COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

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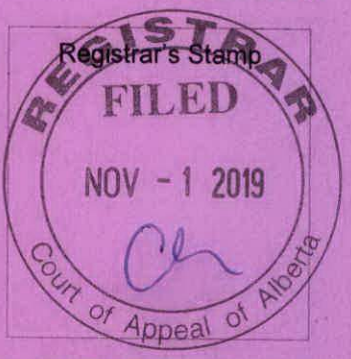

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018 c. 12

AND

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

DOCUMENT: **FACTUM**

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

FACTUM OF THE INTERVENOR, ATTORNEY GENERAL OF NEW BRUNSWICK

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PART I – INTRODUCTION

1. The Intervenor, Attorney General of New Brunswick ("New Brunswick") supports the position of the Attorney General of Alberta ("Alberta") and adopts the arguments in Alberta's factum. New Brunswick is also in general agreement with the climate data submitted by the Attorney General of Canada ("Canada"). Consistent with the previous references of the Attorney General of Saskatchewan ("Saskatchewan") and the Attorney General of Ontario ("Ontario") in their respective Courts of Appeal, this should not be a platform on which to debate climate change however real the threat may be. Climate data and warnings regarding the consequences of greenhouse gas emissions ("GHG emissions") are relevant to the extent that such information dispassionately informs the constitutional question. Objectivity is paramount.

2. Much of Canada's record and arguments support a resolve to deal with a looming existential threat; but it also provokes an emotional response – the natural result of contemplating any dire circumstance. When imbued with the weight and gravitas it deserves, equally weighty solutions feel appropriate. In turn, it may feel appropriate to a layperson that the regulation of GHG emissions should be controlled by Parliament. Such may seem both harmless and practical. When a central control over the matter is cast in supervisory terms and is fixated on minimum standards, the layperson could believe that a benign form of federalism has been accomplished. But those conclusions would ignore the constitutional division of powers.

3. Federal supervision over matters historically within provincial jurisdiction is why New Brunswick objects to Canada's *Greenhouse Gas Pollution Pricing Act*[1] ("*GGPPA*"). Parliament has chosen a path that it believes will diminish Canada's GHG emissions by imposing a "backstop" upon those deemed to fall short of a federal minimum standard. Relative constitutional certainty has been replaced by *parent knows best* ethos that removes local solutions but under the pretense of local autonomy. An uncertain "stringency" standard now undermines local solutions. By applying the *GGPPA* uniquely within any jurisdiction that Canada says falls short of its minimum standard, local solutions are betrayed and an inflexible adherence to carbon pricing is largely to blame. Individual treatments highlight the

[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 ("*GGPPA*"), Book of Legislation of the Attorney General of Alberta ("ABBOL"), Vol. 1, Tab 1

jurisdictionally invasive nature of the legislation. The resulting patchwork, the result of deep intrusion into matters ordinarily within local authority, is an unprecedented model of federal interjurisdictional management where no such model should exist. New Brunswick says that it is unconstitutional management.

4. Our nation was assembled through compromise. That compromise found shape in a decentralized federal structure. Provinces were intended as partners with and not as subordinate to the federal government. The division of powers in our Constitution leaves Canada with a residual law-making power over matters not expressly assigned to it or exclusively assigned to the Legislatures of the Provinces. But one of the balances that comes with that federal residual authority is the relatively broad assignment to provinces of property, civil rights and local or private matters. These act together as reasonably practical means of keeping harmony within the compromise. The common law has given shape to both the specific and general powers over the many decades since confederation. But the *GGPPA* may be walking a new path.

5. If there were ever a price to pay for the distribution of legislative powers extant, it is apparent with the *GGPPA*. It stands to be the tipping point of the constitutional "Generality of the foregoing" language as filtered through the common law "national concern" doctrine. The *GGPPA* – and it does not appear that it was initially conceived as fulfilling that doctrine – is now finding its roost within it. The stakes might not be so high nor the consequences so extreme but for the plenary jurisdiction inherent in legislation found to satisfy that legal doctrine. The loss may well be the original compromise of partners who never intended subordination except where it had been prescribed. Where that subordination was not clear through enumerated authority, the partnership expected that ambiguity would be resolved mindful of the historical balance. But here, that balance is lost, and it may be difficult to regain the balance should this model of legislation be ultimately accepted.

6. Classification tools are expected to keep the balance, maintain the compromise and ensure that jurisdictional subservience does not take root in the living tree. Legal interpretive principles and maxims channel generalities into reliable constitutional fixtures; none should be applied with more caution than a principle deployed in an uncertain or lightly tread area of

constitutional law. There will naturally be greater stresses that accompany the use of the residual power. Power where none previously existed requires reliable constitutional fixtures. If the fixtures are unreliable the authority will exist in an unsettled state. When the authority granted is plenary, that power can grow to gain authority beyond its intended scope. We are there.

7. As intervenor, New Brunswick will endeavour to add a perspective not otherwise provided. New Brunswick will focus upon the national concern doctrine. The proponents of the *GGPPA* say that the legislation is a manifestation of a singular, distinct and indivisible constitutional thing for national concern purposes. New Brunswick disagrees.

PART II – FACTS

8. As part of New Brunswick's carbon mitigation strategy, it chose to repurpose a portion of an existing motive fuel tax into a Climate Change Fund under new legislation that would keep pace with the carbon tonnage cost increases thru to 2022-23. The federal government rejected New Brunswick's strategy for not conforming to the "central pillar" of the *GGPPA*. New Brunswick's Climate Change Action Plan did not impose a sufficiently stringent carbon pricing model satisfactory to the Governor in Council. A portion of the Preamble to New Brunswick's *Climate Change Act,*[2] states:

> The Climate Change Action Plan provides a clear path forward for reducing greenhouse gas emissions while promoting economic growth and increasing New Brunswick's resilience to climate change through adaptation. Among other things, the action plan calls for the implementation of a carbon pricing mechanism that takes into account New Brunswick's unique economic and social circumstances, including trade-exposed, energy intensive industries, low-income families, consumers and businesses.
>
> Carbon pricing is an efficient and effective way to reduce greenhouse gas emissions and will play an important role in New Brunswick's transition toward a low carbon economy. However, carbon pricing alone is not expected to be sufficient to meet the Government of New Brunswick's greenhouse gas emission target levels. Additional actions will be needed. Consequently, the Government of New Brunswick will pursue complementary initiatives to support and promote the transition to a low-carbon economy.

[2] *Climate Change Act*, SNB 2018, Ch 11

9. Irrespective of New Brunswick's unique economic and social circumstances, its carbon pricing mechanism and overall Climate Change Action Plan was disrupted when it was deemed insufficient by the federal Minister, thereby triggering the federal backstop.

10. As stated in Alberta's Factum, there are various ways for governments to encourage business and citizens to reduce greenhouse gas emissions.[3] And even within carbon pricing strategies specifically, pricing of carbon can find many forms and combinations of forms.[4] The best approach in any given case is dependent upon local realities, such as a jurisdiction's economic and industry structure, and a consideration of matters already in place, such that the proper policy mix must be customized to each jurisdiction's needs and circumstances.[5] This is equally true in New Brunswick's unique economic and social circumstances, worlds apart from Alberta's. If nothing else, the radically different economies and needs of Alberta and New Brunswick underscore the need for locally tailored approaches to tackling climate change. By rejecting New Brunswick's Climate Change Action Plan, the spirit of the Vancouver Declaration and its commitment to collaboration in the development of a host of carbon reduction policies[6] was seemingly forgotten.

11. New Brunswick agrees with and adopts the facts presented by Alberta.

PART III – ARGUMENT

I. Introduction

12. New Brunswick agrees with Alberta that the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12 (the "*Act*") is unconstitutional in its entirety. New Brunswick will argue that the *Act* is fundamentally inconsistent with the jurisdiction of Parliament to legislate for the Peace, Order and Good Government of Canada pursuant to section 91 of the *Constitution Act,*[7] *1867* ("p.o.g.g." or "the p.o.g.g. power").

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[3] Factum of the Attorney General of Alberta ("Alberta Factum") at para 52
[4] Alberta Factum at para 53
[5] Alberta Factum at para 54
[6] Alberta Factum at para 43
[7] *The Constitution Act, 1867* (UK) 30 & 31 Victoria, c 3, ABBOL, Vol. 2 Tab 5

13. As intervenor, New Brunswick does not intend to make submissions redundant to those of Alberta. Also, in keeping with the principle that intervenors should provide a unique perspective, and while also acknowledging that Alberta's submissions persuasively cover the field, New Brunswick will explore in greater detail some of the principles inherent in the national concern doctrine under the p.o.g.g. power.

II. Canada's Characterization of the Matter

14. It is unlikely that New Brunswick will have ample opportunity to analyse and comment upon Canada's characterization of the subject matter prior to finalizing this factum. Per case management directions, intervener factums are to be filed by November 4, 2019.[8] Canada's factum is to be filed by October 25, 2019.[9] Finalized factums must be assembled and couriered from Fredericton to Edmonton to meet the filing deadline, which will leave perhaps 2 days to analyse and respond to any new approach.

15. It may be hazardous to assume Canada's characterization of the matter for constitutional purposes. One might expect a consistent characterization in this matter but that has not been a feature of the *GGPPA* references. Canada characterized the national concern addressed by the *GGPPA* as "GHG emissions" at the Saskatchewan Court of Appeal, going so far as to state in its written submissions that "GHG emissions are a quintessential matter of national concern".[10] That quintessence was then altered at the Court of Appeal for Ontario to a more ethereal "the cumulative dimensions of GHG emissions" as a matter of national concern.[11]

16. Those characterization proposals were rejected by the Saskatchewan and Ontario Courts of Appeal. The majority opinion of the Saskatchewan Court of Appeal found that the national concern could be characterized as, "the establishment of minimum national standards of price

[8] Application for Advice and Directions # 3 -- Reasons for Decision of the Honourable Mr. Justice Frans Slatter, para 6
[9] Application for Advice and Directions # 3 -- Reasons for Decision of the Honourable Mr. Justice Frans Slatter, para 6
[10] Factum of the Attorney General of Canada, Saskatchewan C.A. No. CACV3239, para 87
[11] Factum of the Attorney General of Canada, Ontario C.A. No. C65807, para 51

stringency for GHG emissions".[12] The Court of Appeal for Ontario found that "the pith and substance of the *Act* can be distilled as: 'establishing minimum national standards to reduce greenhouse gas emissions.'"[13] Both Courts of Appeal then classified these respective characterizations as matters falling within the national concern branch of the p.o.g.g. power.[14]

17. The matter before this Honourable Court is not an appeal of the previous opinions of the Saskatchewan and Ontario Courts of Appeal. However, because the timing of the filing deadlines stands to reduce the possibility of thoughtful analysis and written response to new approaches, practicality requires that we make a prediction regarding Canada's new characterization of the *GGPPA* for national concern purposes.

18. But first to digress: Could it not be said that the roaming characterization of the matter, both as submitted and then as opined – including concurring and minority opinions – cumulating in about seven argument or opinion options on the pith and substance of the *GGPPA*, serve to underscore the risk of ultimately classifying this matter within the p.o.g.g. power? Do we stand to alter the constitutional balance by endorsing a plenary jurisdiction even though a host of eminent legal thinkers cannot agree on the fundamental constitutional nature of the *GGPPA* despite roughly a year of trying? Instead of convergence on the issue, a year of debate has led to significant divergence of thought. It has been a troubling journey for an infant p.o.g.g. power. Perhaps it would not be so troubling were it not the case that overwhelming provincial competence to manage climate change strategies exist. It does not appear that there were any pre-classification haggles over aeronautics[15] or the national capital region.[16] Marine pollution did not cause a characterization uproar.[17]None of those led to usurpation of established jurisdiction. The immediate matter is different.

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[12] *Saskatchewan Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at paras 123, 125 and 163, Alberta's Book of Authorities ("ABBOA"), Vol. 3, Tab 21
[13] *Ontario Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ("*Ontario Reference*") at para 77, ABBOA, Vol. 3, Tab 20
[14] *Ontario Reference*, *ibid* at para 139
[15] The *Aeronautics Reference* [1932] A.C. 54; *Johannesson v. West St. Paul*, [1952] 1 SCR 292, ABBOA, Vol. 1, Tab 5
[16] *Munro v. National Capital Commission* [1966] SCR 663, ABBOA, Vol. 1, Tab 7
[17] *Crown Zellerbach*, infra, note 18, ABBOA, Vol. 2, Tab 15

19. Over-rationalizing a new pre-classification category of national concern may well result in a self-fulfilling prophesy. La Forest J's comments in *R. v. Crown Zellerbach Can. Ltd.*[18] at paragraph 68 are apposite:

> The need to make such characterizations from time to time is readily apparent. From this necessary function, however, it is easy but, I say it with respect, **fallacious to go further, and,** taking a number of quite separate areas of activity, some under accepted constitutional values within federal, and some within provincial legislative capacity, **consider them to be a single indivisible matter of national interest and concern** lying outside the specific heads of power assigned under the Constitution. By conceptualizing broad social, economic and political issues in that way, one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction or at least abridging the provinces' freedom of operation.
>
> (**emphasis** added)

20. We either have a national concern for constitutional purposes or we do not. With the greatest respect for the opinions to date and the opinions to come, when the process of rationalizing the subject matter begins to have more in common with the hammering of a square peg into a round hole, then the players should step back and reflect on the effort. Indeed, we are witnessing the transformation of a practical concern into a constitutional national concern. "Broad social, economic and political issues" beyond any one specific head of power are being compressed into an artificial national dimension. Previous opinions have squeezed the matter to the breaking point, resulting in an unduly narrow characterization, so constructed to achieve the requisite singularity, such that we now run the risk of sanctioning the means to have most anything removed from provincial jurisdiction. We may be laying the precedent for ready access to the p.o.g.g. power, provided that the concern be categorized in very narrow terms, thereby "incidentally removing [that narrow thing] from provincial jurisdiction".

21. As for the actual characterization that Canada may use, it seems likely that Canada will characterize the *GGPPA* is as having a pith and substance directed at the establishment of fixing minimum national standards of price stringency for GHG emissions – or a hybrid consonant with the two majority opinions to date.

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[18] *R. v. Crown Zellerbach Canada Ltd.*, 1988 CarswellBC 137, [1988] 1 S.C.R. 401 (*"Crown Zellerbach"*), ABBOA, Vol. 2, Tab 15

22. This narrow characterization may at least be agreeable with some of the preamble to the *GGPPA*, particularly the sixteenth and last paragraph:

> And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada;

23. However, and as will be more fully canvassed below, the establishment of minimum standards of any subject matter merely depicts evidence of a supervisory capacity. A pan-Canadian minimum standard, whether it be for carbon pricing or any other conceivable regulatory mechanism, will only survive the requisite analysis and be deemed a national concern if it can be established that the jurisdiction ought to exist. Canada's new characterization of the matter is an unfortunate case of reverse engineering: The jurisdiction is being sourced from a perceived need instead of first dispassionately identifying the existing jurisdictional means to deal with the problem.

24. In *Crown Zellerbach*, the legislation under scrutiny was directed at the control of marine pollution and was characterized as such. Then the legal contest was essentially an inquiry into spheres of competence. The British Columbia Court of Appeal found the waters of Beaver Cove, the dumping site, to be *inter fauces terrae* and therefore *ultra vires* federal competence. The legal analysis to determine the demarcation of authority ran from that point, but there was little doubt about the categorization of marine pollution.

25. Unlike the immediate matter, the constitutional inquiry into marine pollution was not sourced from or fixated on the imposition of a standard across provincial jurisdictions. It was not a case involving minimal pollutant thresholds from which an acceptable pan-Canadian administration of ocean dumping could be rationalized. This may seem an obvious distinction, but it is important. Both the majority and dissent in *Crown Zellerbach* had little hesitation in conceptualizing the matter before them: marine pollution. Little ink was spilled getting there. And from that conceptualization sprung a debate grounded in whether a federal jurisdictional boundary could be demarcated as sufficiently distinct from provincial matters. The analysis

runs reverse to much of the proposed analysis in the immediate matter. Here, much effort is dedicated to creating a matter that will then conform to a jurisdiction. None of the other national concern cases possess this reversed dynamic.

26. In professional boxing, weight categories are not created on a case-by-case basis to conform to a boxer's eating habits. The weight categories exist. Boxers are middleweights, heavyweights or other weights. In *Crown Zellerbach*, the physical line of demarcation from which two distinct jurisdictions could legislate may have required some "fluid" analysis, but it was found that dumping of substances in provincial waters caused pollution in extra-provincial waters. Parliament did not have jurisdiction to regulate dumping in provincial waters if it could not be shown that the dumping effected extra-provincial waters. Inherent in that analysis is a keen appreciation of existing jurisdictional authority within the division of powers (or weight categories, if we may). Qualitative differences drove the analysis. But here there is no appreciation of vital qualitative differences. Instead, a minimal standard is offered as a national concern and is gaining foothold because of its abstractly narrow and therefore non-invasive conceptualization.

27. So how is it that we have come to debate the need for a weight category to conform to the boxer? Why is it not assumed that the participants must conform to established norms, and not the other way around? Why is it seemingly the default position that we are faced with a matter that only Parliament, and Parliament alone, must manage? Setting aside any division of powers analysis, why does this matter transcend provincial capacity?

28. GHG emissions of one form or another have been generated at the local level everywhere since time immemorial and generated unmanageably since the Industrial Revolution, so why would it suddenly be beyond local capacity to reign in the problem? There is nothing apparent in the record indicating that federally-regulated enterprises have operated differently, or in a more enlightened manner than provincially-regulated enterprises. Each province regulates much of the consumer, industrial and natural resource enterprise within their respective borders. Once sentiments of global gravitas, existential threat and enormity of circumstance are set aside,

Canada does not lay a foundation to justify a constitutional pivot from traditional jurisdictional responsibilities.

29. GHG emissions find their present sources in every person, every head of cattle, in every internal combustion engine, in every industry, in every permafrost melt, in every acre of rainforest burning, in practically every human activity. This seems far more diffuse and universal than discrete and distinct. The weight category of climate change is writ large and finds combatants throughout the distribution of legislative powers. The artificially narrow "minimum standards" analysis merely serves as a jurisdiction-splitting construction of convenience while ignoring the existing provincial constitutional competence to address the problem.

III. Basic Premise

30. This Factum's proposition is simple and begins with Le Dain J.'s statement regarding the requirement of distinctiveness in *Crown Zellerbach*:

> For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.[19]

31. Mindful of Le Dain J.'s words, minimum standards could not possibly be the prime factor of a constitutional national concern, because the supervisory component implied by minimum standards creates a jurisdictional division within something that must be single, distinct and indivisible. The "singleness, distinctiveness and indivisibility" found in *Crown Zellerbach* (and elsewhere) rested upon a more internalized, geographic and logical legal dynamic. The supervisory element betrays all the national concern law that has come before it.

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[19] *Crown Zellerbach, supra* note 18 at para 33, ABBOA, Vol. 2, Tab 15

32. The fundamental organizing concept in *Crown Zellerbach* is marine pollution. Marine pollution possesses characteristics suggesting a sense of place and an effect – matter and action – from which ascertainable and reasonable limits exist. In contrast, the imposition of minimum standards lacks internal characteristics or boundaries. There is no analogue to marine pollution to be found in the imposition of minimum standards. The lack of similarity between those concepts is due to the difference between a legal demarcation and a spatial demarcation. These essential organizing concepts should not be avoided. When the organizing concepts are properly aligned it becomes apparent that the federal Parliament exceeded what might have been an appropriate zone of its residual authority by specifically imposing carbon pricing on the federation. Parliament ventured beyond the requisite "singleness, distinctiveness and indivisibility" required to be deemed a national concern when it created a supervisory regime. Canada has ventured into heads of provincial power on a scale of impact that cannot be reconciled with the fundamental distribution of legislative power under the Constitution.

IV. General Argument

33. There is little doubt that it is within the authority of provinces to create carbon pricing measures tailored to local circumstance. To date, there has been no suggestion from the federal government that provinces lack the power to do so and there has been no suggestion from any province that a local solution would be beyond local authority. Provincial authority over property and civil rights and matters of a local or private nature provide a broad authority to craft carbon reduction strategies. Authority over direct taxation, provincial Crown lands, municipalities, renewable and non-renewable natural resources refine the broad authority. A variety of heads of provincial constitutional jurisdiction can be deployed to combat climate change.

34. General authority to regulate local enterprise within provincial boundaries has been an essential component of economic development since Confederation. The principle has been referenced repeatedly in jurisprudence including the *Anti-Inflation Reference*,[20] where Justice Beetz noted at page 441:

[20] *Re: Anti-Inflation Act*, [1976] 2 SCR 373; [1976] SCJ No 12, ("*Anti-Inflation*"), ABBOA, Vol. 2, Tab 17

> The control and regulation of local trade and of commodity pricing and of profit margins in the provincial sectors have consistently been held to lie, short of a national emergency, within exclusive provincial jurisdiction.[21]

35. Intrusion into those areas of exclusive provincial jurisdiction cannot find justification under the national concern doctrine if there is not a qualitative difference between the spheres of regulation. If the matter is more than incidental to the regulation of trade, which New Brunswick submits to be the case, then it cannot possibly be single, distinct and indivisible to it. It is difficult to understand why or how the *GGPPA* would have been conceived and constructed as legislation intended to avail itself of the p.o.g.g. power; it lacks any indication of such intent, including its preamble.

36. Below, New Brunswick will address one of the *Act*'s central tenets – carbon pricing – using *Crown Zellerbach* for comparative analysis of the criteria that justify the use of the p.o.g.g. power.

37. In *Crown Zellerbach*, s. 4(1) of the *Ocean Dumping Control Act*[22] gave the federal Parliament a broad authority to control marine pollution. It is a slim majority opinion, split as to whether the subject matter was sufficiently distinct, singular and indivisible to make it distinguishable from matters of provincial concern. The majority and dissenting opinions agreed that consideration must be given to the result that upholding the p.o.g.g. power would have on the constitutional balance of power. Both opinions considered the necessary balance through addressing principles of federalism. There is much within it that sheds light on the requisite "singleness, distinctiveness and indivisibility" and how that requirement must exist within the federal and provincial spheres of competence.

38. The majority in *Crown Zellerbach* held that a prohibition against dumping any substance in the sea was acceptably within the ambit of the challenged legislation. The definition of "sea" included unnavigable internal provincial waters, which for most other purposes would be a

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[21] *ibid* at page 441

[22] *Ocean Dumping Control Act*, SC 1974-75-76, c 55, as discussed in *Crown Zellerbach, supra* note 16, ABBOA, Vol. 2, Tab 15

matter of provincial competence. Therefore, for the impugned legislation to be constitutional, and in consideration of the national concern doctrine, it was necessary for the Court to isolate a subject matter that could be exclusively controlled by the federal government as *distinct* from provincial authority. A 4:3 majority opinion of the Court found the necessary exclusivity to qualify the subject matter as a national concern under the p.o.g.g. power. However, it bears repeating that neither the majority or minority had difficulty with the characterization of the matter. La Forest J.'s characterization is consonant with the majority. His concern lay elsewhere:

> "...Parliament has very wide powers to deal with ocean pollution, whether within or outside the limits of the province, but even if one stretches this traditional approach to its limits, the impugned provision cannot be constitutionally justified."[23]

39. To arrive at its opinion, the majority considered United Nations' reports, conventions and rules on the issue of demarcation between internal marine waters and territorial seas. It was found that the general demarcation for internal marine waters was "those which lie landward of the baseline of the territorial sea, as contained in the *United Nations Convention on the Law of the* Sea (1982)." From this, the Court determined that the political lines were sufficiently blurred such that dumping in one would have a pollutant effect upon the other. Therefore, this aqueous mix as borne by the ebb and flow of currents was tantamount to an *indivisibility* as between internal marine pollution and coastal water pollution, or an "obviously close relationship". That opinion was bolstered by the appellant's submissions as follows:

> ... there is much force, in my opinion, in the appellant's contention that the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions. This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances.[24]

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[23] *Crown Zellerbach, supra* note 16 at para 66, ABBOA, Vol. 2, Tab 15
[24] *Crown Zellerbach, supra* note 16 at para 38, ABBOA, Vol. 2, Tab 15

40. Therefore, the Court constructed an *indivisible* subject matter out of a relatively fluid uncertainty. The physical political boundaries were blurry and even if they were razor-sharp, it remained that the effect of the moon, tides and currents conspired to make a pollutant's journey from one jurisdictional realm into the other a meandering affair. Blurry boundaries and wandering flotsam and jetsam created a conceptual zone that was, from a regulatory perspective, indivisible. A pollutant deposited in the servient zone that had reasonable potential to migrate to the dominant zone would be caught in a legal assimilation within which all contents would be indivisible from a control perspective.

41. One might attempt to conflate minimal standard for GHG emissions in a similar fashion; however, the exchange of waters in *Crown Zellerbach*, even mindful of the uncertain jurisdictional lines of demarcation, did contain overall fresh and salt water boundaries that were observed in tandem with polluting activities. Even more importantly, the boundaries as drawn were a clear attempt to demarcate the regulatory aspect: The Court wrestled with finding an acceptable physical delineation between provincial and federal control over aqueous pollutants – a delineation that respected jurisdictional qualitative differences. However, the *GGPPA* and its justification has ignored the ascertainable boundary between regulatory aspects as drawn by the majority in *Crown Zellerbach*.

42. Here, we are confronting an *Act* and argument that crosses into clear provincial territory by unilaterally determining that there is but one way to address climate change and GHG emissions: with a carbon-pricing mechanism. As problematic as the "one way out" proposition may be, the imposition of minimum standards for carbon pricing is simply an intrusion that unjustifiably infiltrates matters of property and civil rights in the provinces and other areas of local competence.

43. In *Crown Zellerbach,* the majority found that the control of marine pollution contained elements that could be apportioned along jurisdictional lines. The dumping place and the zone of impact had but one effect on the territorial sea for control purposes. A ***matter to control*** (marine pollution) and an ***action*** (the dumping of substances within rationalized federal limits) became a single, distinctive and indivisible concept within the ambit of the impugned legislation.

44. A jurisdictional division that respects the distribution of legislative powers was achieved. Paragraph 39 of *Crown Zellerbach* highlights this as this necessary objective. The question is: "*whether the pollution of marine waters by the dumping of substances is sufficiently distinguishable from the pollution of fresh waters by such dumping* ***to meet the requirement of indivisibility***".[25] The finding appears to be based largely upon a U.N. Report which emphasizes the "*differences in the composition and action of marine waters and fresh waters* [with] *its own characteristics and considerations that distinguish it from fresh water pollution*".[26]

45. It is clear in paragraph 39 that ***the requirement of indivisibility*** needed to be met before the national concern could be found – which is a different exercise than the *GGPPA*'s quest for status as a national concern prior to examining how it may be qualitatively distinct from established heads of provincial authority. The zones of provincial and federal authority were a limiting template upon which marine pollution control was drawn. This is crucial. Fresh water pollution remained within the domain of provincial authority, with the result that the "*essential indivisibility of the matter of marine pollution by the dumping of substances*"[27] was qualified as a national concern. The court was clearly concerned with determining meaningful zones of authority. To find such zones in the immediate matter requires that minimum standards not be seen as commingling the authority but rather as providing separation, with "reasonable and ascertainable limits". It is submitted that such a finding is not reconcilable with the fundamental distribution of legislative power under the Constitution. Rather, there must be a genuine difference leading to a genuine analysis of ascertainable limits. This cannot occur where patent intrusions exist. Paragraph 39 concludes:

> Moreover, the distinction between salt water and fresh water as limiting the application of the *Ocean Dumping Control Act* meets the consideration emphasized by a majority of this Court in the *Anti-Inflation Act* reference--that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned.[28]
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> (underlining added)

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[25] *Crown Zellerbach, supra* note 16 at para 39, ABBOA, Vol. 2, Tab 15
[26] *Ibid* note 25
[27] *Crown Zellerbach, supra* note 16 at para 38, ABBOA, Vol. 2, Tab 15
[28] *Crown Zellerbach, supra* note 16 at para 39, ABBOA, Vol. 2, Tab 15

46. The Court would not likely have classified the authority if it had not been able to form cognizant limits on the given characterization of marine dumping. There was no struggle with how to characterize the matter, but rather how to have it conform to established powers. Unfortunately, the immediate matter is a struggle with characterization and has potential to be a self-fulfilling prophesy, if *a priori* a national concern is found that then conforms to an indivisibility analysis.

47. The Court relied on evidence of distinct characteristics as between salt and fresh water as a means of (1) creating a legal distinction, and (2) creating a reasonable limitation on the federal power, which is found to be essential at paragraph 39 of *Crown Zellerbach* ("it must have"). And behind this distinction was a dynamic and indivisible ***matter to control*** combined with an ***action***. The majority opinion in therefore does not support the immediate matter unless one accepts that these largely anthropogenic emissions are so impenetrable that they overwhelm the need to do any jurisdictional analysis.

48. Additionally, the prohibition in the *Ocean Dumping Control Act* was a ban against all non-permitted dumping. The first paragraph of the case states that the impugned legislation prohibited, "the dumping of any substance at sea except in accordance with the terms and conditions of a permit."[29] Applying those circumstances (a blanket prohibition) to the immediate matter would result in a ban on the release of any non-permitted GHG emissions. This is not the case; the *GGPPA* is not prohibitive in nature but has regulatory aspects and jurisdiction-splitting minimum standards. However, the comparison is meaningful because it is reasonable to expect a correlation between matters of prohibition and distinctive subject matter. Proscribed activity within a legally demarcated zone of competence is distinct by nature. Regulated activity within a realm triggered by subjective acceptance criteria ("stringency") and supervisory elements such as those found in the *GGPPA*, is not by nature distinct from provincial jurisdiction.

49. The *indivisibility* refers to "an identity which made it distinct from provincial matters"[30] or "a single indivisible matter of national interest and concern lying outside the specific heads of power assigned under the Constitution."[31] Of note, even La Forest's dissent in *Crown Zellerbach* is

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[29] *Crown Zellerbach, supra* note 16 at para 1, ABBOA, Vol. 2, Tab 15
[30] *Crown Zellerbach, supra* note 16 at para 28, ABBOA, Vol. 2, Tab 15
[31] *Crown Zellerbach, supra* note 16 at para 68, ABBOA, Vol. 2, Tab 15

instructive, to contrast any variation of the narrow minimum standards for carbon pricing with "marine pollution" to illustrate how *indivisibility* and "ascertainable and reasonable limits" co-exist within a legitimate national concern.

50. The ability to determine the "ascertainable and reasonable limits in so far as provincial jurisdiction is concerned," depends on a reasonable linkage between matter and action, for the purposes of determining a reasonable proscription limit. La Forest J. considers the obvious linkage of *dumping noxious fluid into coastal waters*.[32] A less obvious linkage would be *depositing noxious solid material inland*,[33] which would require "cogent proof" of causation. "Cogent proof" in such a case might be evidence of leachate from the hypothetical solid matter, escape of deleterious substance into the water table and eventual escape of substances into the environmental zone of federal competence.

51. Whether the linkage is obvious or obscure within the zone of competence, and whether both obvious and obscure linkages may occur within any hypothetical regulatory zone, a nexus between them must exist such that when they operate, they do so within the "indivisible and distinct" matter separate from provincial constitutional competence. The control jurisdiction must be able to govern cause and effect, distinct from the subordinate jurisdiction. By reducing the characterization of the national concern to setting the bar on standards, and then justifying that narrow characterization by emphasizing its isolated nature, any ascertainable and reasonable limits are trivialized. Practically any small action can be rationalized as single, distinct and indivisible.

52. By moving from noun-based concepts such as aeronautics, or the capital region, or marine pollution, and into more active constructs such as "*the establishment of minimum standards...* " the risk of a negative precedent exists whereby any number of micro-jurisdictions could be created simply by deeming them to be sufficiently important and sufficiently unaddressed within what would otherwise be a matter of provincial competence. Marine pollution – in addition to being far from unduly narrow – was joined with a prohibition on <u>any</u> dumping and

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[32] *Crown Zellerbach, supra* note 16 at para 63, ABBOA, Vol. 2, Tab 15
[33] *ibid*

from this a constitutionally acceptable indivisibility from provincial concern was found. There is no sustainable analogy between *Crown Zellerbach* and the immediate circumstances.

53. New Brunswick submits that carbon pricing can never be an element of that which is distinct and indivisible for constitutional purposes. Unlike the blanket prohibition in *Crown Zellerbach*, the setting of minimum standards of stringency for matters within provincial competence, which, if not met, then trigger a jurisdictional override, has no proxy in "the essential indivisibility of marine pollution by the dumping of substances."

54. Perhaps, instead of collapsing Canada's sought-after national concern into the narrow construction it now resides within, legislation might have been developed that respected the division of powers. The ability to reduce greenhouse gas emissions by an ascertainable amount can be ascertained; it is measurable and objectively requires that the megatonnage of emissions being released into the environment be reduced. If there is a national concern to be located within the elusive legal structure that Canada advances, it is likely more proximate to *megatonnage reduction* but without the long arm of carbon pricing, which is clearly divisible from it.

55. Instead of creating legislation founded on a legitimate scope of authority, providing provinces with the leeway to implement the host of options arising under provincial constitutional competence, we now debate Canada's supervisory role over local matters, dressed as a national concern, untethered from intrusive growth potential. The *Anti-Inflation Act's*[34] "ascertainable and reasonable limits" are now open for business. An Act could have been developed from which Parliament could have foregone the general power and availed itself of its enumerated heads of legislative competence, or possibly developed less invasive legislation sustainable under the p.o.g.g. power.

56. In conclusion, it is submitted that the *Act* overreaches and invades provincial constitutional competence to an unacceptable degree. The jurisdictional balance has been upset. Per La Forest J. in *Crown Zellerbach*, "it requires a quantum leap to find constitutional justification for the

[34] *Supra* at note 19

provision."[35] If the *Act* had stopped short of its core principle and focussed upon the global concern of GHG emissions while leaving the means of reduction to the provinces, principles of federalism could possibly have been respected. Going further and regulating local behaviour invades a host of provincial concerns without regard for enumerated heads of power.

57. Even though the *Act* imposes an unbalanced vision of federalism and ignores a range of constitutionally-acceptable solutions, this is not to say that carbon pricing is an untenable method of achieving a reduction in GHG emissions. Incentivizing behaviour may well be one of the most appropriate methods. However, incentivizing behavioural change in the chosen manner *prima facie* requires incursions into matters properly left to provincial governments. Not all well-intentioned approaches are necessarily constitutional. In *R. v. Comeau,*[36] the Supreme Court considered principles of federalism in the context of s. 121 of the *Constitution Act*, 1867:

> [83] Thus, the federalism principle does not impose a particular vision of the economy that courts must apply. It does not allow a court to say, "This would be good for the country, therefore we should interpret the Constitution to support it." Instead, it posits a framework premised on jurisdictional balance that helps courts identify the range of economic mechanisms that are constitutionally acceptable. The question for a court is squarely constitutional compliance, not policy desirability: see, e.g., *Reference re Securities Act*, at para. 90; *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at pp. 471-72, per Wilson J.; *Reference re Anti-Inflation Act*, 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373, at pp. 424-25, per Laskin C.J. Similarly, the living tree doctrine is not an open invitation for litigants to ask a court to constitutionalize a specific policy outcome. It simply asks that courts be alert to evolutions in, for example, how we understand jurisdictional balance and the considerations that animate it.[37]

58. Furthermore, the language in the Preamble to the *Act*, dedicated to elevating carbon pricing as demonstrably necessary, does not suffice to save this jurisdictional misstep. Carbon pricing studies and ratification of accords do not transform carbon pricing in these circumstances into a constitutionally compliant outcome. This "core element" of the *Act* is a way, but unless it is part of an indivisible way for the federal Parliament, it is unconstitutional for p.o.g.g. purposes. By its arbitrary command of the topic it overreaches and captures too much of what is

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[35] *Crown Zellerbach, supra* note 16 at para 66, ABBOA, Vol. 2, Tab 15
[36] *R v Comeau*, 2018 SCC 15; [2018] 1 SCR 342, ABBOA, Vol. 2, Tab 14
[37] *Ibid* at para 83

provincial legislative capacity. In so doing the *Act* causes a stress on Canadian federalism and sets the stage for further incursions whenever similarly constructed (inter)national and allegedly indivisible issues arise, or when broad policy and regulatory matters are considered through such a narrow lens.

59. It is submitted that "reasonable and ascertainable limits" in these circumstances must stop short of an imposed carbon pricing mechanism. In that regard, the first nine recitals in the Preamble to the *Act* appear to be consistent with generally accepted science on the issue of global warming. That said, the remainder of the Preamble foreshadows a singular carbon reduction scheme of questionable constitutional merit that should have been left to the provinces to orchestrate. Instead of properly delineating between federal and provincial spheres of competence, the Preamble's remainder purports to give the federal Parliament authority over pricing schemes and behavioural change, which, by their nature, cannot exist within the essential indivisibility required under the p.o.g.g. power.

PART IV – ANSWER REQUESTED

60. For these reasons New Brunswick agrees with Alberta that the *Act* is unconstitutional in its entirety and respectfully requests that the Court answer the reference question as requested by Alberta at paragraph 290 of Alberta's factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2019.

William E. Gould
Counsel for the Intervenor,
The Attorney General of New Brunswick

PART V – AUTHORITIES

Statutes and Regulations

Climate Change Act, SNB 2018, c 11
Loi sur les changements climatiques, LN-B 2018, c 11

Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186
Loi sur la tarification de la pollution causée par les gaz à effet de serre, LC 2018, ch 12, art 186

The Constitution Act, 1867 (UK) 30 & 31 Victoria, c 3
Loi constitutionnelle de 1867, 30 & 31 Victoria, c 3

Case Law

Aeronautics Reference [1932] AC 54; *Johannesson v West St. Paul,* [1952] 1 SCR 292

Munro v National Capital Commission [1966] SCR 663

R v Comeau, 2018 SCC 15; [2018] 1 SCR 342

R v Crown Zellerbach, [1988] 1 SCR 401

Re: Anti-Inflation Act, [1976] 2 SCR 373; [1976] SCJ No 12

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40