for the exact same purpose. This creates the very type of concurrent jurisdiction that is incompatible with the purposes and rationale of the national concern power.

54. Thus, while the regulation of GHG emissions is a matter of importance to people across the country (and, indeed, the world), it is neither a matter that is "distinct" or separate from matters regulated by the provinces, nor is it a "singular and indivisible" matter that, by its very nature, requires a single and exclusive federal regulator or uniform national regime.

55. Third, granting the federal government permanent, exclusive, and plenary jurisdiction over GHG emissions is clearly not reconcilable with the underlying division of powers, as it is not a narrow and discrete matter that is only marginally connected to matters of provincial jurisdiction.

56. To the contrary, as the majority of Saskatchewan Court of Appeal explained, "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".[20]

57. Therefore, the matter that is fundamentally alleged by the AGC to be of national significance or importance – the regulation of GHG emissions generally – does not come within federal jurisdiction under the national concern branch. Rather, like the reduction of inflation, the regulation of pollution more generally, or many other broad subjects that affect people across the country, it is an aggregate of matters – many of which fall within exclusive provincial jurisdiction – that can be divided and regulated according to the underlying and existing division of powers.

C. Artificial Subject Matters

58. Following the lead of the courts below, the AGC submits that there is a way to avoid the straightforward application of the national concern branch jurisprudence described above – namely, by manipulating the description of the subject matter asserted to be of national concern.

59. Having abandoned its previous descriptions of the alleged matter of national concern –

[20] *SKCA Decision*, *supra,* para 128. See also A Bélanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21 ("**Bélanger**"), 28.

"GHG emissions" and "*cumulative* GHG emissions" – the AGC now submits that the matter of national concern is "establishing minimum national standards integral to reducing nationwide GHG emissions". Some interveners, such as the Attorney General of BC, have proposed other subject matter descriptions, such as "minimum national pricing standards", or some similar variation. These artificial subject matters cannot be accepted as matters of national concern.

60. In reality, the AGC's alleged subject matter is not in substance different from the regulation of GHG emissions generally. Adding that the regulation of GHG emissions is to be done by "national standards" to achieve "nationwide" objectives, which is necessarily the case for all federal legislation, does not change the character or substance of the essential subject matter being regulated by those national standards: that is, GHG emissions.

61. These artificial subject matters therefore constitute a transparent attempt to circumvent the substance of the issue. The outcome of the *Anti-Inflation* case would not have been different had the subject matter of the statute at issue been described, for instance, as "the establishment of national minimum standards to control inflation by means of national price and wage controls that are integral to reducing nationwide inflation in accordance with national policy targets".

62. The fundamental question is whether the essential subject matter *being regulated by those national standards* – GHG emissions – is an inherently narrow and indivisible matter that clearly extends beyond the reach of provincial powers. As set out above, that strict standard is not and cannot be met in relation to the regulation of GHG emissions, by "national standards" or otherwise.

63. Indeed, by creating a regime in which the provinces continue to exercise their jurisdiction subject to "national *minimum* standards", the AGC acknowledges that the *GGPPA* attempts to regulate matters that come within the classes of subjects assigned exclusively to the jurisdiction of the provinces. As such, it clearly cannot fall within the residual national concern branch.

64. In addition, the artificially narrowed subject matters now being proposed face a further difficulty: that adopting certain policies or policy standards, as determined by federal cabinet from time to time, is not itself a matter of national importance or significance.

65. What is important to the country as a whole is that GHG emissions are addressed by all orders of government within their respective jurisdiction, not that all provinces have adopted the

same or similar policies in order to achieve this objective, much less that they all do so according to whatever policy standards or requirements the federal government deems best from time to time.

66. Indeed, giving the federal government a supervisory power over the standards for GHG emissions policies in the provinces is as likely to *inhibit* the objective of reducing GHG emissions as it is to advance it. That is because attempting to impose Canada's preferred policy solution may both prevent provinces from adopting measures that they consider most effective in their unique circumstances, as well as prevent them from serving as laboratories of the federation, benefitting the nation as a whole by discovering new and better policy means to reduce GHG emissions.[21]

67. Therefore, these artificial subject matters not only fail at the second and third stages of the *Crown Zellerbach* analysis, for the same reasons as the regulation of "GHG emissions" generally, but also fail at the first stage of the analysis, as not being a matter of national importance at all.

68. Finally, as Professor Leclair explains, adopting an artificially narrow subject matter is not protective of provincial jurisdiction, as the AGC suggests;[22] rather, it merely *disguises* the true impact on provincial jurisdiction, which is to transfer broad swaths of it to the federal government:

> The conceptual indivisibility test must be applied using the approach of Justice Beetz in *Anti- Inflation*; that is, to the matter said to be of national interest (tobacco use), and not to the legislative means employed to ensure its regulation (control of advertising). In other words, the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its " ... exclusive jurisdiction of a plenary nature to legislate in relation to that matter", Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt.[23] [emphasis added]

69. That is exactly what Canada is attempting to do here.[24] It claims to only be regulating a limited aspect of GHG emissions by imposing a particular policy, but accepting its argument would necessarily grant Canada supervisory jurisdiction over all provincial GHG emissions policies, on

[21] Bélanger, *supra*, 25-29; PW Hogg & WK Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate About Canadian Federalism" (2005) 38:2 UBC L Rev 329 ("**Hogg & Wright**"), 343; K Lysyk, "Reshaping Canadian Federalism" (1979) 13 UBC L Rev 1, 7-9.
[22] AGC Factum, *supra*, para 118.
[23] J LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38 UBC L Rev 353, 363.
[24] See *SKCA Decision, supra,* paras 466-468, per Ottenbreit & Caldwell JJA.

the same basic (but flawed) reasoning – that GHG emissions are a matter of national importance, and Canada knows best what policies the provinces should adopt to deal with this matter.

D. Harm to Provincial Jurisdiction

70. Leaving aside other legislation that could be enacted pursuant to a new federal head of power to set national standards for provincial GHG emissions policies, the *GGPPA* itself intrudes heavily into provincial jurisdiction, in at least four ways.

71. First, it is not feasible to have two separate carbon pricing regimes applying to the intraprovincial activities and entities within a province. Ultimately, the federal standards will govern, whatever they may be from time to time. This effectively deprives the provinces of their jurisdiction to adopt the GHG reduction policies, including carbon pricing mechanisms, of their choosing, in light of their unique economic and environmental circumstances.

72. Second, even for provinces (like Alberta) that have chosen carbon pricing as part of their suite of policy options to reduce GHG emissions, the *GGPPA* dictates both the type of provincial carbon pricing policies the provinces can adopt, and the standards for those policies. For instance, as AGC concedes, the application of the current federal policy standards takes one of the most popular types of carbon pricing – a cap-and-trade system – entirely off the table for Alberta.[25] A more thorough interference with provincial jurisdiction is difficult to imagine.

73. Third, the *GGPPA* does not specify or limit the scope of federal intrusion into provincial policy making in relation to the pricing of GHG emissions. Rather, it authorizes the federal government to impose its preferred policy on the provinces entirely at its discretion, or as "the Governor in Council considers appropriate".

74. Notably, the *GGPPA* does not set fixed pricing standards for the federal 'backstop' plan, nor does it set out what the provinces must do to meet federal standards and thereby avoid having their jurisdiction taken over by the federal government. Those critical policy questions are left entirely to the discretion of federal cabinet, which is why this legislation is not fundamentally about ensuring particular results in relation to GHG emissions, but rather about shifting *control*

[25] Affidavit of John Moffet (Sept. 30, 2019), para 89 [Alberta's Electronic Record ("**AER**"), Record of the Attorney General of Canada ("**CR**"), Vol 1, R33].

and jurisdiction over those matters from the provinces to the federal government.

75. In short, the *GGPPA* leaves as much or as little jurisdiction for the provinces as the federal government desires at any given moment. This gives the federal government unilateral control over the scope of provincial jurisdiction over intraprovincial GHG emissions, which the federal government can expand or contract at will.

76. Fourth, the *GGPPA* interferes with other provincial policies, even when it is not taking over the entire policy field of carbon pricing. That is because GHG emission reductions policies interact in complex ways. For instance, the application of the *GGPPA* backstop plan could undermine Alberta's policies aimed at reducing particularly harmful methane emissions, as well as Alberta's more effective policies for reducing GHG emissions from the electricity sector.[26]

77. The result of the *GGPPA* is that some provinces – like Quebec and British Columbia – currently have the full range of legislative options available to them to address intraprovincial GHG emissions, while Alberta is deprived of the same powers, merely because the federal government does not approve of Alberta's policy approach to the reduction of GHG emissions.

78. And while some provinces currently retain their jurisdiction over these matters, because the federal government approves of how they have exercised their jurisdiction, that could change tomorrow. The federal government could revise its mandated policy standards or impose its preferred backstop policy in *all* of the provinces. And according to the AGC, it could also set *other* "national standards" in relation to other GHG emissions policies, wherever it believed that the federal government could do a better job at exercising provincial jurisdiction than the provinces.

79. In summary, the consequences of upholding the *GGPPA* are significant. While the *GGPPA* alone constitutes a far-reaching appropriation of provincial powers, granting a permanent and exclusive federal power to set "national standards" for provincial GHG emissions policies would allow the federal government to intrude much further into provincial jurisdiction, at its discretion. And critically, this result can only be achieved by fundamentally altering the division of powers

[26] See e.g. Affidavit of Robert Savage (Aug. 2, 2019) ("**Savage Affidavit**"), paras 106-116, 271-274 [AER, Record of the Attorney General of Alberta ("**AR**"), Vol 1, A16-A18, A50-51]; Transcript of Cross-Examination on Affidavit of Robert Savage (Oct. 21, 2019), p. 164 (line 24) to 167 (line 8) [AER].

to allow the federal government to exercise supervisory power over areas of provincial jurisdiction.

E. The "Provincial Inability" Argument

80. Many provincial laws (or the absence thereof) will have some effect or impacts outside of the province. The failure to adopt inflation reduction polices may impact inflation in other jurisdictions; the intraprovincial regulation of products and industries may impact the safety or quality of goods used in other jurisdictions; creating a more attractive investment climate in one province may impact the investment or jobs available in other provinces; and so on.

81. But the mere existence of such extra-provincial effects does not confer jurisdiction on the federal government with respect to matters falling within provincial jurisdiction, as the AGC submits. Indeed, the Court in *Crown Zellerbach* specifically rejected the idea that the mere "possibility or likelihood of the movement of pollutants across" borders is sufficient to demonstrate that the subject matter is indivisible or distinct from matters falling within provincial jurisdiction.[27]

82. Rather, extra-provincial impacts may, in some circumstances, be an *indicia* of, or *relevant* to, whether the matter is singular, indivisible, and distinct from matters of provincial jurisdiction; it may assist with that analysis, but is not the analysis itself, as the AGC essentially argues.[28]

83. Properly understood, a provincial inability to regulate the matter in question does not depend on the mere existence of "extra-provincial" impacts. Rather, a provincial inability is the corollary to the fact that the single, indivisible matter is subject to exclusive federal regulation. It is because the regulation of aspects of an *indivisible* subject matter necessarily falls *outside* of the jurisdiction of the provinces that the provinces cannot regulate it, and therefore the *entire indivisible matter* requires a single national regulator.

84. That is clearly not the case here - the *GGPPA* specifically contemplates continued provincial regulation of the emissions of intraprovincial activities and entities, but subjects that regulation to Canada's preferred policy standards, whatever they may be from time to time.

85. In terms of the alleged extra-provincial impacts, the AGC points to no evidence

[27] *Crown Zellerbach, supra,* 435-438.
[28] AGC Factum, *supra,* para 70.

demonstrating that any small difference between the anticipated GHG reductions under, for instance, Alberta's carbon pricing plan and Canada's proposed backstop carbon pricing plan will have any *tangible* impacts on other provinces, given the fact that neither Alberta nor Canada alone can prevent, or even tangibly impact, an inherently global problem like climate change.

86. Nor has the AGC tried to prove that any marginal discrepancy in anticipated GHG reductions could not be compensated for by additional provincial policies, such as additional regulations or improvements in technology.[29] As such, the AGC can point to no evidence that the actual impacts of global warming on certain provinces would be different if the federal government had permanent and exclusive control over provincial policies in this area.

87. In relation to the alleged extra-provincial harm caused by the phenomenon of "carbon leakage" between the provinces, the *GGPPA* does not require a single or uniform carbon price,[30] as would be necessary to eliminate the theoretical possibility of interprovincial carbon leakage.

88. In any event, there is no tangible evidence that the decision of one province to not adopt carbon pricing – much less the failure of a province to adopt the precise form and stringency of carbon pricing dictated by Canada from time to time – will actually harm any other province. Despite decades of experience with different carbon pricing regimes across the country, the only concrete evidence pointed to by Canada and BC are the alleged impacts of BC's carbon pricing policies on BC's cement industry. However, that evidence deals with the impact of *international* carbon leakage, not interprovincial carbon leakage.[31]

89. Moreover, the evidence – including the AGC's own expert evidence – suggests that carbon leakage generally is not a significant problem in most of the country, and that provincial "governments can design the carbon pricing policy to address these challenges".[32] A province's

---

[29] See Schwartz, *supra*, 225-226, 274-275. See also Canada's Ecofiscal Commission, "Bridging the Gap: Real Options for Meeting Canada 2030 GHG Target" (November 2019) [AER].
[30] Savage Affidavit, *supra*, paras 228-231 [AER, AR, Vol 1, A40]; see also G Bishop, "Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing" (December 5, 2019) *CD Howe Institute* (online), 15-16.
[31] See AGC Factum, *supra*, para 105, fn 126; see also Affidavit of Olivia Lindokken (Nov. 1, 2019), Ex. 1, 225-250 [AER, Record of the Attorney General of British Columbia ("**BCR**"), BC250-BC275].
[32] Expert Report of Nicholas Rivers, Ex. E, 16-17 [AER, CR, Vol 4, R1223-1224]; Savage Affidavit, *supra*, Ex. GGG, ii, 1, 15-18 [AER, AR, Vol 5, A1838, A1840, A1854-A1857].

decision to design its own carbon pricing policies without accounting for competitiveness impacts does not give the federal government supervisory jurisdiction over the policies in other provinces, any more than a province's creation of an unattractive investment climate permits the government to impose similar policies across the country in areas of provincial jurisdiction.

90. As such, even if the mere existence of extra-provincial impacts gave the federal government supervisory jurisdiction – which it does not – there is no evidence in this case of any tangible or concrete extra-provincial impacts that would be addressed by the *GGPPA*.

F. Canada's Preferred Policies

91. The AGC essentially submits that because it has chosen a policy that it considers the most economically efficient way to address the problem of GHG emissions, it should therefore be able to force the provinces to either adopt Canada's preferred policy within their jurisdiction, or have that policy imposed upon them by Canada.

92. The fact that Canada believes it has adopted preferable policy measures to address a given issue does not give it the jurisdiction to impose its preferred policy in areas of provincial jurisdiction, any more than a province's belief that it has more effective or efficient policies gives the province the power to impose that solution nationwide.

93. As Justice Slatter succinctly observed, in the course of deciding a preliminary motion in the Alberta reference proceeding, "[j]urisdiction does not transfer back and forth between the federal government and the provinces depending on which level of government has come up with the most elegant solution to a problem".[33]

94. Moreover, this approach would necessarily involve the courts in trying to determine on a case-by-case basis which order of government, at any given time, had a preferable policy approach to address a particular issue, as a matter of fact. Unlike in a temporary emergency situation, a mere "rational basis" would not be enough, because the national concern power confers on the federal government what amounts to a *permanent*, *exclusive* and *plenary* federal head of power.

95. Thus, engaging in this type of comparative policy analysis is not only an inherently

[33] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 361, para 15.

unstable and impermissible basis upon which to allocate the division of powers, but it would embroil the courts in complex and intractable policy disputes that they are not able to resolve.

96. Finally, relying on the alleged 'necessity' of a particular policy approach, which has by no means been proven in this case, would further undermine the division of powers by encouraging the federal government to create "national minimum standards" in other areas of provincial jurisdiction, wherever it believed that it had a policy that all provinces should adopt.

G. Conclusion

97. As this Court held in *Comeau*, Canada is built upon the principle of ensuring "regional diversity within a single nation".[34] A constitutional order that ensures room for the vast amount of regional diversity across the country reduces the strains on the unity of the federation that can be caused when pervasive and important areas of governance are taken away from provincial governments and replaced with dictation from the federal government.

98. The risk of this occurring is always present, given the doctrine of paramountcy, which provides that even where the expressly enumerated powers permit the concurrent application federal and provincial laws addressing aspects of the same matter, ultimately the federal government has the final say.

99. However, there is an even greater danger to provincial jurisdiction in the context of the national concern power, unless it is strictly confined to its residual role in the constitutional order. Transforming this purely residual federal power into supervisory federal power over areas of provincial jurisdiction necessarily takes important and exclusive powers away from the provinces – as here, over the regulation of the emissions of wholly intraprovincial activities and entities.

100. The majority decisions of the Courts of Appeal below result in a fundamental alteration to the existing division of powers in favour of the federal government. Once the tight restrictions on the residual power break down, as would be necessary to uphold the *GGPPA*, "a fundamental feature of the Constitution, its federal nature… would disappear not gradually but rapidly".[35]

---

[34] *Comeau, supra,* para 85.
[35] *Anti-Inflation, supra,* 445.

101. That is why it is so critical to carefully guard against this type of federal annexation of provincial powers through the use of the national concern doctrine, and why the courts have been so careful to restrict the scope of this purely residual power.

102. Undermining these restrictions would not only subordinate areas of provincial jurisdiction to federal control, contrary to a fundamental principle of our constitutional order; it could also exacerbate the strains on the national union. As Professors Hogg and Wright explain, in response to criticism of the Privy Council's jurisprudence protecting areas of provincial jurisdiction:

> [T]he Privy Council somehow managed to perceive some part of the federal-provincial forces at work in Canada. And so, while it appears to make little sense, in a highly integrated economy, to regulate labour relations and business primarily at the provincial level, the reality is that in a country like Canada, efficiency is far from the only value that must be taken into account. In "Reshaping Canadian Federalism", Lysyk asked whether "... the jurisprudence passed on to us by the Privy Council, so roundly condemned as ignorant or perverse, may in fact reflected an appreciation that an attempt to impose complete domination from have the centre would have imposed strains on the Canadian federation which, quite simply, would have proved unacceptable". It may be a stretch to suggest that the law lords actually had such an appreciation, but we do believe that Pierre Trudeau was correct when he said, "... if the law lords had not leaned [in the direction of the provinces], Quebec separatism might not be a threat today: it might be an accomplished fact."[36]

103. This link between promoting national unity and ensuring provincial autonomy within their exclusive powers is well recognized – and Alberta submits that if the federal government's national concern power is applied as expansively as the AGC seeks in this case, it will seriously disrupt "the careful and complex balance of interests captured in constitutional texts".[37]

PART IV – COSTS

104. As an intervener as of right, Alberta is neither eligible for costs, nor liable for costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF JANUARY, 2020, BY

Peter A. Gall, Q.C. Benjamin J. Oliphant Steven A.A. Dollansky L. Christine Enns, Q.C.

Counsel for the Attorney General of Alberta

---

[36] Hogg & Wright, *supra*, 345-346.

[37] *Comeau, supra*, para 82.

PART V - TABLE OF AUTHORITIES

Lysyk, K., "Reshaping Canadian Federalism" (1979) 13 UBC L Rev 1 [BAAB, Tab 2]	66
Newman, D., "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187 [BAAB, Tab 3]	30
Schwartz, B.P., "The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (2018) 41 MLJ 211	41, 86
Legislation	
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186	41, 93