Court File No. 39116

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

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT

-and-

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

(Style of Cause continued on next page)

FACTUM OF THE INTERVENER
PROGRESS ALBERTA COMMUNICATIONS LIMITED

Rule 42 of the *Rules of the Supreme Court of Canada*

NANDA & COMPANY
3400 Manulife Place
10180 – 101 Street NW
Edmonton, Alberta T5J 4K1

Avnish Nanda
Martin Olszynski

Tel: (780) 801-5324
Fax: (587) 318-1391
Email: avnish@nandalaw.ca

Counsel for Progress Alberta Communications Limited

MCGUINTY LAW OFFICES
1192 Rockingham Avenue
Ottawa, Ontario K1H 8A7

Dylan McGuinty Jr.

Tel: (613) 526-3858
Fax: (613) 526-3187
Email: dylanjr@mcguintylaw.ca

Agent for Progress Alberta Communications Limited

-and-

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

INTERVENERS

ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

COPIES TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street, 6th Floor
PO Box 9280 Stn Prov Govt
Victoria, British Columbia V8W 9J7

J. Gareth Morley
Jacqueline D. Hughes

Tel: (250) 952-7644
Fax: (250) 356-0064
Email: gareth.morley@gov.bc.ca

Counsel for the Appellant Attorney General of British Columbia

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

Michael J. Sobkin
Marie-France Major

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Agent for the Appellant Attorney General of British Columbia

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

Peter A. Gall, Q.C.
Benjamin Oliphant

Tel: (604) 891-1152 / (604) 891-1181
Fax: (604) 669-5101
Email: pgall@glgzlaw.com
boliphant@glgzlaw.com

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

Steven A. A. Dollansky

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

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

Alyssa Tomkins

Tel: (613) 565-2292
Fax: (613) 565-2087
Email: atomkins@plaideurs.ca

Agent for the Respondent Attorney General of Alberta

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

L. Christine Enns, Q.C.

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

Counsel for the Respondent Attorney General of Alberta

ATTORNEY GENERAL OF SASKATCHEWAN
820 - 1874 Scarth St.
Aboriginal Law Branch
Regina, Saskatchewan S3P 3B3

P. Mitch McAdam, QC, Alan Jacobson, and Deron Kuski, QC

Tel: (306) 787-7846
Fax: (306) 787-9111
Email: mitch.mcadam@gov.sk.ca

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

Deron Kuski
Jodi Wildeman

Tel: (306) 347-8404
Fax: (306) 352-5250
Email: dkuski@mltaikins.com
jwildeman@mltaikins.com

Counsel for the Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Saskatchewan

ATTORNEY GENERAL OF CANADA
Prairie Regional Office
301-310 Broadway Avenue
Winnipeg, Manitoba
R3C 0S6

Sharlene Telles-Langdon, Christine Mohr, Mary Matthews, and Neil Goodridge

Tel: (204) 983-0862
Fax: (204) 984-8495
Email: Sharlene.Telles-Langdon@justice.gc.ca

Counsel for the Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice
50 O'Connor Street
Suite 500
Ottawa, Ontario K1A 0H8

Christopher Rupar

Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Attorney General of Canada

ATTORNEY GENERAL OF NEW BRUNSWICK
675 King Street, Suite 2018
P.O. Box 6000, Stn. A.
Fredericton, New Brunswick E3B 5H1

William Gould

Tel: (506) 453-2222
Fax: (506) 453-3275
Email: william.gould@gnb.ca

Counsel for the Attorney General of New Brunswick

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of New Brunswick

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

Joshua Hunter, Padraic Ryan, and Aud Ranalli

Tel: (416) 908-7465
Fax: (416) 326-4015
Email: joshua.hunter@ontario.ca

Counsel for the Attorney General of Ontario

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Attorney General of Ontario

ATTORNEY GENERAL OF MANITOBA
Constitutional Law
1230 - 405 Broadway
Winnipeg, Manitoba
R3C 3L6

Michael Conner and Allison Kindle Pejovic

Tel: (204) 945-6723
Fax: (204) 945-0053
Email: michael.conner@gov.mb.ca

Counsel for the Attorney General of Manitoba

ATTORNEY GENERAL OF QUEBEC
Ministère de la justice du Québec
1200 Route de l'Église, 4e étage
Québec, Quebec G1V 4M1

Jean-Vincent Lacroix

Tel: (418) 643-1477 Ext: 20779
Fax: (418) 644-7030
Email: jean-vincent.lacroix@justice.gouv.qc.ca

Counsel for the Attorney General of Quebec

SASKATCHEWAN POWER CORPORATION and SASKENERGY INCORPORATED
McKercher LLP
374 Third Avenue South
Saskatoon, Saskatchewan S7K 1M5

David M. A. Stack, Q.C.

Telephone: (306) 664-1277
Fax: (306) 653-2669
Email: d.stack@mckercher.ca

Counsel for Saskatchewan Power Corporation and SaskEnergy Incorporated

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Manitoba

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

Pierre Landry

Tel: (819) 503-2178
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Attorney General of Quebec

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Saskatchewan Power Corporation and SaskEnergy Incorporated

CANADIAN TAXPAYERS FEDERATION
Crease Harman LLP
800-1070 Douglas Street Unit
Victoria, British Columbia V8W 2C4

R. Bruce E. Hallsor and Hana Felix

Telephone: (250) 388-9124
Fax: (250) 388-4294
Email: Bhallsor@crease.com

Counsel for the Canadian Taxpayers Federation

INTERNATIONAL EMISSIONS TRADING ASSOCIATION
DeMarco Allan LLP
265-333 Bay Street
Toronto, Ontario M5H 2R2

Elisabeth DeMarco and Jonathan McGillivray

Telephone: (647) 991-1190
Fax: (888) 734-9459
Email: lisa@demarcoallan.com

Counsel for the International Emissions Trading Association

CANADIAN PUBLIC HEALTH ASSOCIATION
Gowling WLG (Canada) LLP
1600 - 100 King Street West
Toronto, Ontario M5X 1G5

Jennifer L. King, Michael Finley and Liane Langstaff

Telephone: (416) 862-7525
Fax: (416) 862-7661
Email: jennifer.king@gowlingwlg.com

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Canadian Taxpayers Federation

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

Sophie Arseneault

Phone: (613) 696-6904
Fax: (613) 230-6423
Email: sarseneault@fasken.com

Agent for the International Emissions Trading Association

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell

Telephone: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Agent for the Canadian Public Health Association

Counsel for the Canadian Public Health Association

ATHABASCA CHIPEWYAN FIRST NATION
University of Ottawa
216-1 Stewart Street
Ottawa, Ontario K1N 6N5

Amir Attaran

Telephone: (613) 562-5800 Ext: 3382
Fax: (613) 562-5319
Email: aattaran@ecojustice.ca

Counsel for Athabasca Chipewyan First Nation

CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. and SISTERS OF PROVIDENCE OF ST. VINCENT DE PAUL
Canadian Environmental Law Association
1500 - 55 University Avenue
Toronto, Ontario M5J 2H7

Joseph F. Castrilli, Theresa McClenaghan and Richard D. Lindgren

Telephone: (416) 960-2284 Ext: 7218
Fax: (416) 960-9392
Email: castrillij@sympatico.ca

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

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell

Telephone: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

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

ASSEMBLY OF FIRST NATIONS
Assembly of First Nations
1600-55 Metcalfe Street
Ottawa, Ontario K1P 6L5

Stuart Wuttke, Julie McGregor, Adam Williamson and Victor Carter

Telephone: (613) 241-6789 Ext: 228
Fax: (613) 241-5808
Email: swuttke@afn.ca

Counsel for the Assembly of First Nations

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon

Telephone: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Assembly of First Nations

DAVID SUZUKI FOUNDATION
University of Ottawa
216-1 Stewart Street
Ottawa, Ontario K1N 6N5

Joshua Ginsberg and Randy Christensen

Telephone: (613) 562-5800 Ext: 3399
Fax: (613) 562-5319
Email: jginsberg@ecojustice.ca

Counsel for David Suzuki Foundation

CANADIAN ECOFISCAL COMMISSION
University of Ottawa Faculty of Law
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5

Stewart Elgie

Telephone: (613) 562-5800 Ext: 1270
Email: stewart.elgie@uottawa.ca
Counsel for the Canadian Ecofiscal Commission

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, Ontario K2P 0W6

Bijoy Roy

Telephone: (613) 237-4740
Fax: (613) 232-2680
Email: broy@champlaw.ca
Agent for the Canadian Ecofiscal Commission

CLIMATE JUSTICE SASKATOON, NATIONAL FARMERS UNION, SASKATCHEWAN COALITION FOR SUSTAINABLE DEVELOPMENT, SASKATCHEWAN COUNCIL FOR INTERNATIONAL COOPERATION, SASKATCHEWAN ENVIRONMENTAL SOCIETY, SASKEV
Kowalchuk Law Office
18 Patton Street
Regina, Saskatchewan S4R 3N9

Larry W. Kowalchuk, Taylor-Anne Yee and Jonathan Stockdale

Telephone: (306) 529-3001
Email: larry@kowalchuklaw.ca

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

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon

Telephone: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

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

COUNCIL OF CANADIANS: PRAIRIE AND NORTHWEST TERRITORIES REGION, COUNCIL OF CANADIANS: REGINA CHAPTER, COUNCIL OF CANADIANS: SASKATOON CHAPTER, NEW-BRUNSWICK ANTI-SHALE GAS ALLIANCE and YOUTH OF THE EARTH
Kowalchuk Law Office
18 Patton Street
Regina, Saskatchewan S4R 3N9

Larry W. Kowalchuk, Taylor-Anne Yee and Jonathan Stockdale

Telephone: (306) 529-3001
Email: larry@kowalchuklaw.ca

Counsel for Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New-Brunswick Anti-Shale Gas Alliance and Youth of the Earth

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon

Telephone: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New-Brunswick Anti-Shale Gas Alliance and Youth of the Earth

OCEANS NORTH CONSERVATION SOCIETY
Arvay Finlay LLP
1512-808 Nelson Street
Vancouver, British Columbia V6Z 2H2

David Wu

Telephone: (604) 696-9828
Fax: (888) 575-3281
Email: dwu@arvayfinlay.ca
Counsel for the Ocean North Conservation Society

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, Ontario K1P 5H9

Moira Dillon

Telephone: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Agent for the Ocean North Conservation Society

AMNESTY INTERNATIONAL
Stockwoods LLP
TD North Tower, suite 4130
77 King Street West, P.O. Box 140
Toronto, Ontario M5K 1H1

Justin Safayeni and Zachary Al-Khatib

Telephone: (416) 593-7200
Fax: (416) 593-9345
Email: justins@stockwoods.ca

Counsel for Amnesty International

SMART PROSPERITY INSTITUTE
University of Ottawa Faculty of Law
57 Louis Pasteur St.
Ottawa, Ontario K1N 6N5

Jeremy de Beer

Telephone: (613) 562-5800 Ext: 3169
E-mail: Jeremy.deBeer@uOttawa.ca

Counsel for Smart Prosperity Institute

THUNDERCHILD FIRST NATION
McKercher LLP
374 Third Avenue South 454
Saskatoon, Saskatchewan S7K 1M5

Dusty Ernewein and Lorne R. Fagnan

Telephone: (306) 664-1296
Fax: (604) 653-2669
Email: d.ernewein@mckercher.ca

Counsel for Thunderchild First Nation

CONWAY BAXTER WILSON LLP
400 - 411 Roosevelt Avenue
Ottawa, Ontario K2A 3X9

David P. Taylor

Telephone: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

Agent for Amnesty International

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Guy Régimbald

Tel: (613) 786-0197
Fax: (613) 563-9869
Email: guy.regimbald@gowlingwlg.com

Agent for Smart Prosperity Institute

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of Saskatchewan
Power Corporation and SaskEnergy Incorporated

GENERATION SQUEEZE, PUBLIC HEALTH ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN PUBLIC HEALTH ASSOCIATION, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, CANADIAN COALITION FOR THE RIGHTS OF THE CHILD AND YOUTH CLIMATE LAB
RATCLIFF & COMPANY LLP
500-221 West Esplanade
North Vancouver, British Columbia V7M 3J3

Nathan Hume, Emma Hume and Cam Brewer

Telephone: (604) 988-5201
FAX: (604) 988-1452
E-mail: nhume@ratcliff.com

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

POWER LAW
1103-130 Albert Street
Ottawa, Ontario K1P 5G4

Darius Bossé

Telephone: (613) 702-5566
Fax: (613) 702-5566
Email: DBosse@juristespower.ca

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

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PART I: OVERVIEW

1. In contrast to the Saskatchewan and Ontario Courts of Appeal, a majority of the Alberta Court of Appeal held that the *Greenhouse Gas Pollution Pricing Act* ("***GGPPA***") is *ultra vires* Parliament's "peace, order and good government" ("**POGG**") power[1] and that it cannot be upheld under any other federal head of power.[2] According to the majority, the *GGPPA* falls within the provinces' authority pursuant to sections 92A, 109, and 92(13) of the *Constitution Act, 1867*.[3]

2. The submissions of Progress Alberta Communications Limited ("**Progress Alberta**") in the collateral *GGPPA* reference appeals focus on the "scale of impact on provincial jurisdiction" analysis under the national concern branch of POGG. Those submissions stress the importance of setting a meaningful baseline when assessing the impact of recognizing a matter of national concern.[4] Setting such a baseline requires not only an identification of the relevant heads of power but also a correct delineation of their scope.

3. Progress Alberta submits that the majority in the *ABCA Reference* misconstrued the scope of provincial legislative authority pursuant to sections 92 and 92A, which error was then carried over into the majority's approach to POGG. Contrary to the majority's opinion, sections 92 and 92A do not confer on the provinces an unlimited authority to develop their natural resources without regard to impacts outside the province. Rather, like all legislative authority in Canada, these powers are to be interpreted in accordance with the relevant principles of federalism, including the equality of the provinces and regard for their respective sovereignties.

PART II: POSITION ON THE QUESTION IN ISSUE

4. According to the majority, sections 92 and 92A of the *Constitution Act, 1867* confer on the provinces an essentially unlimited authority to develop their natural resources.[5] Consequently, when assessing the scale of impact of recognizing the subject matter of the *GGPPA* as a matter of national concern, the majority held that the *GGPPA* was not reconcilable with the division of powers.[6]

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[1] 2020 ABCA 74 [**"*ABCA Reference*"**] at ¶¶287 – 337, Book of Authorities of Progress Alberta Communications Limited ("**PA –Book of Authorities**"), Tab 1.
[2] *Ibid* at ¶¶257 – 261, PA – Book of Authorities, Tab 1.
[3] *Ibid* at ¶¶271 – 274, PA – Book of Authorities, Tab 1.
[4] Factum of Progress Alberta Communications Limited filed in Supreme Court of Canada Case 38781 and 38663 ("**PA – Primary Factum**") at ¶¶20 – 23.
[5] See *infra* Part III.A; Factum of the Appellant, at ¶48.
[6] *ABCA Reference,* at ¶¶326 – 330, PA – Book of Authorities, Tab 1.

5. Such an approach to sections 92 and 92A is clearly in error. Legislative authority must respect the principles of federalism.[7] Provincially preferred outcomes with respect to natural resources development can be affected by valid federal legislation.[8] Provincial authority is territorially limited "in recognition of…the equality of the provinces within the Canadian federation [and] respect for the sovereignty of other provinces within their respective legislative spheres."[9] Thus, where the majority posits a unilateral provincial right to balance environmental concerns with economic sustainability,[10] such authority is surely contingent on respect for provincial territorial limits.[11] Where environmental concerns substantially transcend those limits, the equality and sovereignty of the other provinces is engaged and federal involvement is justified.[12]

PART III: STATEMENT OF ARGUMENT

A. Unlimited Provincial Authority?

6. The majority in *ABCA Reference* determined that sections 92 and 92A confer on the provinces an essentially unlimited authority to develop their natural resources. The majority found that "the purpose of s 92A, when passed, *was to bar* the federal government's intrusion into a province's development and management of its natural resources."[13] It held that the "fact one or more provinces produce disproportionately higher GHG emissions, and thus more potential for a negative impact on other provinces on this front, does not permit the federal government to deprive *the provinces of their incontrovertible jurisdiction over their natural resources or other provincial powers*,"[14] and that "how the provinces exercise their jurisdiction to regulate GHG emissions *is a policy question not a legal one*."[15] In considering the scale of impact on provincial jurisdiction, the majority concluded by finding that "the regulation of GHG emissions and any variation on this theme…interferes with the provinces' exclusive jurisdiction [and] *effectively deprives the*

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[7] *Ward v Canada (Attorney General),* 2002 SCC 17 at ¶30, PA – Book of Authorities, Tab 2.
[8] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [**"*Friends of the Oldman River*"**] at p. 69, PA –Book of Authorities, Tab 3.
[9] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* 2020 SCC 4 [**"*Uashaunnuat*"**] at ¶¶210 – 211, PA – Book of Authorities, Tab 4.
[10] *ABCA Reference,* at ¶316, ¶328 and ¶330, PA – Book of Authorities, Tab 1.
[11] *1068754 Alberta Ltd v Québec (Agence du revenu),* 2019 SCC 37 at ¶84 (**"*Bitton Trust*"**), PA – Book of Authorities, Tab 5.
[12] *Interprovincial Co-operatives Ltd. et al. v R*, [1976] 1 SCR 477 [***"Interprovincial Co-op"***], PA – Book of Authorities, Tab 6.
[13] *ABCA Reference, supra* note 3 at ¶271 [emphasis added], PA – Book of Authorities, Tab 1.
[14] *Ibid* at ¶314 [emphasis added], PA – Book of Authorities, Tab 1.
[15] *Ibid* at ¶316 [emphasis added], PA – Book of Authorities, Tab 1.

provinces of their right to balance environmental concerns with economic sustainability."[16] Such an approach to sections 92 and 92A is inconsistent with the modern approach to federalism.

B. Co-operative Federalism

7. In *Reference re Genetic Non-Discrimination Act*, this Court re-affirmed that "the fixed 'watertight compartments' approach has long since been overtaken… the more flexible principle of 'co-operative federalism' and the doctrines of double aspect and paramountcy have been developed."[17] This understanding is well-established in the environmental and natural resources contexts, where "considerable overlap" is the rule[18] and where section 92A has <u>never</u> barred federal involvement in natural resources development.[19] Indeed, this Court's decision in *Quebec (Attorney General) v Moses* is apposite:

> There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister... The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.[20]

8. Practically speaking, in the natural resources context this means that the provinces have often been, and will continue to be, joined by the federal government in balancing environmental concerns with economic ones – regardless of whether the *GGPPA* is upheld. Indeed, the federal government may conduct its own "cost-benefit analysis" in such instances.[21]

C. The Territorial Limit

9. Even in those instances where resource development is not affected by federal involvement, provinces remain constrained by the territorial limitations expressed throughout sections 92 and 92A. As recently explained by Justices Rowe and Brown:

> …in our constitutional order…provincial jurisdiction is *territorially limited*, in recognition of two related principles. The first — the equality of the provinces within the Canadian federation — has been stated as follows by Ruth Sullivan:

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[16] *Ibid* at ¶328 [emphasis added], PA – Book of Authorities, Tab 1.
[17] 2020 SCC 17 at ¶22, PA – Book of Authorities, Tab 7.
[18] *Friends of the Oldman River,* at p. 64, PA – Book of Authorities, Tab 3.
[19] Martin Olszynski, et al "Breaking Ranks (and Precedent): Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74" (2020) 33(2) J. Env. L. & Prac 159 at 170 – 174, PA – Book of Authorities, Tab 13.
[20] 2010 SCC 17 [**"*Moses*"**] at ¶36, PA – Book of Authorities, Tab 8.
[21] *Friends of the Oldman River,* at p. 39, PA – Book of Authorities, Tab 3; *Moses,* at ¶¶49 – 52, PA – Book of Authorities, Tab 8.

> The provinces of Canada . . . are of equal dignity and each is vested with identical exclusive jurisdiction over the subjects listed in section 92. This jurisdiction is necessarily confined to matters "in the Province" because any other arrangement would permit one province to violate the internal sovereignty of its fellow provinces…

The second principle — respect for the sovereignty of other provinces within their respective legislative spheres — was enunciated by this Court in *Unifund*...

> This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: "In each Province the Legislature may exclusively make Laws in relation to" the enumerated heads of power. The authority to legislate in respect of insurance is founded in s. 92(13), which confers on each legislature the power to make laws in relation to "Property and Civil Rights in the Province".[22]

10. Two manifestations of these principles are found in *Interprovincial Co-op*. First, a majority of judges agreed that one province (Manitoba) could not modify the legal rights of a company in another province.[23] This is part of the "provincial inability" facing provinces like British Columbia with respect to GHG emissions emanating from other provinces.[24] Second, a different majority agreed that provinces could not authorize harms beyond their own borders – at least insofar as civil liability for such harms was concerned.[25] Justice Pigeon put it this way: [26]

> … I find it necessary to say that it does not appear to me that a province can validly license on its territory operations having an injurious effect outside its borders so as to afford a defence against whatever remedies are available at common law in favour of persons suffering injury thereby in another province… Such a cause of action is, I think, a right enforceable outside that state or province which its legislature cannot take away under the principle stated in Royal Bank of Canada v. The King. The legal situation would not be different if, instead of polluting plants, we were faced with dams flooding lands in an adjoining province. It could certainly not be contended that the province in which the dam was erected could validly license the flooding in the other.

11. Similarly, Justice Laskin (dissenting but concurring on this point) put it this way:

> If [the companies] are respectively licensed to discharge contaminants to the extent that they did, that licence…does not have an extra-territorial reach to entitle each of them with impunity to send their pollutants into the waters of another province. That would be to assert against Manitoba an extra-territorial privilege and to use it as a basis for denying to Manitoba any

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[22] *Uashaunnuat*, at ¶¶210 – 211, PA – Book of Authorities, Tab 4.
[23] *Interprovincial Co-op*, at p. 510, PA – Book of Authorities, Tab 6.
[24] Factum of Attorney General of British Columbia filed in Supreme Court of Canada Case 38781 and 38663 at ¶46.
[25] *ABCA Reference,* at ¶533 (Wakeling JA concurring), PA – Book of Authorities, Tab 1.
[26] *Interprovincial Co-op,* at p. 511 – 512, PA – Book of Authorities, Tab 6.

> local internal power to charge [the companies] with civil liability for damage produced in Manitoba.[27]

12. Thus, while under current doctrine the regulatory regimes governing resource development that generate extra-territorial harms are probably *intra vires* provincial authority,[28] such harms may nevertheless be unlawful.[29] Alberta concedes as much when it unsuccessfully attempts to distinguish GHG emissions from "provincial actions with an *immediate* and tangible impact on other provinces – such as toxic waste flowing *directly* from one province to the other."[30] However, neither immediacy nor directness are universal pre-requisites for tortious liability. Private nuisance requires only substantial and unreasonable interferences with the use or enjoyment of land,[31] while public nuisance involves unreasonable interference with "the public's interest in questions of health, safety, morality, comfort or convenience."[32]

13. Such actions would be not unlike those between nation states for transboundary harm pursuant to customary international law.[33] The critical distinction is that, as between Canadian provinces, where a "legislative solution may well be wanted…the federal Parliament is the only forum competent to weigh the competing provincial interests and reach a policy decision based on a perception of what will best serve the national welfare."[34] Climate change plainly demands a "legislative solution," interprovincial civil litigation being both undesirous and insufficient to the task. Returning to the scale of impact analysis, then, the foregoing also makes clear that the impact of such legislation would be less significant because provincial authority is already constrained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 7th DAY OF AUGUST 2020.

Counsel for the Intervener,
Progress Alberta Communications Limited
Martin Olszynski & Avnish Nanda

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[27] *Ibid* at p. 498 – 499; see also p. 505, PA – Book of Authorities, Tab 6.
[28] *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at ¶¶ 26 – 36, PA – Book of Authorities, Tab 9. But see Ruth Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 *S.C.L.R.* 511 at 544, PA – Book of Authorities, Tab 14.
[29] *Groat v Edmonton (City)*, [1928] SCR 522 at pg. 532, PA – Book of Authorities, Tab 10.
[30] Factum of the Respondent, at ¶ 28 [emphasis added].
[31] *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at ¶19, PA – Book of Authorities, Tab 11.
[32] *Ryan v Victoria (City),* [1999] 1 SCR 201 at ¶52 – Book of Authorities, Tab 12.
[33] *Interprovincial Co-op, supra* note 13 at p. 512, PA – Book of Authorities, Tab 6.
[34] Sullivan, *supra* note 29 at 551 [emphasis added], PA – Book of Authorities, Tab 14; *Interprovincial Co-op,* at p. 512 – 513, PA – Book of Authorities, Tab 6.

PART IV: TABLE OF AUTHORITIES

Jurisprudence	Cited At:
1. *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74	¶1, ¶5, ¶6, ¶10
2. *Ward v Canada (Attorney General),* 2002 SCC 17	¶5
3. *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3	¶5, ¶7, ¶8
4. *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)* 2020 SCC 4	¶5, ¶9
5. *1068754 Alberta Ltd v Québec (Agence du revenu),* 2019 SCC 37	¶5
6. *Interprovincial Co-operatives Ltd. et al. v R*, [1976] 1 SCR 477	¶5, ¶10, ¶11, ¶13
7. *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17	¶7
8. *Quebec (Attorney General) v Moses,* 2010 SCC 17	¶7, ¶8
9. *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49	¶12
10. *Groat v Edmonton (City)*, [1928] SCR 522	¶12
11. *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13	¶12
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13. Martin Olszynski, et al "Breaking Ranks (and Precedent): Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74" (2020) 33(2) *J. Env. L. & Prac* 159	¶7
14. Ruth Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 *S.C.L.R.* 511	¶12, ¶13