**Court File No.: 39116**

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

**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 ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S. 26**

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

Appellant

- and -

**ATTORNEY GENERAL OF ALBERTA**

Respondent

- and -

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## PART I – OVERVIEW AND FACTS

1. In this appeal, the Attorney General of British Columbia ("**AGBC**") argues that, through a manipulation of the pith and substance and double aspect doctrines, the *Greenhouse Gas Pollution Pricing Act* ("***GGPPA***")[1] can be squeezed into the national concern branch of the federal government's residual Peace, Order and Good Government ("**POGG**") power, with minimal impact on the jurisdiction of the provinces or the structure of the federation.

2. The majority and concurring opinions of the Alberta Court of Appeal comprehensively refute this contention.[2] As they explain, upholding the *GGPPA* under the federal government's residual POGG power would "forever alter the constitutional balance that exists between the heads of power allotted to Parliament and the provincial Legislature in the federal Canadian state, and thus is *ultra vires*" (¶21). The Attorney General of Alberta ("**AG Alberta**") submits that this conclusion should be confirmed on appeal, and the *GGPPA* should be declared unconstitutional.[3]

## PART II – ISSUES ON APPEAL

3. The AGBC, along with the Attorney General of Canada ("**AG Canada**"), relies on the federal POGG power as the sole basis for the constitutionality of the *GGPPA*. As such, the issue on this appeal is whether the *GGPPA* comes within the residual POGG power.

## PART III – STATEMENT OF ARGUMENT

### A. The Alberta Court of Appeal Decisions

4. The opinions of Fraser C.J.A. for the majority of Alberta Court of Appeal ("**Majority**"), and the concurring opinion of Wakeling J.A. ("**Concurrence**"), make three fundamental points. First, they explain why the *GGPPA* cannot be shoehorned into the national concern branch of POGG without distorting the balance of powers under the Constitution. Second, they demonstrate the significant and harmful impact on provincial jurisdiction, and hence the balance of powers, occasioned by the *GGPPA*. Third, they dispel the notion that it is necessary to manipulate the

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[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 ("***GGPPA***").
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (in-text citations throughout) [Alberta's Electronic Record, SCC Files 38663 & 38781 ("**AER**"), Vol 1, at 1-273].
[3] This factum supplements the factum filed by AG Alberta as an intervener in the companion appeals (SCC Files 38663 & 38781), dated January 27, 2020 ("**AGA Intervener Factum"**).

national concern doctrine to enable Canada as a nation to effectively reduce greenhouse gas ("**GHG**") emissions and combat climate change.

5. And contrary to the premise of Feehan J.A.'s dissenting opinion ("**Dissent**"), the *GGPPA* does give the federal government concurrent jurisdiction over matters coming within the jurisdiction of the provinces, which is fundamentally inconsistent with the residual nature of the national concern power and the balance of powers more generally. With respect, a contrived application of the pith and substance and double aspects doctrines cannot hide this essential fact.

### *i. The GGPPA Fundamentally Distorts the Division of Powers*

6. As the Majority and Concurrence explain, upholding the *GGPPA* would result in a fundamental distortion of the division of powers in our federal system because it provides the federal government with a supervisory power over how the provinces' exercise their jurisdiction, which is incompatible with the residual nature of the POGG power.

7. No party or court has disputed the extensive powers granted to the provinces to regulate GHG emissions, and in particular, to do so through various forms of carbon pricing (¶¶262-283; ¶385). The *GGPPA* provides the federal government with a supervisory power over how the provinces exercise these provincial powers. The provinces must comply with the requirements established by the federal government under the *GGPPA*, failing which the federal requirements will be imposed in the jurisdictions of the non-conforming provinces.

8. Calling these requirements "minimum national pricing standards", or any variation thereof, does not change the reality that the *GGPPA* gives the federal government control, and hence a concurrent and overriding jurisdiction, over how the provinces exercise their powers with respect to the regulation of GHG emissions (¶¶253-256).

9. Therefore, as the Majority and Concurrence explain, regulating GHG emissions is the ultimate purpose and effect of the *GGPPA*, and hence its pith and substance (¶¶204-256; ¶¶777-806). There is no legitimate way that this supervisory control over GHG emissions by the federal government can be distinguished from provincial regulation of these same emissions from the same sources. The *GGPPA* simply overrides the provincial regulation of GHG emissions, with federal regulations confined to the provinces that do not fall into line.

10. The Dissent held that by narrowly defining the pith and substance of the *GGPPA* as "to effect behavioral change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions" (¶943), the double aspect doctrine can then be applied to enable the federal government to use its residual power to support the *GGPPA*, in the same way that this doctrine is applied to the federal government's express powers (¶¶988-998, ¶¶1032-1036).

11. But the *GGPPA* does not regulate a federal "aspect" that is distinct from the provincial aspects in relation to the regulation of GHG emissions, as required by the double aspect doctrine. As the Majority explained, "even if the double aspect doctrine could in theory operate, it would not apply here regardless since both levels of government would be regulating GHG emissions for the same purpose and in the same aspect" (¶209).

12. More fundamentally, the federal residual power is not like its expressly enumerated powers (¶¶663-669). As the Constitutional text makes clear, while the enumerated federal powers have independent content, the residual power is just that: *residual* (¶157; ¶664). It can only be exercised in relation to matters "*not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*".[4] This limitation was clearly intended to preclude the use of the federal residual power to control or usurp the exercise of enumerated provincial powers.

13. That is why the Court has not previously treated the residual power in the same way as the express powers of the federal government. It has correctly recognized that permitting the POGG power to cover matters falling within provincial jurisdiction would result in the improper expansion of federal power, at a considerable cost to the exclusive jurisdiction of the provinces and hence to the division and balance of powers in our federal system (¶¶175-177; 749-750).

14. The Majority and Concurrence each offer thoughtful, albeit slightly different, interpretative approaches designed to safeguard this foundational limitation on the federal government's residual power. However, the objective of their approaches is the same: to confine the residual power, consistent with the Constitutional text, previous jurisprudence, and our federal system, so that it does not interfere with the exercise of exclusive provincial powers.

[4] *The Constitution Act, 1867*, s. 91.

15. It is difficult to imagine something more harmful to the nature of our federal system than requiring the provinces to go to the federal government, cap-in-hand, for permission to exercise their enumerated powers. It is not an exaggeration to say that giving the federal government this overriding authority upends the fundamental premise of confederation: that within their respective jurisdictions, the federal and provincial governments are equally sovereign (¶11; ¶531).

### *ii. The* GGPPA *Seriously Impacts Provincial Jurisdiction*

16. The Majority and Concurrence explain the wide ranging extent of the supervisory power that the *GGPPA* confers on the federal government, and the impact it has on provincial jurisdiction, both in terms of constraining the ability of the provinces to adopt their chosen policies within their jurisdiction, and in terms of the direct, practical interference with existing provincial policies.

17. The power to regulate GHG emissions "is so pervasive and all-encompassing" that granting it exclusively to the federal government under the residual power "would render many enumerated provincial powers meaningless" (¶296). As the Majority notes, the *GGPPA* provides the federal government with broad discretion to intrude upon these enumerated provincial powers:

> But the *Act* does far more than levy charges on certain emissions under Parts 1 and 2 of the *Act*. The Executive is given large and liberal discretionary powers vis à vis the existing scheme. Not only are there no limits on what can be covered, there are no limits on "price stringency" either, meaning that, under the *Act*, this concept is open-ended and entirely subjective. And since a price can be attached to anything, the Executive is also effectively given broad and pervasive discretion to take *whatever other steps the Executive decides should be taken to mitigate climate change*.
>
> In no way does the *Act* constrain the provincial areas of jurisdiction into which Parliament and the Executive may intrude, quite apart from those it has already entered. Indeed, given the degree of discretion in the *Act*, the Executive can authorize additional and different pricing measures for more and more industries and institutions and also for virtually all aspects of daily life consistent with the Preamble and body of the *Act*. Nor, to repeat, would Parliament be limited to this *Act* if the validity of this *Act* were upheld. (¶¶221-222; see also ¶246) [emphasis added]

18. As a result, the *GGPPA* "effectively deprives the provinces of their right to balance environmental concerns with economic sustainability" under s. 92A, and it intrudes deeply into the provinces' jurisdiction over property and civil rights, amongst other heads of power (¶328, ¶333). If the *GGPPA* is upheld, "the constitutional foundation for provincial governments is badly damaged and their future as an important level of government is in jeopardy" (¶349).

19. The Dissent is based on the incorrect premise that the establishment of so-called minimum pricing standards leaves ample room for the provinces to adopt their own GHG emission measures to meet their individual needs and circumstances (¶¶999-1009). That is not so.

20. The scope of the *GGPPA* encompasses virtually every activity within the provinces (¶¶221-251, ¶296, ¶349; ¶¶787-806, ¶¶845-849). It is not confined to a discrete and narrow subject matter, such as aeronautics or marine pollution, that does not come within provincial jurisdiction at all, and hence comes within the residual federal power without impacting enumerated provincial powers. Rather, the *GGPPA* places significant constraints on the ability of the provinces to choose the policy options that work best in their unique circumstances. And if upheld, it will authorize even deeper incursions into provincial jurisdiction in the future.

21. In addition to the serious impact of depriving the provinces of their entitlement to adopt the policies of their choosing within their own jurisdiction (¶¶262-282, ¶311, ¶321, ¶331), the significant practical impact on provincial powers of the *GGPPA* in its present form is established by the evidence in this case. As the Majority explained, noting in particular the interference with Alberta's policy to reduce methane emissions:

> One example only. Imposing a demand side carbon price under Part 1 of the Act contradicts Alberta's policy choice to have approximately 28,000 small facilities [Small Facilities], including single well oil production sites, focus their GHG reduction efforts on reducing methane emissions. The Methane Regulation exempted Small Facilities from its retail carbon tax until 2023 to assist them while they invested in actions to reduce methane emissions.205 There has been significant uptake of this program, which has resulted in over 19,000 device conversions since 2016 and an estimated 1.6 Mt of GHG emission reductions in 2019. But Part 1 of the Act imposed on January 1, 2020 does not exempt these Small Facilities. Thus, they are now subject to both Part 1 and the Methane Regulation. That means that additional costs have now been imposed on these Small Facilities which, according to Alberta, will slow or halt progress on methane emission reduction projects. (¶329; see also ¶¶327-337)

22. The Majority notes that this is just one example – there are others (AGA Intervener Factum, ¶¶71-76), and there will be far more in the future if the *GGPPA* is upheld. Moreover, this issue is not unique to Alberta, but is confirmed by the experience of other provinces, as well.[5]

[5] See e.g. Bryan P. Schwartz, "The Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals" (2018) 41 MLJ 211, at 275.

23. While all provinces have had their jurisdiction curtailed by the enactment of the *GGPPA*, some provinces – like BC and Quebec – have not yet had their chosen policies directly impacted by the *GGPPA*, because they have adopted measures that happen to meet the *current* federal standards. However, neither the federal nor the provincial policies are cast in stone, and there is no reason why their respective policies will not come into conflict in the future if the federal government is granted a supervisory power over how the provinces exercise their jurisdiction.

24. In short, the power to impose compulsory standards on the provinces in relation to GHG emissions significantly restricts the ability of the provinces to decide for themselves how best to deal with the GHG emissions through the exercise of their own powers, both now and in the future. That is, by any measure, a very serious impact on provincial jurisdiction.

### *iii. The GGPPA is Not Necessary*

25. The Majority and Concurrence dispel the belief that the federal government must have the power to supervise how the provinces deal with GHG emissions in order for Canada, as a whole, to deal effectively with GHG emissions.

26. All provinces are acting within their own jurisdiction to reduce GHG emissions (¶1, ¶¶93-113, ¶295; ¶310; ¶353, ¶¶453-515), and there is no basis to believe that giving the federal government supervisory control over how they exercise their powers will lead to better overall outcomes in terms of national (or global) emissions. In fact, there is reason to believe the opposite, as Professor Bélanger explains:

> Much is to be gained from taking advantage of the diversity of political solutions developed across Canada, rather than impose a national policy, which would inevitably produce friction given the vast number of divergent interests within the federation. Until now, the intergovernmental conflict surrounding adherence to the Kyoto Protocol and the conditions for its implementation have dominated too much of the Canadian political debate on climate change. It is preferable to use all of the resources available to develop and test various formulas in seeking the best possible combination of public policies based on different local and regional realities. Instead of a centralized approach, the federal government should work in partnership with the provinces to undertake activities to complement provincial initiatives, thereby maximizing the impact of environmental action.
>
> New strategies must be adopted to face new challenges. To address increasingly urgent environmental problems, the federal government and its supporters must set aside their centralist reflexes and encourage the provinces to continue experimenting. Ottawa must,

> at the same time, fulfill its environmental responsibilities in its own fields of jurisdiction, for the greatest benefit of both federalism and the environment.[6]

27. Also, there is no need for national standards in order to prevent harm to other provinces. As the Majority explains, the global impact of climate changes is not disputed, but there is no causal connection between activity or inactivity in one province and harm from climate change in another:

> [T]here is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. The scale and proportionality of GHG emissions differ from the immediacy of harm from a toxic chemical. The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries. (¶324; see also ¶757, ¶¶851-852)

28. This fact does not relieve any jurisdiction (whether within Canada or around the world) from the obligation to reduce emissions within their own borders. However, it shows that the purported analogy between provincial actions with an immediate and tangible impact on other provinces – such as toxic waste flowing directly from one province to the other – and the interprovincial impacts of one province's GHG emissions, is simply inaccurate.

29. Nor is it the case that the policies of the provinces who have adopted carbon pricing will be undermined, through carbon leakage or otherwise, if all provinces do not adopt the federal government's approach. As the Majority explains, "Canada asserted its choice would work best, it did not prove that variation in provincial approaches would actually jeopardize the operation of the *Act* in different parts of the country" (¶323).

30. Indeed, there is no evidence of *interprovincial* carbon leakage in the record at all, despite a decade of experience with differing carbon pricing policies across the country (AGA Intervener Factum, ¶88). The real concern is *international* carbon leakage (¶331), which minimum national pricing standards does not address, and may even exacerbate if the policy standards fail to account for regional differences.[7]

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[6] See Alexis Bélanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21 ("**Bélanger**"), at 29.

[7] See AER, Record of the Attorney General of Alberta ("**AR**"), Vol 1, A33-35 (¶¶219-220); Vol 5, A1818-1820; Vol 7, A2646-A2648.

31. Even if it can be assumed (without evidence) that interprovincial carbon leakage is occurring in Canada, the expert evidence and reports in this case demonstrate that there are ways that carbon leakage can be significantly mitigated by the provinces themselves through the design of provincial regulatory measures (AGA Intervener Factum, ¶89). This is a matter that each province is best placed to address given their unique emissions and industry profiles (¶330, ¶334).[8]

32. Finally, competitive advantages can arise from any and all differences in individual provincial laws relating to socio-economic matters, and these advantages may well have some impact on what goes on in other provinces, such as their ability to attract and retain investment and skilled workers. This type of impact is not a valid basis for establishing supervisory federal jurisdiction over how provinces exercise their own jurisdiction (¶115, ¶314; see also AGA Intervener Factum, ¶¶206-209).

### *iv. Conclusion regarding the Alberta Court of Appeal Decision*

33. The federal government thinks it has the best GHG reduction policies, and therefore that it should be able to force the provinces to adopt them. But this is not a valid or legitimate basis for conferring federal supervisory jurisdiction over the exercise of exclusive provincial powers (¶281, ¶291, ¶310, ¶¶320-321). Under our federal system, the provinces have the right to regulate GHG emissions within their jurisdiction in ways that they believe best meets their unique needs and circumstances (¶311, ¶331).

34. The federal government does not have a monopoly on sound policy judgment, and in any event, its "effort to co-opt the provinces' jurisdiction in pursuit of the federal government's preferred policy choices is fundamentally inconsistent with the national concern doctrine" (¶291).

35. If the federal government cannot implement its desired emissions measures through the valid exercise of its enumerated powers, it cannot force these measures on the provinces. Rather, it must obtain the agreement of the provinces to adopt these measures through negotiation, cooperation and compromise. That is how our federal system is intended to operate.

[8] AER, AR, Vol 1, A44 (¶246); Vol 7, A2651.

## B. Response to AGBC's Argument

### *i. Manipulation of the Pith and Substance and Double Aspect Doctrines*

36. AGBC and AG Canada do not seek to support the *GGPPA* under any of the federal government's enumerated powers. Instead, they say that the *GGPPA* is a valid exercise of the federal government's residual POGG power under the national concern branch. [9]

37. The preamble of s. 91 states that Parliament is empowered "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".[10]

38. To be a valid exercise of the federal residual power, the *GGPPA* must, as stated in the preamble to s. 91, be in relation to a matter that does not come within provincial jurisdiction. However, as the Majority explains, "the regulation of GHG emissions and any variation on this matter falls within the heads of power assigned to the provinces under ss. 92A, 92(10), 92(13) and also 109 of the Constitution" (¶20; see also ¶¶262-280; ¶¶807-818).

39. Thus, if the subject matter of the *GGPPA* is regulating GHG emissions, the *GGPPA* would not be a valid exercise of the federal residual power. This was expressly acknowledged by the majority in the Saskatchewan reference case (¶¶833-834), and is implicitly accepted by the AGBC and AG Canada, as well as the majority in the Ontario case, in their efforts to artificially confine the subject matter of the *GGPPA*.

40. In particular, AGBC characterizes the subject matter of the *GGPPA* as "establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction" (AGBC Factum, ¶2). It says that the pricing of GHG emissions requires a consistent national approach, and, therefore, because only the federal government can impose national pricing standards, this is not a matter within provincial jurisdiction.[11]

41. However, while the provinces cannot impose *national* pricing standards for GHG

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[9] Factum of the Attorney General of British Columbia, dated May 20, 2020 ("**AGBC Factum**").
[10] *The Constitution Act, 1867*, s. 91 (emphasis added).
[11] Intervener Factum of the Attorney General of British Columbia (SCC Files 38663 & 38781), dated January 27, 2020 ("**AGBC Intervener Factum**").

emissions, they clearly have the power to impose pricing standards in their regulation of GHG emissions from entities and activities within their borders, as both AGBC and AG Canada concede. Indeed, the *GGPPA* is premised on the existence of this provincial power and jurisdiction to regulate provincial GHG emissions, but seeks to subordinate it to federal regulatory oversight.

42. The federal and provincial governments are regulating GHG emissions for the very same purpose – to reduce these emissions – with the federal government holding the trump card.

43. This is unlike aeronautics, the national capital region, and marine pollution, where the subject matter is outside of the jurisdiction of the provinces. The residual power is being used in this case to give the federal government concurrent, supervisory control over a matter that comes within provincial jurisdiction. As noted above, this is clearly inconsistent with the nature and scope of the residual POGG power, and seriously threatens the autonomy of the provinces.[12]

44. This reality cannot be avoided by proposing ever more intricate formulations of the asserted subject matter, as AG Canada, AGBC, and their supporting interveners have done. These various formulations amount to a sleight of hand, designed to obscure the essential subject matter of the regulatory measures – that is, the reduction of GHG emissions.

45. For instance, including "minimum *national* standards" is an attempt to describe the subject matter in a way that it cannot fall within provincial jurisdiction *by definition*, given that no province can legislate extra-provincially. Similarly, it is hard to see how the essential subject matter of the *GGPPA* could include "the allocation of a portion of national targets", when the *GGPPA* neither sets nor allocates any targets, nor any portion thereof. It simply gives the federal government the discretion to override provincial choices in relation to the regulation of GHG emissions.

46. The federal government's preferred regulatory measure – carbon pricing meeting federal policy standards – may or may not be consistent with the way the provinces, or some of them, would have otherwise regulated GHG emissions if they were unfettered by a federal dictate, but this is only the *means* by which the federal government seeks to regulate the subject matter. It is not the essential subject matter being regulated, for the purposes of the POGG analysis (AGA

[12] See also Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR 555, at 594-595.

Intervener Factum, ¶¶34-63).

47. Similarly, as AGBC states, the federal government may have intervened in the provincial regulation of GHG emissions because it wants to manage and monitor the overall output of emissions in the country, in accordance with the international commitments it has unilaterally set. That may be the federal government's "proximate purpose" (AGBC Factum, ¶¶23-24).

48. However, whatever the term "proximate purpose" means in this context, the essential subject matter of the legislation, its *dominant* purpose, is the regulation of GHG emissions to address climate change. That is the federal government's core objective, and the federal government's current chosen means for achieving this objective is carbon pricing according to discretionary policy specifications set by the federal government, from time to time.

49. So, again, this is not a situation where the federal government and the provinces are dealing with different matters or even different aspects of the same matter, as required by the double aspect doctrine. It is the very same essential subject matter – the reduction of GHG emissions – with both federal and provincial governments regulating this matter in the same way under the *GGPPA*, that is, through carbon pricing. If the provinces do not use their jurisdiction to regulate GHG emissions in compliance with the federal requirements, the federal government will take over that area of provincial jurisdiction and do it for them.

50. This goes well beyond the established scope of the federal residual power, and effectively amounts to treating the federal residual power as if it were an express federal power over matters such as taxation or criminal law, which can be used to deal with different aspects of matters that also come within provincial jurisdiction.

51. Ultimately, then, notwithstanding the dozens of different ways the *GGPPA* can be described (see e.g. ¶¶937-938), it will clearly give the federal government power over the same subject matter that the AGBC and AGC concede fall squarely within the enumerated provincial powers. That is the essential point, and it demonstrates that the subject matter of the *GGPPA* necessarily falls outside of the federal residual power.

52. In summary, in order to uphold the *GGPPA*, this Court would have to extend the federal residual power well beyond the text of the Constitution, and the jurisprudence of this Court, which

both limit the residual power to matters that are *not* within provincial jurisdiction. This conclusion cannot be avoided through the manipulation of the pith and substance analysis and double aspect doctrine, as AGBC attempts to do, because the *GGPPA* seeks to regulate the same essential subject matter, for the same purpose, as equivalent provincial carbon pricing legislation.

### *ii. AGBC's Proposed New Test for the POGG National Concern Doctrine*

53. AGBC says that the expansion of the scope of the federal residual power, to include supervisory control over the exercise of provincial jurisdiction, is justified because: (i) the federal government must be able to participate in the management of a key global commons, namely the atmosphere, and (ii) the current carbon pricing measures under the *GGPPA* proportionately balance the need to protect national interests with provincial autonomy. As AGBC put it, this falls within the POGG power because the federal measures are both "necessary and proportionate" (AGBC Factum, ¶49).

54. The AGBC calls this new test for the exercise of the federal residual power a "proportionality test" (AGBC Intervener Factum, ¶41). Under this proportionality test, the residual power is no longer confined to matters clearly outside of provincial jurisdiction, as mandated by the text of s. 91 and previous cases. It can also be used to deal with matters within provincial jurisdiction of sufficient national importance that they require coordinated action by the provinces to meet national targets, as long as the means used to achieve these targets minimally and proportionately impact the provinces' ability to exercise their own jurisdiction.

55. Applying AGBC's proposed new proportionality test for the scope of the federal residual power would require the adjudication of complex and difficult factual and policy issues that would not only significantly tax the competency of the courts, but more importantly, would provide an inherently unstable, uncertain, and illegitimate basis for altering the existing division of powers.

56. For example, in the case at hand, for the *GGPPA* to be upheld as a valid exercise of the federal residual power on AGBC's approach, this Court would have to find, *inter alia*, that:

a. Federal oversight over provincial policies in this area is not only likely, but necessary, to achieve meaningful reductions in GHG emissions;

b. Carbon pricing according to federal policy specifications is the only, or the most

minimally impairing, way the provinces are able contribute their share to meaningful national reductions;

c. The necessary degree of national coordination in this context cannot be achieved through good faith negotiations with the provinces; and

d. The need for national carbon pricing standards outweighs the harm to provincial autonomy.

57. These types of policy questions are not properly at issue in this, or any, division of powers case. This is not "a referendum on the phenomenon of climate change" or a case "about the undisputed need for governments throughout the world to move quickly to reduce GHG emissions", which is accepted by all Canadian governments. Nor is it about which order of government is best suited to regulate GHG emissions, or what the best policies are (¶¶1-2, ¶113).

58. Unlike *Charter* cases, which may depend to some extent on the substantive justification for particular policies, this has never been a proper or valid basis for allocating the division of powers in our federal system, as this Court has reiterated time and time again (¶250; ¶347, ¶560). That is because the question in this context is not *whether the laws in question are substantively good or reasonable*, but *which order of government* is entitled to make that determination.

59. Finally, even if such an analysis were permissible in division of powers cases, undertaking it properly would require extensive and contentious trial-like procedures, including expert evidence subject to cross-examination. This is incompatible with a common procedure for resolving division of powers disputes in our constitutional history – that is, constitutional references to appellate courts (¶250) – which further demonstrates the problems with adopting the analysis AGBC proposes.

60. In any event, such a procedure has not occurred in these references, and the evidence before the Court does not support any of the findings AGBC's approach requires. For instance, as noted above, there is no reason to believe that the country or the climate is better served, on balance, by federal supervision in this area. Over the past two decades, the provinces have been driving innovation and policy responses in relation to GHG emissions, including through various forms of carbon pricing that fit with the unique economic and social circumstances in each province.

61. And, as the Concurrence alludes to, both federal and provincial governments can change, along with the wisdom of their respective policies in this area (¶¶862-863). A federal government with the power to set national standards in this area can just as easily use that power to suppress sound climate change policies in the provinces as it can be to promote them.

62. Moreover, the record clearly demonstrates that carbon pricing is not the only way that GHG emissions can be successfully reduced (¶76).[13] The provinces have adopted a wide range of policy measures to reduce GHG emissions (¶¶75-113; ¶¶453-515), many of which are treated as irrelevant under the *GGPPA*, because they do not involve carbon pricing.

63. Further, and importantly in terms of the professed need for federal carbon pricing standards, the fact that only some provinces have adopted policies for the reduction of GHG emissions that satisfy the federal government does not mean that no agreement could have been reached between the provinces and the federal government on measures that each province could take – tailored to their own individual circumstances and needs – that enabled the country as a whole to participate in the management of this global commons.

64. To the contrary, the record shows significant intergovernmental co-operation in relation to GHG emissions, along with real progress and action by all provincial jurisdictions (¶¶75-80, ¶310; ¶¶427-433). In fact, those efforts were ongoing at the very moment the federal government unilaterally announced that it would be imposing its preferred carbon pricing policies on the provinces, causing a number of provincial ministers to walk out of an intergovernmental meeting on the subject in protest (¶¶434-435).[14]

65. Thus, even assuming the necessity of the federal government's preferred policies, the record hardly demonstrates that attempts at intergovernmental cooperation towards this objective had been exhausted. It simply demonstrates that the federal government decided it had the best policy, and unilaterally imposed it on the provinces, leading to the present litigation.

66. If the *GGPPA* were upheld, this would effectively allow the federal government to eschew the constitutional requirement that common standards in relation to matters falling within

[13] See also AER, AR, Vol 1, A39-41 (¶¶227-236).
[14] See also AER, AR, Vol 8, A2891-2908.

provincial jurisdiction can only be achieved through co-operation with the provinces, and not through coercion under the federal residual power.

67. The *GGPPA* frustrates rather than facilitates co-operative federalism, contrary to a fundamental objective of Canadian federalism.[15] As Professor Lederman explains, in comments that apply to a subject matter as pervasive as GHG emissions:

> … I do not deny the reality and importance of social problems grouped under headings such as pollution, economic growth, culture, quality of life, and the like. Of course these are important generalized concepts with social reality in our country. My point is rather that categories as all-pervasive as these ones are, cannot be allowed to dominate our distribution-of-powers system from within, so to speak. They must be treated as outside the system, which means they should each be subdivided into appropriate parts so that necessary legislative action can be taken by some combination of both federal and provincial statutes. Co-ordination of these legislative efforts should come through co-operative federalism-that is, by complementary federal and provincial statutes co-ordinated by virtue of custom, practice or intergovernmental agreements of some sort... Suffice it to say that *before* you can successfully practice co-operative federalism, you must have in place a fundamental distribution of legislative powers and resources between the central government and the provinces. The essence of co-operative federalism is federal-provincial agreement, whether tacit or explicit, about complementary uses of federal and provincial powers and resources. Hence unless the constitutional definitions of such powers and resources remain reasonably stable as the basis of the autonomy of the parties, subject only to the process of gradual adjustment I have already described, the respective bargaining positions of the two levels of government will be too uncertain for federal-provincial agreements to be reached.[16]

68. On the other side of the balance, AGBC downplays the negative impact of the imposition of national carbon pricing standards on the provinces. Under the *GGPPA*, the provinces must implement the federal government's chosen measures to reduce GHG emissions: carbon pricing that meets certain standards determined from time to time by the federal government. While the provinces can implement other measures, they cannot be in substitution of the federal pricing scheme and pricing standards, only as an addition to them.

69. The result is that the provinces are denied their full ability to determine how best to manage or regulate GHG emissions within their jurisdictions, because the federal residual power over a

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[15] See *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶22.

[16] W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can B Rev 597, at 615-616 (emphasis added).

matter is necessarily plenary and exclusive (¶149, ¶209; AGA Intervener Factum, ¶¶28-31). This significantly intrudes upon provincial autonomy, as outlined above.

70. In this respect, it is worth emphasizing the note of constitutional caution offered by the Majority, with respect to the courts expanding federal power at the expense of the provinces:

> When the provinces agreed to repatriation of the Constitution, it was on the basis that the constitutional amending formula expressly include the right on the part of an individual province to dissent from an amendment if that amendment derogated from the province's legislative powers or proprietary rights. The final compromise on amendment of the Constitution is found in s 38 of the *Constitution Act, 1982*. Why is this relevant? Because while a province can dissent from any *constitutional amendment* derogating from its proprietary rights and legislative powers over its natural resources, it cannot dissent from a judicial decision. That decision binds. Thus, courts should be slow to judicially expand federal heads of power under the national concern doctrine since this effectively steps past provinces' rights and protections under s 38(3). (¶337) [emphasis added]

71. Complicating the adjudication of the factual and policy issues raised by AGBC's proposed test even further is that the *GGPPA* gives the federal government the ability to revise the national standards as it sees fit; for example, by expanding the range of entities and activities that are covered and increasing the pricing on these entities and activities (¶¶221-227).

72. The Majority rightly point out that this magnifies the detrimental impact on provincial autonomy:

> The *Act* is a constitutional Trojan horse. Buried within it are wide ranging discretionary powers the federal government has reserved unto itself. Their final shape, substance and outer limits have not yet been revealed. But that in no way diminishes the true substance of what this *Act* would effectively accomplish were its validity upheld. Almost every aspect of the provinces' development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. It would substantially override ss 92A, 92(13) and 109 of the Constitution. (¶22)

73. In response, AGBC says that any future changes to national standards imposed on the provinces can be judicially reviewed, or be the subject of another constitutional challenge, if subsequent regulations are not necessary or proportionate (AGBC Factum, ¶¶17-20, 49).

74. In effect, and even leaving aside other legislation the federal government could pass under its expanded POGG powers, AGBC's approach would result in every amendment to the *GGPPA*

or its schedules leading to a new challenge, in which the courts would have to attempt to determine whether the balance between provincial autonomy and policy necessity had changed from the previous iteration of the Act. With respect, that makes no sense, as explained by the Majority: [17]

> The validity of the *Act* must be decided at present, but inclusive of what the *Act* allows to be done in the future on its existing terms. In other words, this Court must decide the constitutionality of the *Act* based on the totality of the measures it authorizes and not simply the steps currently taken under the *Act*. Courts do not reassess the constitutionality of legislation as each new step authorized under legislation is implemented. Thus, we reject the proposition that the *Act* might be declared valid today and invalid tomorrow.
>
> Further, any new head of power judicially sanctioned under the national concern doctrine permits Parliament to legislate in the future as it sees fit in relation to that head of power. Accordingly, if the constitutional validity of this Act were ultimately upheld, the Act could be amended tomorrow or indeed replaced entirely with whatever new legislation Parliament chooses in its unilateral discretion providing the new legislation falls within the new head of power allocated to Parliament. Under the principle of Parliamentary sovereignty, no power can lay its "dead hand" on future law making. A present Parliament cannot fetter its future authority to amend the Act. Nor can the present expressed intentions of the Executive through their counsel. (¶¶201-202)

75. There has to be an underlying stability and predictability regarding the division of powers for our federal system to function properly. As this Court stated in *Canada Western Bank*, "a certain degree of predictability with regard to the division of powers between parliament and the provincial legislatures is essential".[18] Seeking to fundamentally modify the residual nature of the POGG power, as AGBC's approach requires, would destroy this essential predictability.

76. The ability of the federal government to oversee and regulate the exercise of provincial jurisdiction through its residual power cannot depend on a case-by-case judicial balancing of the alleged need for national standards at any particular time against the impact of the chosen measures on provincial autonomy. This is a recipe for continuous battles over the constitutionality of federal legislation enacted pursuant to its residual power, with additional skirmishes following any subsequent amendments and regulations to determine whether the balance had shifted far enough that the legislation should be declared unconstitutional.

77. Moreover, the courts would have to attempt to resolve these highly contentious policy

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[17] See also *R. v. Hydro-Québec*, [1997] 3 SCR 213, ¶73, per Lamer CJ & Iacobucci J, dissenting but not on this point.

[18] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶23.

questions in each case in which the federal government sought to rely on the POGG power to grant it an overriding supervisory power over how the provinces exercise their jurisdiction, which would surely be encouraged if this Court approves the type of supervisory power granted by the *GGPPA*.

78. While today it may be the environment and GHG emissions, tomorrow it could the federal government supervising how the provinces exercise their jurisdiction over any other situation in which important and urgent policy problems are replicated across provincial jurisdictions, and some largely theoretical harm to other provinces was put forward in justification. Then, the court would need to decide whether the fear of provincial inaction and importance of national policy standards outweighed the harm to provincial autonomy in each case. Needless to say, this approach would be extremely harmful to unity and diversity within our country.

79. And by creating significant uncertainty regarding the division of powers, this approach would leave the provinces in an impossible position of never knowing when, and to what extent, their policies will subsequently be interfered with or overridden by the federal government. This would discourage the provinces from expending the significant time and resources necessary to carefully design and implement GHG reductions measures, which requires extensive consultation and research regarding the unique needs and circumstances of the province. Rather than ensuring quick action to address climate change, this is a recipe for endless litigation and policy stasis.

80. There is an even more fundamental constitutional problem with AGBC's proposed new test for the exercise of the federal residual power. This proposed test is not, as AGBC claims, "rooted in the constitutional text, history and principles of parliamentary federalism" (AGBC Factum, ¶3). Indeed, the text, the history and the principles of our federal system – and specifically the need to maintain the intended balance of powers – argue against this extension of the scope of the residual power, regardless of the importance of the matter in question.

81. AGBC also argued that "(a) floor on the stringency with which provinces price GHGs is the least intrusive step Parliament can take to enable Canada to set national targets on the same basis as other federations" (AGBC Factum, ¶5). However, Canada has its *own* federal system of government. The federal government only has the powers allocated to it under the Constitution. These powers cannot be expanded on the basis that the federal government (or AGBC) believes that this will better enable Canada to participate in the management of a global commons, or better

address any other important policy issue. As the Majority noted:

> [T]he federal government cannot intrude on provincial powers simply because it would prefer national standards in any particular area… otherwise, the federal government could usurp provincial power every time it decided it preferred its policy objectives more than the ones the provinces had selected in a given area (¶294).

82. If the federal government cannot achieve its national objectives through the valid exercise of its express powers (and its purely residual power over matters that do not fall within provincial jurisdiction), then, in the absence of a temporary emergency, it must obtain the agreement of the provinces to advance its preferred policy standards (¶281, ¶352). That is the way our federal system is intended to function. The provinces are not subordinate to Parliament, they are equal partners.

83. The *GGPPA* is premised on the idea that the federal residual power can trump the provinces' exercise of their enumerated powers; however, this is precisely the opposite of what the Constitution dictates, which is that the residual POGG power is limited to matters "not coming within the Classes of Subjects by this Act assigned exclusively to" the provinces. If this residual power is converted into a federal super power that can be used to control how the provinces exercise their jurisdiction, it would "end federalism as we know it" (¶349; ¶835).

84. Such a significant transformation of our federal system cannot be implemented through judicial interpretation – as this Court has held, there are limits to the application of the living tree principle.[19] This transformative change would require a constitutional amendment (¶209, ¶339).

### C. Conclusion

85. Professor Newman is correct in saying that the *GGPPA* references are "an important moment to clarify and confine the POGG powers for the sake of the federation and the diversity of human values and policy choices that it was always designed to permit". He expresses the "hope that the Court will let the Canadian federation flourish".[20]

86. As explained by the Majority and Concurrence, this hope cannot be realized if the *GGPPA*

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[19] See e.g. *R. v. Blais*, 2003 SCC 44, ¶40; *Caron v. Alberta*, 2015 SCC 56, ¶36; *R. v. Comeau*, 2018 SCC 15, ¶83; *R. v. Prosper*, [1994] 3 SCR 236, at 287-288, per L'Heureux-Dubé, dissenting but not on this point.

[20] Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187, at 200-201 [AG Alberta's Intervener Book of Authorities, Tab 3].

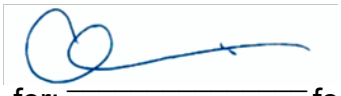
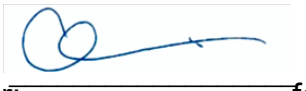
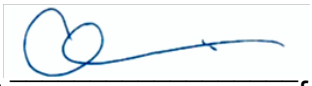
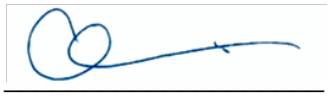
is upheld. Allowing the federal government to use its residual power to control how the provinces exercise their jurisdiction over the reduction of GHG emissions would fundamentally alter the balance of powers in our federal system.

87. To preserve our federal system, the federal residual power must be confined to its intended scope, as set out expressly in the text of s.91 – that it only applies to matters outside of provincial jurisdiction, which is clearly not the case with the *GGPPA*. This conclusion cannot be avoided or mitigated by a doctrinal sleight of hand, as AGBC proposes.

## PART IV – REMEDY SOUGHT

88. As the *GGPPA* is clearly in relation to matters within provincial jurisdiction, this Court should confirm the opinion of the Alberta Court of Appeal that the *GGPPA* is unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15th DAY OF JULY, 2020, BY

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