C.A. No. C65807

IN THE COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

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INDEX

PAGE

PART I – INTRODUCTION

1. The Intervenor, Attorney General of New Brunswick ("New Brunswick") agrees with the factum of the Attorney General of Ontario ("Ontario") regarding the nature of this reference and agrees with Ontario's conclusions in every respect. New Brunswick also agrees with the climate data submitted by the Attorney General of Canada ("Canada"). This reference should not be a forum for those who deny climate change; nor should it be a showcase about the risks posed by greenhouse gas emissions ("GHG emissions"). The supporting data is relevant only to the extent that it is meaningfully connected to the constitutional question at issue.

2. The foundational climate change data provided by Canada, generally intended to portray the anticipated impacts of climate change in Canada, as well as the many references to international accord and commitments, leave an unquestionable impression of Canada's a deep resolve to see the nation's environmental footprint diminished. New Brunswick does not take issue with Canada's commitment or with the importance of the overall subject matter.

3. What New Brunswick disputes is the way in which the federal Parliament has apportioned its resolve to diminish GHG emissions by imposing "backstop legislation". Parliament's best intentions have resulted in it applying subjective criteria where uniform and objective standards previously were required to support its residual constitutional authority. The federal Parliament has substituted a vague "stringency" standard for any meaningful cooperative model for GHG emissions reduction. Much of the federal initiative has been

justified by providing the appearance of support for local solutions, but in some cases those solutions have been rejected without regard for local economic realities or constitutional authority. The resulting patchwork, the result of deep intrusion into matters ordinarily within local authority, creates an unprecedented model of federal interjurisdictional management where no such model should exist. New Brunswick says that much of it is unconstitutional.

4. New Brunswick therefore concurs with and adopts Ontario's submissions. As intervenor, New Brunswick will endeavour to add a perspective not otherwise provided.

PART II – SUMMARY OF FACTS

5. New Brunswick agrees with the facts as presented by Ontario. It further notes that provincial reactions to Canada's position, as Canada's position evolved, have also evolved during the time of the Vancouver Declaration through to the release of the Pan-Canadian Framework on Clean Growth and Climate Change. Some jurisdictions saw fit to sign on to the latter Framework, while some did not. New Brunswick proceeded by developing a plan responsive to the Framework document in a manner that respected local concerns and economic realities.

6. New Brunswick 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. New Brunswick's plan was rejected. The federal reasoning for the rejection was that it did not conform to

a federal acceptance criterion or "central pillar" of the *Act.* New Brunswick's plan apparently did not impose a sufficiently stringent carbon pricing model satisfactory to the Governor in Council. A portion of the Preamble to the *Climate Change Act* 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.
>
> *Climate Change Act*, SNB 2018, Ch 11

PART III – ISSUES AND LAW

I. Introduction

7. New Brunswick agrees with Ontario 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, 1867* ("p.o.g.g." or "the p.o.g.g. power").

8. The factums of Ontario and Canada and ably address the requisite issues and arguments leading to respective positions regarding the *vires* of the Act. As intervenor, New Brunswick does not intend to make submissions redundant to those of Ontario. Also, in keeping with the principle that intervenors should provide a unique perspective, and while also acknowledging that Ontario'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. Preliminary Observations

9. The pith and substance of Canada's justification for upholding the constitutionality of the Act may be found at paragraph 62 of its factum. The entirety of that paragraph bears repeating here:

> The *Act* deals with a single, distinct and indivisible matter – the cumulative dimensions of GHG emissions. Ontario's submissions inaccurately conflate GHG emissions with environmental pollution generally, air pollution categorically, or even with the environment as a whole. Canada is not claiming that pollution generally, or air pollution at large, are matters of national concern. Nor is Canada claiming that the environment generally is a matter of national concern. Canada only says that the cumulative dimensions of GHG emissions is a matter of national concern. GHG emissions are a discrete and distinct form of air pollution. Their cumulative effect provides the necessary unity and indivisibility and distinguishes the matter from provincial jurisdiction over local GHG emissions.

10. Although Canada argues that the cumulative dimensions of GHG emissions is a matter suitable for regulation under the nations concern doctrine (above and at paragraph 67 of its factum), it does not define with any precision "the cumulative dimensions of GHG emissions". Through a process of elimination

based upon Canada's response to Ontario's submissions – essentially that it is not pollution at a macro level – it appears that GHG emissions are at the heart of the matter. But Canada modifies the heart of the matter with "cumulative dimensions". This may seem a relatively benign addition, but it is an addition that apparently elevates the matter to that of a constitutional *national concern*, thereby implying that the criteria in fulfillment of the *national concern* doctrine are weaved within "the cumulative dimensions of GHG emissions".

11. New Brunswick assumes that "cumulative dimensions" is temporal in nature and that the chosen words are not merely intended as evocative of the (constitutional) "national dimension". The conclusion drawn is that Canada intends the phrase in the temporal sense, relating to a combination of past, current and future activities that, going to the heart of the matter, speaks to a combination of past, current and future GHG-emitting activities. New Brunswick submits that "cumulative" means as much. But we cannot be certain, because the *Act* in its preamble makes no attempt to provide temporal context. Rather the opposite, the preamble references "recent anthropogenic emissions of greenhouse gasses" and the "responsibility of the present generation to minimize impacts" – which do not clearly refine the meaning of "cumulative dimensions".

The *Act* Preamble, recitals no. 2 and 4

12. If this attempt to understand the heart of the constitutional *national concern* is close to the mark, then it begs the question of *why is this a matter that only Parliament, and Parliament alone, must manage?* Setting aside any division of

powers analysis, why does this matter transcend provincial capacity? GHG emissions 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. Canada's argument does not lay a foundation to justify a constitutional pivot from that state of affairs. Canada's characterization of the matter – such as that found at paragraph 62 of its factum, that "GHG emissions are a discrete and distinct form of air pollution" – might echo bits of the language in the *national concern* jurisprudence to be discussed below, but it does not provide any intuitive response to the issues that arise from the *Act's* intrusive intent.

13. Irrespective of how "discrete" past, present and future emissions of GHG may be, which is far from certain, they certainly find their present sources in every person, every head of cattle, in every internal combustion engine, in every industry, in practically everything that humanity does. This seems far more diffuse and universal than discrete and distinct. It is submitted that Canada's characterization of the matter lacks precision, is a construction of convenience, and is not a reflection of the science or socio-economic reality.

III. Basic Premise

14. This paragraph and the three that follow it are intended to summarize the overall argument appearing below. This factum's proposition is simple and begins with Le Dain J.'s statement regarding the requirement of distinctiveness in *R. v. Crown Zellerbach Canada Ltd.* ("*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.
>
> *R v Crown Zellerbach Canada Ltd*., [1988] 1 SCR 401; 49 DLR (4th) 161, at para 33

15. Mindful of Le Dain J.'s words, Canada's assertion that GHG emissions are sufficiently distinct will be analyzed in the light of the legal analysis in *Crown Zellerbach* – that the distinctive entity must possess a readily ascertainable scope and constraint. At paragraph 64 of its factum, Canada equates "the cumulative dimensions of GHG emissions with *Crown Zellerbach's* marine pollution. New Brunswick submits that this equation is flawed. While the "cumulative dimensions of GHG emissions" in all their diffuseness may, ironically, seem appropriately indivisible, New Brunswick will argue that the "singleness, distinctiveness and indivisibility" found in *Crown Zellerbach* (and elsewhere) rested upon a more internalized, geographic and logical legal dynamic – as opposed to Canada's externalized locus that apparently relies almost literally upon an inability to physically parse the GHG haze into constituent elements.

16. 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, GHG emissions, cumulative or otherwise, lack internal characteristics or boundaries. Accordingly, there is no analogue to marine pollution to be found in the "cumulative dimensions of GHG emissions". The lack of analogue dwells in Canada's failure to distinguish legal demarcations from spatial demarcations. Canada does not delve into what is really going on in *Crown Zellerbach*. As a result, appropriate organizing concepts are avoided and essential legal distinctions become anchored to wrong location. When the organizing concepts are properly aligned it is 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" expected of matters entitled to be deemed a national concern by fixating on the GHG haze as opposed to determining that which could not be achieved by provinces within provincial jurisdiction. In so doing, 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.

17. That is, by theorising the GHG emissions – cumulative or otherwise – fulfill the criteria that support a national concern, the federal Parliament started from the wrong footing and reached too far when it assumed control over the means of GHG emissions reduction.

IV. General Argument

18. 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 a carbon reduction strategy. 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 could be deployed.

19. 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*, where Justice Beetz noted at page 441:

> 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.
>
> *Re: Anti-Inflation Act*, [1976] 2 SCR 373; [1976] SCJ No 12, [*Anti-Inflation*], at page 441

20. On the other hand, it is not as straightforward to explain or understand federal intrusion into the enumerated heads of provincial competence. Perhaps this is the reason why Canada has settled upon its residual p.o.g.g. authority to justify the *Act*.

21. The *Act* and immediate issues share several characteristics with the case of *Crown Zellerbach*. Ontario and Canada say much about this case. 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.

22. The national concern doctrine within p.o.g.g. as it applies to the matter at hand is canvassed by Ontario commencing at paragraph 56 of its factum and by Canada commencing at paragraph 58 of its factum. Those submissions are persuasive from each point of view; repeating them would not be helpful, but expanding upon one area may provide some assistance.

23. The first sentence in paragraph 64 of Canada's factum states: "*Like marine pollution in Crown Zellerbach, the cumulative dimensions of GHG emissions has sufficiently distinct and separate characteristics to make them amenable to Parliament's residual power*." This seems like a fair comparison from a relatively distant vantage point, but does it withstand closer scrutiny?

24. In *Crown Zellerbach*, s. 4(1) of the *Ocean Dumping Control Act* gave the federal Parliament a broad authority to control marine pollution, just as here the *Act* gives the federal Parliament authority to control GHG emissions. *Crown Zellerbach* 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 concurred that consideration had to 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. It is admittedly tempting to focus upon La Forest J.'s dissenting opinion and argue that the immediate circumstances can be distinguished from the majority analysis. However, as noted above, these submissions are intent on dealing with the operational concept within the requisite "singleness, distinctiveness and indivisibility."

> *Ocean Dumping Control Act*, SC 1974-75-76, c 55, as discussed in *R v Crown Zellerbach, supra*

25. 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 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.

26. 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.
>
> *R v Crown Zellerbach, supra,* at para 38

27. Therefore, the Court constructed an *indivisible* subject matter out of a relatively fluid uncertainty. The political boundaries were blurry and even if the boundaries were razor-sharp, it remained that the effect of the moon, tides and currents conspired to make a pollutant's journey from one realm of water into the other a matter of great uncertainty. Blurry boundaries and aimlessly wandering flotsam and jetsam created a conceptual zone that was, from a regulatory perspective, indivisible. Something thrown in that zone would be thrown into a legal assimilation within which all contents would be legally indivisible from a control perspective.

28. One might attempt to conflate "the cumulative dimensions of GHG emissions" in extraterritorial space 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. Here, Canada is intent on externalizing the *locus of control*, effectively abandoning any inquiry into the lines of regulatory control. Canada relies largely upon international *gravitas* and transboundary diffuseness, which does nothing to enlighten any awareness of the regulatory aspect. If Canada were to internalize the *locus of control* and contemplate the true nature of the examination into regulatory aspects in *Crown Zellerbach*, then perhaps Canada would see that diffuseness of GHGs, cumulative or otherwise, has no partner in the boundary between regulatory aspects as drawn by the majority in that case.

29. Here, we are confronting an *Act* and argument that rather simplistically crosses over into clear provincial territory by unilaterally determining that there is but one way out of the problem with a carbon-pricing mechanism. This is supported by a hazy characterization of subject matter ("the cumulative dimensions of GHG emissions") while ignoring that lines of authority can still be drawn. New Brunswick submits that the approach unjustifiably infiltrates matters of property and civil rights in the provinces and other areas of local competence.

30. In *Crown Zellerbach,* the Court was unambiguous that the heralded *indivisibility* was not simply a matter of spatial diffuseness. The Court noted that the matter under consideration had elements that could indeed be parsed out along jurisdictional lines. For jurisdictional analysis, *place* and *impact* can be gleaned as constituent elements of indivisibility. An operational concept with dynamic elements is at play:

> This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of marine pollution by the dumping of substances.
>
> (underlining added)
>
> *R v Crown Zellerbach, supra,* at para 38

31. 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 *Ocean Dumping Control Act.*

> *Ocean Dumping Control Act*, SC 1974-75-76, c 55, as referenced in *R v Zellerbach, supra*

32. The Court gets there by observing the difference between marine and fresh waters – paragraph 39 of *Crown Zellerbach* highlights this as the ultimate 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***." 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*."

> *R v Crown Zellerbach, supra*, at para 39

33. Although it should be obvious, it may still be prudent to note that, in the above-referenced excerpt from paragraph 39, two things are being distinguished ***to meet the requirement of indivisibility***. What are those two things? Quite simply, the zone of provincial authority and the zone of federal authority. Is this important? Yes. 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*" was qualified as a national concern. Why does this matter? Because it shows that the Court was first and foremost concerned with establishing meaningful zones of authority that everybody could live with. New Brunswick submits that the existence of a national concern howsoever found does not justify legislation that goes beyond filling the gap in provincial authority. Canada goes well beyond any conceivable gap with its offering of a transcendent, spatial and temporal construct ("the cumulative dimensions of GHG emissions") seemingly to justify its core principle of carbon pricing while ignoring provincial heads of authority.

R v Crown Zellerbach, supra, at para 38

34. Said yet another way, the single, distinct and indivisible matter under examination in *Crown Zellerbach* required that its dynamic elements be isolated and apportioned such that the ***matter to control*** (marine pollution) was combined with an ***action*** (the dumping of substances within rationalized federal limits). The finding of a sufficient distinction between fresh and salt waters enabled the Court to find a satisfactory federal limitation within the impugned legislation. That

limitation was crucial in enabling the Court to find the national concern. Paragraph 39 concludes as follows:

> 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.
>
> (underlining added)

R v Crown Zellerbach, supra, at para 39

35. Accordingly, 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 *Crown Zellerbach* 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.

36. Additionally, the prohibition in the *Ocean Dumping Control Act* was a ban against all non-permitted dumping. The first paragraph of *Crown Zellerbach* states that the impugned legislation prohibited, "the dumping of any substance at sea except in accordance with the terms and conditions of a permit." 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 *Act* is not prohibitive in nature but has regulatory aspects. However, the

comparison should not be dismissed. 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"), such as that found in the *Act*, is not by nature distinct from provincial jurisdiction. That "the cumulative dimensions of GHG emissions" are "sufficiently distinct … to make them amenable to Parliament's residual power" should be questioned.

R v Zellerbach, supra, at para 1

37. The *indivisibility* refers to "an identity which made it distinct from provincial matters," or "a single indivisible matter of national interest and concern lying outside the specific heads of power assigned under the Constitution." This was found to exist in *Crown Zellerbach* in the face of a relatively howling dissent. That dissent is instructive here, for the purpose of contrasting "the cumulative dimensions of GHG emissions" with "marine pollution" to illustrate where *indivisibility* co-exists with "ascertainable and reasonable limits."

R v Zellerbach, supra, at paras 28 and 68

38. 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 limits. For example, in *Crown Zellerbach's* dissenting opinion, La Forest J. considers the obvious linkage of d*umping noxious fluid into coastal waters*. A less obvious linkage would be *depositing noxious solid material inland*, 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.

R v Zellerbach, supra, at para 63

39. Whether the linkage is obvious or more distant, it is submitted that a reasonable nexus must exist between the elements to enable them to be bundled into an "indivisible and distinct" matter separate from provincial constitutional competence.

40. Canada's unqualified assertion that "*the cumulative dimensions of GHG emissions has sufficiently distinct and separate characteristics*" does not appear to consider sub-characteristics let alone any nexus between them. From that perspective, almost anything could be rationalized as distinct; the ability to differentiate is illusory and the defaulting outcome would all-too-easily be a finding of a national concern for p.o.g.g. purposes. GHG emissions, with or without the temporal "cumulative" dimension, lacks meaningful context. Marine pollution was married with a prohibition on <u>any</u> dumping and from this a constitutionally acceptable indivisibility from provincial concern was born. To create analogous circumstances between *Crown Zellerbach* and the immediate circumstances, we could ask, *what are these cumulative GHG emissions partnered with and what is the constitutionally acceptable indivisibility from provincial concerns?*

41. Given the construction of the Act, the partner to GHG emissions appears to be carbon pricing, a stated core principle in the *Act* and the apparent dominant factor

in the subjective stringency analysis. Carbon pricing must be an element of the essential indivisibility in fulfillment of the national concern doctrine.

42. 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*, controlling GHG emissions and the imposition of particularized carbon pricing has no proxy to "the essential indivisibility of marine pollution by the dumping of substances." The sustainable comparison would be *the essential indivisibility GHG emissions and the need to reduce those emissions*. A province has no ability to determine on its own a national reduction goal even though it has full constitutional competence to implement the means of achieving that goal. That is, there may well be a constitutional point at which federal legislation could have landed to fill in the gap in provincial powers. But it is not the point at which this *Act* landed. The federal Parliament went well beyond any gap and delivered an *Act* that focussed not on the need to reduce emissions, but on the means of emissions reduction through carbon pricing. It is a step too far.

43. It is submitted that there is no construction that can be given to "the cumulative dimensions of GHG emissions" and carbon pricing together that would suffice to collapse them into the required singularity distinct from provincial competence. 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 has founded in "the cumulative dimensions of GHG emissions" it is likely more proximate to *megatonnage reduction* but without the long arm of carbon pricing, which is clearly divisible from it.

44. Instead of fixating upon a legitimate scope of authority and providing provinces with the leeway to implement the host of options arising under provincial constitutional competence, Canada has lately relied upon "the cumulative dimensions of GHG emissions" to support the assertion of a national concern – a reliance that conveniently defies any internalized analysis or, unlike marine pollution, possesses no inherent jurisdictional horizons. By doing this Canada has invited the scrutinizer to forego or ignore any analysis into the *Anti-Inflation Act's* "ascertainable and reasonable limits". However, New Brunswick submits that the goalposts could indeed be moved to the location of a rational "single, distinct and indivisible" subject matter from which the lodestar of federalism could have been respected. Also, 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. But for reasons known only to Canada, it did not do that, and we are faced with this *Act*, and it is unconstitutional.

45. 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 provision." If the Act had stopped short of its core principle and focussed upon the national concern of GHG

emissions while also leaving the means of doing so to the provinces, principles of federalism would more likely have been respected. Going further and regulating human behaviour simply invades a host of provincial concerns without regard for enumerated heads of power.

R v Zellerbach, supra, at para 66

46. 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 these circumstances *prima facie* requires incursions into matters properly left to provincial governments. Not all well-intentioned approaches are necessarily constitutional. Recently in *R. v. Comeau,* the Supreme Court considered principles of federalism in the context of s. 121 of the *Constitution Act*, 1867. At paragraph 83:

> [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.

R v Comeau, 2018 SCC 15; [2018] 1 SCR 342 at para 83

47. 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, it is unconstitutional. By its arbitrary command of the topic it overreaches and captures too much of what is 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.

48. 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 constituents or boundaries of the indivisibility required to invoke the p.o.g.g. power.

PART IV – ANSWER REQUESTED

49. For these reasons New Brunswick agrees with Ontario that the *Act* is unconstitutional in its entirety and respectfully requests that the Court answer the reference question as requested by Ontario at paragraph 113 of Ontario's factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of February, 2019.

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

PART VII – AUTHORITIES

Legislation
Climate Change Act, SNB 2018, Ch 11
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186
Ocean Dumping Control Act, SC 1974-75-76, c 55
Cases
Re: Anti-Inflation Act, [1976] 2 SCR 373; [1976] SCJ No 12
R v Comeau, 2018 SCC 15; [2018] 1 SCR 342
R v Crown Zellerbach Canada Ltd., [1988] 1 SCR 401; 49 DLR (4th) 161
Secondary Sources
UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

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COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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