COURT OF APPEAL OF ALBERTA

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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

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PART I – FACTS

OVERVIEW

1. Greenhouse gases might pose the most difficult collective action problem the world has ever faced. Sub-national jurisdictions have developed innovative responses to the challenge. But only national – and ultimately international – action to ensure minimum levels of stringency can render these efforts meaningful. The collective action problem arises because the benefits of emissions are local, but the costs are global. If the climate is to be stabilized, overall emissions must be constrained and ultimately decline to net zero. That implies that an emission in one place must be offset somewhere else. But small jurisdictions that get out in front of others will pay a disproportionate economic price unless others enact measures of comparable stringency. including through the phenomenon of "carbon leakage." The result is everyone does less than they would if they knew others would do the same

2. Under Canada's Constitution, provinces have legislative authority to regulate or price emissions by individuals and businesses within their borders. In 2008, British Columbia enacted one of the first carbon pricing schemes. In the intervening decade, emissions were reduced compared to what they would have been, while the province enjoyed the highest economic growth in the country. But because greenhouse gases do not respect borders -- while provincial legislation must -- British Columbia's actions will only work if other jurisdictions follow suit. While British Columbia has no need to have other jurisdictions adapt its precise model, if they do not enact measures of comparable stringency, British Columbia's carbon price will have no real effect on the impacts of climate change on British Columbia or anywhere else.

3. The world as a whole has no solution to this problem, except the uncertain process of international negotiation. Canada, on the other hand, is not a treaty arrangement between independent states, but a federation with two levels of co-ordinate sovereign governments. Section 91 of the *Constitution Act, 1867* gives Parliament the power to make laws "for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." This General Power authorizes Parliament to address matters the provinces cannot, thereby ensuring that legislative jurisdiction under our Constitution is exhaustively distributed.

4. The legal and practical effect of the *Greenhouse Gas Pollution Pricing Act,* SC 2018, c.

12 (the *"GGPPA"*) is to enable the Governor in Council to set a minimum benchmark of stringency for pricing greenhouse gases in Canada and to impose backstops for small and large emitters if provincial and territorial measures do not meet this benchmark. Its purpose is to allocate part of the economic burden of meeting Canada's national greenhouse gas targets across the country in a way Parliament considers efficient and fair. The "dominant characteristic", "matter" or "pith and substance" of the *Act* is therefore ***establishing minimum national pricing standards to allocate part of Canada's overall targets for greenhouse gas emissions reduction.***

5. The constitutional validity of the *GGPPA* therefore turns on whether the matter so defined can be classified as part of the General Power because it is of national dimensions or concern. Long ago, the courts recognized dangers to provincial autonomy if the national concern doctrine were given too broad a reading. They insisted that a "matter" must be defined narrowly. To be eligible for federal authority under the General Power, it must have a "singleness, distinctiveness and indivisibility" that clearly distinguishes it from matters of provincial concern. The scale of the impact of assigning it to federal jurisdiction must be reconcilable with the fundamental distribution of legislative power under the Constitution. But they also insisted that all sovereign power is exhaustively distributed in Canada, so matters truly beyond provincial competence because of collective action problems must lie with Parliament. The key is the seriousness of extra-provincial effects of one province's inaction – the so-called "provincial inability" test. The people of Canada are not left without a means to address joint threats because one region might defect: the division of powers is not a suicide pact.

6. The world is rapidly using up the atmosphere's limited capacity to take greenhouse gas emissions. It is already too late to prevent serious disruption of the world's biological, social and economic systems. But it is not too late to stop catastrophe – if we can overcome the collective action problem. At the international level, only the Federal government has the means to do so. Canada has appropriated for itself a disproportionate share of this global capacity and, so far, Canada has never met its international commitments. Within the nation, there is a great deal of room for provincial experimentation, but meeting collective targets also requires ensuring minimum levels of stringency. The Framers of Confederation gave Parliament the express legal tools to address the inter-provincial collective action problems of their own day (tariffs, defence, cross-border transportation and communication infrastructure) and the General Power to address those that would come in the future. That future has now arrived.

EFFECTIVENESS OF GHG PRICING DEPENDS ON STRINGENCY IN OTHER JURISDICTIONS

7. The economic and non-pecuniary interests of British Columbians are under threat from climate change: it has already experienced average temperature increases of 1.4°C since 1900 and can expect between 1.7 and 4.5 degrees more by 2100.[1] The most devastating consequence so far was the pine beetle epidemic that raged from 1999 through 2012. A succession of relatively warm winters allowed the previously endemic beetle to spread and destroy 58% of merchantable pine volume.[2] British Columbia's iconic forest industry has never recovered. The worst fire seasons in memory were 2017 and 2018: in coming decades, British Columbia can expect wildfires like California's today.[3] Melting permafrost as a result of climate change may damage infrastructure in Northern British Columbia, especially for remote communities and Indigenous Peoples.[4] Sea level rise poses risk of unquantified property losses for coastal British Columbia. [5] In addition to climate change, carbon dioxide emissions cause the oceans to become more acidic, posing risks to bony fish and shell fish resources on the coast.[6]

8. British Columbia has been an innovator in climate policy to try to reduce emissions. Beginning in 2008, British Columbia enacted a carbon tax, which is scheduled to reach $50 per tonne of carbon dioxide equivalent by 2021.[7] A study in 2015 estimated that this tax had reduced emissions between 5 and 15% compared with what they would otherwise have been.[8] But because of the basic physical fact that greenhouse gas emissions are global, unless other jurisdictions follow suit, and unless British Columbia's own ambition becomes even greater, there will be no measurable impact on the problem, either globally or as experienced in British

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[1] As set out in BC's Indicators of Climate Change 2016 Update, as seen in the Affidavit of Tim Lesiuk #2, filed in the Saskatchewan Court of Appeal, which is Exhibit 1 to the Affidavit of Olivia Lindokken ("Lesiuk"), paras. 5 and 6, Ex. B, **Record of Attorney General of British Columbia (BCR), pp. 18-19, 35-36.**

[2] Lesiuk, para. 7, Ex. C, **BCR, pp. 19, 74-75, 91-98.**

[3] Lesiuk, para. 8, Ex. D, **BCR, pp. 20, 101-115.**

[4] Lesiuk, para. 11, Ex. F, **BCR, pp. 20-21, 123-127.**

[5] Lesiuk, para. 9-10, Ex. B, p. 32 ("Higher mean sea level and more frequent extreme high-water events, such as king tides, will increase the likelihood that storms will damage waterfront hoes, wharves, roads, and port facilities… Areas particularly at risk are the Fraser River delta, where 100 square kilometres of land are currently within one metre of sea level.") and Ex. E, which states long-term trends in sea level rise on the West Coast may currently be masked by decadal-scale variations, , **BCR, pp. 20, 64, 117-121.**

[6] Cross Examination of Robert Savage ("Savage Cross"),p. 536, ln. 1-18; Lesiuk, para. 13, Ex. G, **BCR, pp. 21, 128-175.**

[7] Lesiuk Affidavit, para. 19, **BCR, p. 24**

[8] Lesiuk Affidavit, Ex. I, **BCR, pp. 204-224.**

Columbia itself.

9. British Columbia is, of course, not alone in its predicament: any jurisdiction that takes more stringent actions than the jurisdictions with which it is competing pays a price.[9] Greenhouse gases are the ultimate example of a global pollutant, which economists of environmental federalism distinguish from local pollutants (in which the negative effects are felt in the same jurisdiction as the emission) or cross-border pollutants (in which the negative effects are felt in one "downstream" jurisdiction, which can then bilaterally negotiate with the "upstream" jurisdiction). [10] With a global pollutant, we are all both upstream and downstream.

10. Greenhouse gases are defined by international convention as gases that, when released into the atmosphere, accumulate over time and contribute to climate change.[11] The most common is carbon dioxide, and the warming potential of the other greenhouse gases is converted to carbon dioxide equivalent.[12] The key physical facts about greenhouse gases for federalism purposes are that they mix and they accumulate. As gases, they circulate through the world's atmosphere so that an emission anywhere has the equivalent effect of an emission anywhere else.[13] "Accumulation" means that what matters is the concentration of the gas in the world's atmosphere: this is determined by the amount in the atmosphere at the beginning of a period of time (such as a year) plus the amount emitted during that period of time minus the amount leaving the atmosphere ("net emissions").[14] While the impacts of climate change have been and will continue to be extremely geographically disparate, the harm any particular part of the planet will suffer will have nothing to do with how much it contributed to the problem.[15]

11. To meet any target for total warming, net emissions must reach zero at a determinate

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[9] Savage Cross, p. 87, ln. 11-p. 88, ln. 10

[10] Maureen Cropper & Wallace Oates, "Environmental Economics: A Survey" 30 *J. of Econ. Lit.* 675 (1992) at pp. 695-5 , **BCR, pp. 278-343**; Roland Magnusson, "Efficiency of Non-cooperative Emission Taxes in Perfectly Competitive Markets, **BCR, pp. 392-396**; Revesz, Richard, "Federalism and Interstate Environmental Externalities" 144 U. *Penn. L.R.*: 2341 (1996); Farber, Daniel, "Environmental Federalism in a Global Economy" 83 *Virginia L.R.* 1283 (1997); Cooter, Robert & Siegel, Neil, "Collective Action Federalism: A General Theory of Article 1, Section 8" 63 *Stanford L.R.* 115 (2010).

[11] UN Framework Convention on Climate Change, 1992, Art. 1, para. 5; Affidavit of Robert Savage ("Savage Aff"), para. 12, **Record of the Attorney General of Alberta, Vol. I ("ABRI"), p. A4.**.

[12] Savage Aff, para. 13, **ABRI, p. A4.**

[13] Affidavit of John Moffet, para. 7; Savage Cross, p. 51, ln 16-19.

[14] Savage Cross, p. 52, ln 17-21.

[15] Moffet, para. 7.

point in the future and be constrained in the intervening decades.[16] In a 2018 Special Report, the Intergovernmental Panel on Climate Change concluded that, in order to keep global warming to 1.5°C over pre-industrial levels, global emissions of carbon dioxide would need to fall to 45% of 2010 levels by 2030 and reach net zero by 2050.[17] Canada committed to pursue efforts to meet the 1.5°C target in the 2015 Paris Agreement, but its Nationally Determined Contribution in the Paris Agreement is just a 30% reduction compared with 2005 levels by 2030.[18]

12. In 2005, total Greenhouse Gas Emissions in Canada were 732 Megatonnes (Mt) carbon dioxide equivalent. Canada has committed to a target of 30% below this level (or 512Mt) by 2030. In 2016, they were 704 Mt, with about 60 Mt emitted in British Columbia. So even if British Columbia ceased – immediately – to emit any greenhouse gases at all, Canada would not meet the target.[19] Canada is one of the highest emitters in the world on a per capita basis. Alberta's per capita emissions exceed those of any country on the planet.[20] Canada has repeatedly failed to meet its national targets in the past. Emissions in Alberta, in particular, are not consistent with Canada meeting its Paris target.[21]

COMPETITIVE PRESSURES AND "CARBON LEAKAGE"

13. In addition to rendering their own actions incapable of effectively addressing the harm of climate change, the failure to have minimum national price standards for greenhouse gas emissions can be expected to damage the competitiveness of industries located in jurisdictions that have more stringent prices.[22] British Columbia has provided evidence that the competitiveness of its cement industry has been hurt by the difference between its carbon price and pricing in other provinces.[23] The concept of "carbon leakage" is that displacement of industry and other activity from a jurisdiction with more stringent climate policies to a jurisdiction with less stringent policies results in less overall reduction than if the trade or relocation did not occur. If carbon leakage rates exceeded 100% (more additional emissions in the competing jurisdictions than reductions in the more stringent jurisdictions), then overall

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[16] Savage Cross, p. 55, ln. 20-25.
[17] Moffet, para. 18, Ex. E.
[18] Moffet, Ex. M,
[19] Expert Report of Dr. Dominique Blain, para. 21-22.
[20] Expert Report of Dr. Nicholas Rivers, Ex. D.
[21] Nic Rivers Affidavit, para. 11, Ex. D.
[22] Savage Affidavit. para. 153-165, **ABRI, p. A25**; Savage Cross, p. 79, ln. 18 – p. 81, ln. 5.
[23] Lesiuk Affidavit, Exhibits J and K

emissions could increase. Contrary to Alberta's claims, there is no evidence that carbon leakage rates approach 100% in general or in Alberta.[24]

14. There are a few options to address carbon leakage. The more stringent jurisdiction could simply accept the loss of competitiveness and the corresponding economic cost. In the international context, a border adjustment charge could be set up to reflect unpriced GHG in imports. Finally, the less stringent jurisdiction could be induced to increase the stringency of its own approach.[25]

15. The phenomenon of carbon leakage and the inability of any one jurisdiction, acting alone, to internalize the benefits of its reductions of global emissions creates a real potential of a "race to the bottom" if there is no federal action: each jurisdiction responds to competitive pressure by setting greenhouse gas prices below the level it would choose if others also took action.

PRICING IS MOST EFFICIENT AND TRANSPARENT WAY OF ENSURING "STRINGENCY"

16. Economic analysis views pollution through the lens of the concept of "externalities." An externality arises when the entity that controls whether an activity will occur and enjoys the benefit from it does not pay the cost. Pollution is an externality carried through an environmental medium (air, surface water, the food chain, groundwater). If it is not practical for all parties affected to bargain or otherwise reach a cooperative solution, externalities lead to a "collective action problem" in which the total losses can exceed the private gains of the polluters. In the case where everyone both causes the pollution and suffers from it, this collective action problem can make almost everyone worse off. In the technical language of economics, "social cost" exceeds "private cost."[26]

17. There are multiple policy approaches a government can try to take to reduce emissions, including pricing, regulation, subsidies and voluntary programs.[27] A price paid by the polluter equivalent to the pollution's "marginal external cost" has the effect of "internalizing" the

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[24] Alberta Factum, para. 66 claims pricing may contribute to overall emissions. Rivers Report , Ex. D., pp. 16-17; Savage Cross,p. 82, lines 15-18 show this can only occur if the leakage rate is over 100% and this is not the case for Alberta.
[25] Savage Cross, pp. 82, ln. 24-p.84, ln. 3.
[26] Cropper & Oates, pp. 678-681, **BCR, pp. 281-284.**
[27] Peters para. 9, **BCR, p. X**; Savage Affidavit, para.14, **ABRI, p. A4**

externality of pollution.[28] It does this by inducing private actors to adopt emission-savings technologies and to reduce total output of emission-intensive products up to the point where doing so costs more than the injury to others.[29] Pricing can be divided into a simple volumetric levy per unit of pollution, an overall quantity restriction and assignment of permits with trading ("cap-and-trade") and an output-based pricing system, which can be understood as a volumetric levy on emissions above a certain level calculated on the basis of output with tradeable credits given out if a producer's emissions are below that amount. Regulation can be understood as the legal requirement of actions (either refraining from doing something or being mandated to do something) without the ability to pay to avoid the requirement, and therefore without regard to cost.[30] If complied with, a regulation in this sense will prevent an emission-producing activity from occurring or will require an emission-mitigating action.

18. A key metric is the *stringency* of the measure, defined by the OECD as "the degree to which environmental policies put an explicit or implicit price on polluting or environmentally harmful behaviour."[31] Pricing creates an explicit price. Regulations, defined as state-imposed mandates or prohibitions, have an implicit price equal to the cost of compliance. All other things being equal, more stringent policies will bring about deeper reductions in emissions.[32] With some exceptions,[33] explicit prices are expected to be economically efficient, which means that they bring about a given level of emission reduction at least cost, or get the maximum amount of emission reduction for a given cost.[34] The implicit price of regulations is less transparent and more difficult to measure.[35] By contrast, when carbon pricing is applied broadly across an economy, it establishes a minimum level of stringency to reduce all greenhouse gas emissions.[36]

NEGOTIATING A PAN-CANADIAN APPROACH AND THE *GGPPA*

19. British Columbia adopts Canada's description of the Vancouver Declaration, the Carbon

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[28] Cropper & Oates, p. 679-680, **BCR, pp. 282-283.**
[29] Peters, para. 10, **BCR, p. 3**. Pricing may be below actual social cost, in which case it will only partially fulfill this function.
[30] Peters, para. 9, **BCR, pp. 2-3.**
[31] Peters, para. 15, **BCR, pp. 4-5.**
[32] Peters, para. 12, **BCR, p. 4.**
[33] Canvassed in Peters, para. 20- 21, **BCR, pp. 5-6.**
[34] Peters, para. 14-28., **BCR, pp. 4-8.**; Savage Cross, p. 100, ln. 14-p. 101, ln. 20.
[35] Peters, para. 16-17, **BCR, p. 5**.
[36] Peters, para. 14, **BCR, p. 4**.

Pricing Working Group, the development of the Pan-Canadian Approach to Pricing Carbon Pollution and the enactment of the *GGPPA*.[37] In the Vancouver Declaration, the First Ministers agreed to develop "a concrete plan to achieve Canada's international commitments through a pan-Canadian framework for clean growth and climate change."[38] The Vancouver Declaration recognized that pricing mechanisms were being used by governments in Canada and globally to address climate change and drive the transition to a low carbon economy, and recognized the importance of provincial flexibility in designing their own pricing mechanisms.[39]

20. The Working Group on Carbon Pricing Mechanisms, one of four such groups created under the Declaration, considered three possible approaches to carbon pricing across Canada: (1) a single form of broad-based carbon pricing mechanism that would apply across the country, (2) broad-based carbon pricing mechanisms in all jurisdictions but allowing for flexibility of instrument choice, and (3) a range of broad-based carbon pricing mechanisms in some jurisdictions with the remaining jurisdictions instituting other mechanisms or policies to meet specific GHG reduction targets within their respective jurisdictions.[40] The Working Group noted that the first option would not be consistent with the Vancouver Declaration's recognition of the importance of provincial flexibility, while the third option would "add complexity to reporting on carbon policies, in terms of coverage/stringency and associated emission reductions."[41] Without a common baseline of *price* stringency, as at least one pillar of a pan-Canadian reduction strategy, a common metric of price/regulatory stringency would be difficult.

21. The *GGPPA* is essentially a mechanism to ensure that greenhouse gases are priced across Canada at levels the Governor in Council considers adequately stringent. The decision to list a province is based on the purpose of "ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate", which must consider, as the primary factor, "the stringency of provincial pricing mechanisms for greenhouse gas emissions."[42] Its purpose is set out in a Preamble and in the sponsoring minister's statement to the House of Commons that "pricing pollution is making a major

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[37] AG Canada's Factum, para. 22-50
[38] Savage, Ex. BBBB, **ABR, p. A2598**
[39] **ABR, p. A2600**
[40] **ABR, p. A2656**
[41] **ABR, p. A2659**
[42] See *GGPPA,* s. 3 "listed province", s. 169 "covered facility". See also ss. 166, 189.

contribution to helping Canada meet its climate targets under the *Paris Agreement*."[43]

PART II- LEGAL ISSUES ON THIS REFERENCE

22. British Columbia says the *GGPPA* is wholly constitutional. Its matter/dominant characteristic is establishing minimum national pricing standards to allocate part of Canada's overall targets for greenhouse gas emissions reduction. This is a matter of national concern.

PART III – ARGUMENT

CANADIAN FEDERALISM AND THE NATIONAL CONCERN DOCTRINE

23. The national concern doctrine has deep roots in the foundational principles of Canadian federalism. The Preamble to the *Constitution Act, 1867* sets out a desire to be "federally united" under a constitution "similar in principle to that of the United Kingdom." No previous country had combined a federal division of sovereignty between central and sub-national governments with a British system of parliamentary democracy. The central feature of parliamentary democracy in the *British* model is that the legislature can make or unmake any law whatsoever. The central feature of a *federal* union,is that each level of government Parliament and the provincial legislatures is supreme only with respect to matters that fall within their respective spheres of jurisdiction.[44] These are reconciled through the principle of *exhaustiveness*: the whole of legislative power, whether exercised or merely potential, is distributed between Parliament and the provincial legislatures.[45]

24. The framers of Confederation recognized that they could not anticipate all future needs for legislation, and therefore exhaustiveness was not compatible with purely enumerated powers. They therefore provided for general powers. Under s. 92(16), they gave provinces legislative jurisdiction over "all Matters of a merely local or private Nature in the Province" and, through the opening words of section 91, gave the Dominion Parliament legislative authority over all matters not within the class of subjects assigned exclusively to provincial legislatures and not otherwise within Parliament's authority. This General Power for mattes not merely local or

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[43] *House of Commons Debates,* No. 289 (1 May 2018) at 18982 (Minister McKenna), **Canada's Authorities, Vol. 2, Tab 30.**

[44] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [the "2018 *Securities Reference*"] at paras. 53-56; *Hodge v. The Queen* (1883), 9 AC 117 (JCPC) at p. 11-12.

[45] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79, para. 34.

private - often referred to as the "Peace, Order and Good Government" power or just "POGG" - was a deliberate departure from the model of the United States of America, as specified in the Tenth Amendment, that all unenumerated powers remained with the States.[46]

25. Canadian jurisprudence has identified three "branches" of the general power: first, the "emergency branch" (over temporary emergencies beyond provincial competence to address); second, the "residual branch" (over matters that simply cannot be classified under any enumerated powers, even "property and civil rights"); third, the "national concern" or "national dimensions" branch. [47] It is important to note, though, that all of these branches derive from the basic principle of exhaustiveness. Matters of "national concern" are within the power of the federal Parliament because all provincial powers, including the far-reaching power over "property and civil rights" under s. 92(13) are confined to being "in the province."[48]

26. Strictly speaking, the national concern branch of the general power cannot negatively affect provincial sovereignty since it can only be used to enact laws that provinces cannot. But it was recognized early on by the Privy Council beginning in the *Local Prohibition* case that the national concern doctrine could effectively threaten provincial autonomy if the matters to which it applied were not defined narrowly.[49] If anything that could plausibly be said to be of national concern were to be outside provincial jurisdiction, this would offend the principle of subsidiarity, that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected."[50]

27. If the "Matter" that is said not to come within the "Classes of Subjects Assigned exclusively to the Legislatures of the Provinces" is defined with the requisite precision, however, exhaustiveness and subsidiarity can both be maximized: Parliament gets only that narrow domain that provincial legislatures legitimately cannot reach because it is not their citizens who are primarily affected. By contrast, if the matter is defined broadly, then it will *either* unnecessarily sweep more precisely defined matters that could be dealt with by the provinces into the federal

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[46] Speech of the Hon. John A. Macdonald to the Legislative Assembly of the Province of Canada, 6 February 1865 in ed. P.B. Waite, *The Confederation Debates in the Province of Canada, 1865.* McLelland and Stewart, 1963, p. 44.

[47] *Labatt Breweries of Canada Ltd. v. Canada*, [1980] 1 SCR 914, at pp. 944-5.

[48] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477, pp. 512-3.

[49] *Ontario (A.G.) v. Canada (A.G.)*, [1896] UKPC 20 (JCPC) [*Local Prohibition*], pp. 6-7.

[50] *14957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 3.

sphere with unfortunate centralizing effect *or,* if the conclusion is that this broad matter should not be recognized as federal, leave a gap in overall legislative sovereignty when some more narrowly defined sub-component of the matter is beyond provincial ability.

28. The narrow definition of the "matter" was observed and theorized by W. R. Lederman in a 1975 article.[51] Lederman noted that there is no single, determinate way of categorizing laws. He objected to broad categories such as "culture", "language" or "labour relations" in favour of "the need to keep the power-conferring phrases of our federal-provincial division of powers at meaningful levels of specifics and particulars."[52] Another example was "pollution" (too broad) compared with "pollution of interprovincial rivers bringing residents of different provinces into legal conflict with one another" (a properly specific characterization within the general power). [53]

29. In the *Anti-Inflation Reference*, Justice Beetz, writing for the majority on the national concern branch of the general power, specifically adopted Professor Lederman's preference for narrow definitions of the "matter" as a way of reconciling exhaustiveness with due respect for provincial autonomy.[54] Justice Beetz rejected broad definitions of a "matter" said to be of national concern if they amounted to "aggregates" of provincial matters or of provincial and federal matters: a broad area of policy such as "inflation" should not be a "matter."[55]

30. In division-of-powers analysis, the first stage in analyzing the validity of a law is identifying its "matter": what the law is about in "pith and substance." This can obviously be done at varying levels of generality. The same law can be said to be "about" (a) the future of the world, (b) the environment, (c) global climate change, (d) pollution, (e) greenhouse gases, (f) pricing of greenhouse gases, (g) setting minimim standards of price stringency for greenhouse gases; and (h) setting minimum standards of stringency for pricing greenhouse gas emissions to allocate a portion of overall targets. Any of these could be argued to be matters beyond the competence of the provinces. But in the *Anti-Inflation Reference*, Justice Beetz held that broad definitions would endanger the system of federalism as one with co-ordinate, equal sovereigns. As a result, the most determinate and least general formulation should be chosen as the "dominant characteristic" in the characterization process.

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[51] W. Lederman, "Unity and Diversity in Canadian Federalism", 53 *Can. Bar. Rev.* 596 (1975)
[52] Lederman, p. 43.
[53] Lederman, p. 45.
[54] *Re: Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*], p. 451, Beetz J.
[55] *Anti-Inflation Reference*, p. 458

31. While the importance of narrowly defining the "matter" in constitutional validity analysis originated with the national concern doctrine, it has not been confined to that power, nor should the national concern doctrine be singled out as separate from the general principles of Canadian federalism. So in a case relating to provincial jurisdiction over property and civil rights under s. 92(13) and federal jurisdiction over "Indians and Lands Reserved for Indians" under s. 91(24), the Supreme Court of Canada followed Lederman in rejecting "culture" as too broad as a characterization of the matter of a statute.[56] Most recently, in a case about the criminal law power, the Supreme Court has stated "vague characterizations" of the pith and substance lead to dilution and confusion of constitutional doctrines and erosion of the scope of provincial powers, especially where the limits of the head of power are "imprecise". [57]

32. The definitive statement of the test for a "matter" that is within the national concern/dimensions branch is found in the majority judgment of Justice Le Dain, upholding federal legislative authority over marine pollution in the *Crown Zellerbach* decision:

> 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;
>
> In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.[58]

33. The *Crown Zellerbach* test instantiates the tension between exhaustiveness on the one hand and subsidiarity on the other. Exhaustiveness is respected by ensuring that Parliament can legislate in relation to truly well-defined and indivisible "matters" distinguishable from provincial matters. Subsidiarity is respected by ensuring that those matters are defined singly and by linking indivisibility to the question of the impact on extra-provincial interests (i.e., those interests not represented in the provincial democratic process) of a failure to deal effectively with the control or regulation of what would otherwise be intra-provincial aspects. This is of course consistent with matters being decided at the level closest to the people *affected*.

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[56] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146, 2002 SCC 31, par. 51.
[57] *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, 2010 SCC 61, para. 190-191.
[58] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401at 431-432,

MATTER OF THE *ACT* IS MINIMUM PRICE STRINGENCY TO MEET OVERALL TARGETS

34. In its factum, Alberta is surprisingly nonchalant about the proper characterization of the *GGPPA*'s "matter." Indeed, it says at paragraph 113 that it "does not matter" what the pith and substance/dominant characteristic of the *GGPPA* may be. This is surprising because the Supreme Court of Canada has repeatedly stated that determining the dominant characteristic/pith and substance/matter is the first stage of any validity analysis.[59] Defining the "matter" (characterization) must be rigorously distinguished from the classification exercise, which determines whether the matter so defined is better assigned to federal or provincial heads of power or, where the double aspect doctrine applies, both.[60]

35. Instead of this orthodox approach, Alberta gives the "pith and substance" short shrift, and instead says there is an additional step for the national concern doctrine, namely finding a "new federal POGG national concern power" into which the matter of the *GGPPA* must fall.[61] Without reference to any authority, Alberta creates a novel concept of "asserted POGG power", which is determined without reference to the "particular piece of legislation before the Court."[62].

36. There is no basis for this additional hoop in the *language* of the opening words of s. 91. It assigns to the Queen-in-Parliament the "Matters" not coming within "Classes of Subjects" assigned exclusively to the provinces or otherwise enumerated. This is precisely the same distinction between "Matters" and 'Classes of Subjects" as it uses in relation to enumerated powers. As the Supreme Court stated in the *Firearms Reference*, a "Matter" is the word the Constitution uses for what the jurisprudence has referred to as the "dominant characteristic" or "pith and substance" of a statute or part of a statute.[63] A "Class of Subject" is synonymous with a "head of power". There is no third concept of "POGG Subject Matter" or "asserted POGG power" in the words of section 91 and no textual reason to depart from the orthodox two-stage process of analysis.[64] Alberta's claim that there must be a new unenumerated head of power "added" to the Constitution by judicial amendment is without merit: since the framers of

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[59] *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 2000 SCC 31, para. 15.
[60] *Chatterjee v. Ontario (Attorney General)*, [2009] 1 SCR 624, 2009 SCC 19, para. 16.
[61] Alberta Factum, para. 112.
[62] Alberta Factum, para. 166.
[63] *Firearms Reference*, para. 16.
[64] British Columbia concedes that the term "subject matter" is sometimes used in the jurisprudence, but always as a synonym for matter/dominant characteristic, not for "Class of Subject."

Confederation already included the General Power, it is Alberta that must turn to the amendment process if it is unhappy with that decision.

37. The idea of a "POGG Subject Matter" broader than the pith and substance of an impugned federal statute would not necessarily protect provincial autonomy – after all,it is possible a court would find the broader power beyond provincial competence. It would just raise the stakes – contrary to the basic role of the judiciary to narrowly adjudicate genuine disputes.

38. Nor do we see this hybrid concept of "POGG Subject Matter" in the cases. In *Crown Zellerbach* itself, the Court went through the orthodox method of first characterizing the pith and substance of the *Act* before "considering the relationship of the subject-matter of the Act to the possible bases of federal legislative jurisdiction." [65] The result of this process was a finding by the majority that the dominant characteristic/pith and substance of the *Ocean Dumping Control Act* was the regulation of marine pollution. The majority in fact favoured a *narrower* characterization of the *Act* as opposed to the broader "regulating dumping of substances [whether pollutants or not] into marine waters" favoured by the company challenging the *Act.* [66]

39. The only reason the "matter" in *Crown Zellerbach* was broader than that found by the majorities in the Ontario and Saskatchewan Court of Appeal was that the *Ocean Dumping Control Act* had a broader remit than the *GGPPA.* The Court was confronted with a scheme where there was a *blanket ban* on placing *any* substance in marine waters without a permit, no deference to adequately stringent provincial regulation and no right to buy such a permit. Nothing in *Crown Zellerbach* suggests that the "matter" for the purposes of national concern analysis is ascertained any differently than the matter for classification in relation to any other federal head of power, and in *Crown Zellerbach,* Justice Le Dain uses precisely the same characterization of the "matter" for rejecting classification under the s. 91(12) Fisheries power.[67]

40. This is not unique to *Crown Zellerbach.* There is no example of a court looking past the statute and to the enumerated powers to determine the level of generality at which the "matter" of an *Act* should be characterized.[68] Indeed, to do this would be to contradict Justice Binnie's

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[65] The entire characterization analysis is found *Crown Zellerbach,* para. 18.
[66] La Forest J, for the minority, implicitly preferred the respondent's submission that the "matter" encompassed the "dumping of all substances, whether pollutants or not": *Crown Zellerbach,* paras. 55-56.
[67] *Crown Zellerbach,* para. 19-22.
[68] *Contra* Alberta Factum, para. 173

injunction in *Chatterjee* that the assessment of the matter should be done "without regard to the head(s) of legislative competence" to avoid results-oriented jurisprudence.[69] So, for example, in *Munro,* the Court looked at the at the purpose and effect of the *National Capital Act* to find that its matter was "establishment of a region consisting of the seat of the Government of Canada and the defined surrounding area which are formed into a unit to be known as the National Capital Region which is to be developed, conserved and improved in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance." [70]

41. The unacceptably broad "matter" of the *Anti-Inflation Act* came not from some general principle that subject matters under the national concern doctrine must be broad – indeed that is precisely the opposite of what was held by Justice Beetz – but because the pith and substance of the *Anti-Inflation Act,* which mandated the price term in every transaction in the provincial private sector by the federal government – *was* broad.[71]

42. Turning then to the provisions of the *Act* and the extrinsic evidence, both make clear that Chief Justice Richards and Associate Chief Justice Hoy were correct in identifying that the *GGPPA* imposes *minimum standards of stringency* for *pricing* emissions.[72] This is apparent from the name of the *Act*, the debate over the *Act* and its legal effect, which is solely to price greenhouse gas emissions where provincial/territorial pricing mechanisms are not as stringent as the Governor in Council considers adequate. Leaving aside some process offences such as obstructing an inspector or engaging in improper record-keeping, there is no conduct that can put a person offside the *GGPPA* if they are willing to pay money to engage in it.

43. Alberta says that the "matter" of legislation should be defined in a way that does not refer to "means", as opposed to "ends,"[73] but cites no case law for this proposition. In fact, the case law is clear that both "purposes" and "effects" must be considered in determining the dominant

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[69] *Chatterjee*, para. 16.
[70] *Munro v. National Capital Commission*, [1966] SCR 663 at p. 667.
[71] *Anti-Inflation Reference*, p. 440, Beetz J. ("The Anti-Inflation Act authorizes the imposition of guidelines for the restraint of prices, profit margins, dividends and compensation in [...] the federal public sector, the federal private sector and the provincial private sector.")
[72] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ["*Sask Reference*"], para. 125, Richards CJ (Jackson and Caldwell JJA concurring); *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ["*Ont Reference*"], para. 166, Hoy ACJ, concurring.
[73] Alberta Factum, para. 172. In this paragraph, Alberta confuses a "matter" with a "class of subjects"

characteristic.[74] The jurisprudence avoids the apparently similar concepts of "means" and ends" for good reason: while law has always distinguished between the effects of a statute and its purpose (or the mischief to which it is addressed), there is no determinate distinction between a "means" and "ends". Imposing a backstop arrangement could be seen as a "means" to the "end" of ensuring pricing of greenhouse gas emissions is applied broadly in Canada. Ensuring pricing is applied broadly is a means to the end of meeting Canada's national targets. Meeting Canada's national targets is a means to the end of giving Canada credibility in international climate negotiations. Credibility in international climate negotiations is a means to the end of stabilizing the climate. Stabilizing the climate is a means to the ends of global stability, avoiding economic harm and preserving the biosphere.

44. The Supreme Court has repeatedly included references to the effects *and* purpose in its statement of the "matter" or "dominant characteristic" of legislation. Examples include promoting "the stability of the Canadian economy by managing systemic risks related to capital markets having the potential to have material adverse effects on the Canadian economy," making "the choice of the location of radiocommunication infrastructure," "the licensing of drivers, the enhancement of highway traffic safety, and the deterrence of persons from driving on highways when their ability is impaired by alcohol," "creation of a property-based authority to seize money and other things shown on a balance of probabilities to be tainted by crime and thereafter to allocate the proceeds to compensating victims of and remedying the societal effects of criminality" and replacing the employment income interrupted by pregnancy or the arrival of a child.[75] The general tendency in Canadian division-of-powers jurisprudence has been to more specific statements of the matter, encompassing both purpose and effect.

45. A broader-than-necessary "dominant characteristic" creates a Catch-22: Alberta says the "subject matter" for national concern purposes must be as broad as an enumerated head of power, but a broad subject matter will be found not to be "single, indivisible and distinct" and to upset the federal-provincial balance. This is not because the dominant characteristic of the actual

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[74] See, for example, *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at para. 27.

[75] *2018 Securities Reference*, para. 97; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, para. 46; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, para. 29, 34; *Chatterjee*, para. 23; *Reference re Employment Insurance Act, ss. 22 and 23*, 2005 SCC 56 at para. 34 and 75. In *Chatterjee*, in particular, it was the "means" ("property-based authority") that made the "matter" within provincial jurisdiction.

law that Parliament enacted fails these tests, but because failing these tests is baked into the analysis. This is precisely the sort of results-oriented analysis Justice Binnie warned against in *Chatterjee*.

46. Of course, a legislature always has more than one option as to how to legislate with respect to a specifically-delimited matter, including to pass no legislation in relation to that matter at all.[76] In the present case, Parliament could legislate setting higher, lower or no minimum standards of emission pricing to help meet overall targets. It could perhaps mandate volumetric levies, output-based pricing or cap-and-trade, or, as it has done here, allow any or a combination of these approaches. It could decide what level of coverage of overall emissions is sufficient. It could provide a different mechanism than listing by the Governor-in-Council for determining whether a province or territory met adequate standards of stringency.

47. While the Saskatchewan Court of Appeal majority made no error in referring to setting minimum standards of price stringency as part of the matter, as urged by British Columbia in that court, on reflection, British Columbia agrees with Associate Chief Justice Hoy of *also* including a purpose in the statement of the matter, since this (appropriately) results in more narrowly-defined federal power. Associate Chief Justice Hoy therefore stated the dominant purpose as "establishing minimum national greenhouse gas emissions pricing standards *to reduce greenhouse gas emissions*."

48. Before this Court, British Columbia would simply add that we submit the *purpose* part of Associate Chief Justice Hoy's formulation could be *even more specific,* given the intrinsic and extrinsic evidence about this statute. In British Columbia's view, the purpose of the *GGPPA* cannot be divorced from the specific need to try to meet Canada's overall targets and to allocate a portion of the burden of meeting that target through a principled mechanism. Much of the Preamble speaks to the importance of Canada's national commitments and the eighth recital in particular speaks to "committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy. The purpose was not just to reduce emissions in general, but to do so in a way that contributed to meeting Canada's national targets.

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[76] All of Alberta's references to *Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 SCR 693, 2015 SCC 14 assert no more than this: Alberta Factum, para. 173

49. Of course, to meet a national target, it is necessary to find a way to *allocate* that national target. As we have seen, this amounts to ensuring that *stringency* is fairly and efficiently divided among the provinces and territories. Establishing minimum standards of pricing stringency was what Parliament considered to be the fairest, most transparent and efficient way of doing this.

50. In the Saskatchewan Court of Appeal, Justices Ottenbreit and Caldwell characterized Part 1 of the *GGPPA* simply as a "tax", which was a failure to distinguish the characterization from the classification exercises.[77] Their characterization of Part 2 as "regulation of greenhouse gases"[78] makes no distinction between a prohibition-subject-to-permit scheme like the one in *Crown Zellerbach* and a scheme that allows trading and purchasing of credits. It also ignores the fact that Part 2 only applies if the Governor General in Council can reasonably conclude that pricing with respect to emissions from industrial facilities in the province or area is not sufficiently stringent. Neither part of the *GGPPA* allows the federal government to interfere with emissions if the polluter is willing to pay for them. Since the pith and substance must be defined "precisely", especially as a prelude for classification with respect to a vague head of power, it is not acceptable to fail to distinguish between a law that can always be complied with by the payment of money with a law that requires specific physical acts or omissions (i.e., regulation).

51. Chief Justice Strathy correctly noted the importance of the finding of a lack of adequate stringency as a prelude to the applicability of the *GGPPA* in determining its dominant characteristic, and hence correctly characterized the federal law as setting "minimum standards."[79] But British Columbia respectfully disagrees with his explanation for not limiting the dominant characteristic of the law to pricing. The *GGPPA* refers to pricing in its title and Preamble. It only applies if provincial or territorial pricing is found to be inadequately stringent. And where it does apply, what it applies is pricing. It would be stretching the matter to say the *GGPPA*'s "dominant characteristic" is minimum standards of regulation in general when it makes no attempt to impose any discipline on anyone that cannot be avoided by paying money.

52. Justice Huscroft criticized Chief Justice Richards and Associate Chief Justice Hoy's characterization on the grounds it incorporates a "means or technique", which he stated cannot

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[77] *Sask Reference*, para. 265.
[78] *Sask Reference*, para. 333.
[79] *Ont. Reference*, para. 77.

be the dominant feature, which he appears to identify with its "ultimate purpose."[80] In fact, though, the dominant characteristic of a law is supposed to involve both its purpose and its effect, and in both cases, the focus is on what is proximate, rather than ultimate. Stringency of pricing across the country can, in any event, be seen as a purpose.

53. British Columbia therefore says the pith and substance of the *GGPPA* – its matter or dominant characteristic – is ***establishing minimum national pricing standards to allocate part of Canada's overall targets for greenhouse gas emissions reduction.*** It is this matter which should be subject to the classification stage of the validity analysis.

MINIMUM PRICE STRINGENCY TO MEET OVERALL TARGETS BEYOND PROVINCIAL ABILITY

54. At that classification stage, the issue is whether the "matter" – assuming it is not otherwise within federal jurisdiction under an enumerated power - meets the national concern branch as set out in *Crown Zellerbach.* The first question is whether the matter is single, indivisible and distinct from matters of provincial concern.

55. Contrary to Alberta's characterization of the decisions of the majority of the Saskatchewan and Ontario Courts of Appeal,[81] this is not a tautological exercise of seeing whether the federal law applies nationally. Rather, the question is whether the *nature of the problem* – particularly the extra-provincial effects of provincial inaction – gives a national approach indivisibility or leaves national standards as a mere aggregate of provincial ones. In Justice Le Dain's words, *Crown Zellerbach,* we are told that whether a matter like "establishing minimum national pricing standards to help meet national greenhouse gas emission targets" is "indivisible" depends in large measure on "what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter " (the so-called "provincial inability" test).[82]

56. Like the concept of "national concern", it is important not to take the phrase "provincial inability" in its colloquial sense. The provinces are not literally *unable* to regulate radio frequencies or air travel, set up a national capital commission, address drug trafficking, regulate marine pollution, provide remedies against monopolies or address systemic securities risk. What

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[80] *Ont Reference,* para. 211.
[81] Alberta Factum, para. 204.
[82] *Crown Zellerbach,* para. 33.4.

matters is whether, taking into account the inability of one legislature to bind a future one, and therefore the ability of provinces to resile from a negotiated pact, there is the constitutional ability to *sustain* a viable national scheme when truly national goals are at issue.[83]

57. A national standard for a provincially-regulated activity where the principal effects of inaction are felt within the boundaries of the province – whether motivated by a desire for uniformity or by a desire to see a particular policy result -- would not do what provinces were *unable* to do, but what they have *decided* not to do. It would, to use Justice Beetz's words in the *Anti-Inflation Reference,* be a mere "aggregate" of provincial standards. So national standards for curriculum, investor protection, residential development, or local pollutants, for example, would not be matters of national concern.[84] However, where "the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province,"[85] a minimum standard is no longer an aggregate of individual provincial standards, but becomes an indivisible "unity" necessary to protect the federation from devolving into a war of all against all. Provinces limited to legislating within their own borders are, in the constitutional sense, *unable* to address such a collective action problem.

58. The issue is not the importance of the policy issue, but whether inaction in one province has a significant effect on others. So opioid *treatment*, although obviously of vital importance, is not a matter to which the national dimensions/concern branch applies.[86] The failure of one province to provide addiction treatment would not demonstrably "endanger the interests of another province." (As this example suggests, the question is not whether inaction has incidental effects on other provinces, but whether these are outweighed by the primary impact on the non-acting province.) By contrast, a failure to prevent opioid *trafficking* from one province does endanger the interests of others, and was therefore found to be within the general power.[87]

59. As Professor Lederman pointed out in his seminal article, the relationship between local pollutants and global pollutants is analogous. The collective action problem inherent in controlling global pollutants makes the lack of a minimum standard an indivisible matter. This has been found by *all* Supreme Court justices who have opined on the issue.

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[83] *Reference re* Securities Act, [2011] 3 SCR 837, 2011 SCC 66 [*2011 Securities Reference*], para. 120.
[84] *Anti-Inflation Reference*, p. 458.
[85] *Schneider v. The Queen.*, [1982] 2 SCR 112 at p. 131.
[86] *R. v. Hauser*, [1979] 1 SCR 984
[87] *Schneider*.

60. The 1976 *Interprovincial Co-operatives* case arose in the context of toxic discharges into interprovincial rivers. Manitoba enacted a statute allowing damages for and injunctions against discharges in upstream provinces, whether those provinces authorized the discharge or not. Justice Ritchie, for the Court, held that a downstream province can create civil liability for the consequences of such discharges, subject to the defence that the discharge was authorized by the upstream province. The upstream province had jurisdiction over the discharge, the downstream province jurisdiction over the effects, and Parliament jurisdiction over the conflict.[88]

61. In *Crown Zellerbach,* despite splitting in the result, all justices on the court agreed that the general power provides a basis for federal authority in relation to global pollutants. Justice Le Dain allowed a permitting scheme for any dumping into marine waters. Justice La Forest, in dissent, held that dumping of *toxic* chemicals that would affect the oceans would be within federal authority, but drew the line at a permitting scheme for all dumping, including of inert wood waste.[89] In effect, they disagreed on how to characterize the *Act,* but agreed that addressing the flow of pollutants into a global commons would have a national dimension.

62. In *Hydro-Québec*, Chief Justice Lamer and Justice Iacobucci (dissenting but not on this point) held that a crucial criterion of the national dimensions branch is "whether the failure of one province to enact effective regulation [of a global pollutant] would have adverse effects on interests exterior to the province." They held that regulation of diffuse, persistent and seriously toxic chemicals, such as PCBs, would have such effects, but that not all the substances regulated by the federal statute in issue in that case were diffuse, persistent and seriously toxic. Justice La Forest for the majority upheld the impugned legislation under the criminal law power and found it unnecessary to address the national dimension branch.[90] Justice La Forest subsequently stated for a unanimous court that the national dimensions branch embraced the power to address conflicts in provincial laws relating to the use of records in cross-border litigation.[91]

63. While competent to restrict or price greenhouse gas emissions that take place within its borders, British Columbia is constitutionally powerless to price emissions that take place in

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[88] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477, p. 520 (Richie J).
[89] *Crown Zellerbach,* para. 59, La Forest J (dissenting)
[90] *R. v. Hydro-Québec*, [1997] 3 SCR 213 [*Hydro- Québec*], at paras. 76, Lamer CJ and Iacobucci J (dissenting) and 110, La Forest J (majority)
[91] *Hunt v. T & N PLC*, [1993] 4 SCR 289 at para. 60, The law of the forum prevailed over the province in which the records were located in the absence of such federal intervention.

Alberta, Saskatchewan or Ontario. In the case of local pollutants, this inability would accord with the fundamental design of a federal system. Since British Columbians would not be materially affected by health or environmental effects of local pollution discharges in those provinces, it should be up to the residents of Alberta, Saskatchewan or Ontario to decide what, if anything, ought to be done. The case of global pollutants is different. British Columbians cannot hold Alberta, Saskatchewan or Ontario's government to account, but are affected anyway.

64. The phenomenon of carbon leakage supports the point of provincial inability. Carbon leakage not only imposes a cost on provinces: it deprives them of a substantial portion of the environmental benefit for which they incurred that cost. Provinces have no constitutionally available solutions to carbon leakage as against each other. Nor can they address carbon leakage as against other countries. Only the federal government can impose border adjustment charges or negotiate higher standards of stringency with competing jurisdictions.

65. Extra-provincial effects are not just on other provinces. The federal government has a role in protecting the interests of Indigenous peoples and their lands under s. 91(24), the territories under the *Constitution Act, 1871*. As the entity responsible for foreign relations, it also has a role in protecting citizens of foreign countries –for the purposes of negotiation and for altruistic reasons. These extra-provincial effects give national standards for price stringency of cumulative global pollutants like greenhouse gases an indivisibility that other national standards, including for ambient air pollution, would lack.

66. At para. 207, Alberta attempts a slippery slope argument. It points out that provincial economies are related to each other and therefore argues that the logic of finding a provincial inability in relation to national standards for minimum price stringency would give the federal government "supervisory control over all aspects of the economy wherever economic activity within a province may have national or international effects." This *in terrorem* argument was addressed by the Supreme Court in the *Pan-Canadian Securities Reference*.[92] In that case, the Supreme Court reiterated its 2011 holding distinguishing "systemic risk" as a legitimate subject of federal jurisdiction under the general trade and commerce power. Systemic risk was distinguished from other problems with securities markets based on its potential for an adverse material effect on the integrity and stability of the Canadian economy as a whole. This in no way

[92] *2018 Securities Reference*

suggests that federal regulation over uncorrelated matters that have minor negative external effects are also under federal jurisdiction.

THE BASIC FEDERAL/PROVINCIAL BALANCE IS UNDISTURBED

67. Alberta largely concedes that if the "matter" in federal jurisdiction is confined to minimum standards for pricing a global pollutant, this will not fundamentally undermine the balance of the federation.[93] Since Parliament could have simply imposed a price on all provinces under its authority over "any mode or system of taxation" (s. 91(3)), it makes little sense to say a lesser power to establish minimum standards of stringency for *provincial* pricing would endanger the fundamental federal-provincial balance.

68. There is no question that freedom for provincial pricing and regulation is vital both for innovative approaches to environmental protection. A federal power over "minimum" standards does not interfere with any provincial initiative. There is no contradiction between an aspect of an issue being within federal competence under the "national dimensions" branch of the general power and other aspects being within provincial competence. Indeed, the "double aspect doctrine" was first declared in relation to the general power, which was the basis for the *Canada Temperance Act*, held to be consistent with provincial temperance legislation.[94] Provinces and the federal Parliament share jurisdiction over land use decisions in the capital region, advertisements carried on radio and television, and drinking on airplanes. [95] In *Interprovincial Co-operatives* and *Hunt*, federal power under the general power was discussed in the context of provincial laws over discharges into inter-provincial rivers and the disclosure of records in civil litigation as a possible solution to conflicts *between* provincial legislative regimes – which obviously requires the application of the double aspect doctrine.

69. In the specific context of radio and aeronautics, what was at issue was precisely intra-provincial communication and transportation, since inter-provincial and international communications and transportation undertakings are enumerated federal powers under s. 92(10)(a) of the *Constitution Act*. In *that* context, "plenary" authority displaces provincial

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[93] Alberta Factum, para. 237.

[94] *Ontario (AG) v. Canada Temperance Federation*, [1946] 2 DLR 1 (PC), p. 5, citing *Russell v. The Queen* (1882), 7 AC 829 (PC) and *Local Prohibition*.

[95] *Munro* ; *Re Regulation & Control of Radio Communication in Canada*, [1932] 2 DLR 81 (JCPC); *Irwin Toy Ltd. v. Quebec (AG)*, [1989] 1 SCR 927; *Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292; *Air Canada v. Ontario (LCB)*, [1997] 2 SCR 581.

communications or transportation laws, although it does not displace laws about the content of expression or the sale of alcohol on airplanes. In any event, it would be misguided to extend these examples to a general rejection of the "double aspect doctrine."

70. With the exception of agriculture and immigration, it is *always* the case that powers are *exclusive*: what the double aspect doctrine says is just that the same acts and omissions can be in relation to more than one matter, one of which is in federal and the other in provincial jurisdiction.[96] British Columbia could not pass legislation specifically in relation to marine pollution or to minimum pricing stringency to meet national targets for a global pollutant – but that does not prevent it passing legislation in relation to industrial discharges, including into salt water, or enacting a carbon tax.

71. Unlike comprehensive authority over the price, salary or margin or every transaction, a minimum requirement of price stringency for one unwanted output of combustion is not going to eviscerate provincial power. The better analogy to measures to control inflation would not be wage-and-price controls, but rather the Bank of Canada's control over interest rates and aggregate money supply or the way federal and provincial authority have been reconciled – by agreement – in the area of agricultural supply management, by providing federal authority to set overall production quotas while provinces allocate them.[97]

72. Indeed, *not* recognizing federal competence to address minimum standards of stringency for pricing greenhouse gas emissions would imperil Canadian federalism. It would give those provinces seeking to do something about climate change through pricing mechanisms no forum in which to seek to obtain comparably stringent measures from other provinces, rendering their own attempts ineffective. The distribution of legislative authority would no longer be exhaustive, because there would be critical measures that no legislature could enact.

73. The distinction between global and local pollutants and between minimum standards of stringency in pricing as opposed to command-and-control regulation corresponds to the principle of subsidiarity, defined as law-making at a level of government that is not only *effective*, but also *closest to the citizens affected.* Provincial governments are most effective and closest to the

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[96] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, para. 189, cited in *Canadian Western Bank*, para. 30.

[97] *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292, 2005 SCC 20 at paras. 4-8.

citizens affected in relation to local pollutants. They are also best placed to judge how to implement a minimum level of stringency in their province. But collective action problems make them ineffective at addressing the cumulative problems of global pollutants without guarantees of stringency. Without such guarantees, provincial governments will *primarily* affect the residents of other provinces and countries without fear of accountability to them. Only in Parliament are all the Canadian citizens affected by one province's refusal to price greenhouse gases to national standards of stringency represented.

74. This is the fundamental reason we have a federal level of government. The framers of Confederation could not predict the impact of industrialization on the global climate system. But they did anticipate that there would be matters no province could address itself. They were committed to the "British" principle that *some* legislative body could "make or unmake any law whatsoever." This was why they gave Parliament authority over matters not falling within provincial competence because they were not matters "in the province." If minimum standards for setting a provincial price for using up a global commons - and thereby contributing to the dimensions of a global pollutant that threatens human life - do not qualify, what would?

PART V – ORDER REQUESTED

75. British Columbia therefore asks this Honourable Court to advise the Lieutenant Governor-in-Council that the *GGPPA* is not unconstitutional in whole or in part.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th OF NOVEMBER, 2019

J. GARETH MORLEY AND JACQUELINE HUGHES
COUNSEL FOR THE ATTORNEY GENERAL OF BRITISH COLUMBIA

SCHEDULE "A"
LIST OF AUTHORITIES

TAB IN BOA	DOCUMENT
	CASES
1.	*Reference re: Pan-Canadian Securities Regulation*, 2018 SCC 48
2.	*Hodge v. The Queen* (1883), 9 AC 117 (JCPC)
3.	*Reference re Same-Sex Marriage*, 2004 SCC 7
4.	*Labatt Breweries of Canada Ltd. v. Canada*, [1980] 1 SCR 914
5.	*Ontario (A.G.) v. Canada (A.G.)*, [1896] UKPC 20 (JCPC)
6.	*14957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 3
7.	*Re: Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*],
8.	*Canada (A.G.) v. British Columbia (A.G.)*, [1930] AC 111
9.	*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31
10.	*Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, 2010 SCC 61.
11.	*R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401
12.	*Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 2000 SCC 31.
13.	*Chatterjee v. Ontario*, [2009] 1 SCR 624, 2009 SCC 19
14.	*Munro v. National Capital Commission*, [1966] SCR 663
15.	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40

TAB IN BOA	DOCUMENT
16.	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544
17.	*Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, 2007 SCC 22
18.	*Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23
19.	*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46
20.	*Reference re Employment Insurance Act, ss. 22 and 23*, 2005 SCC 56
21.	*Quebec (Attorney General) v. Canada (Attorney General)*, [2015] 1 SCR 693, 2015 SCC 14
22.	*Reference re* Securities Act, [2011] 3 SCR 837, 2011 SCC 66 [*2011 Securities Reference*]
23.	*Schneider v. The Queen*, [1982] 2 SCR 112
24.	*R. v. Hauser*, [1979] 1 SCR 984
25.	*Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477
26.	*R. v. Hydro-Québec*, [1997] 3 SCR 213
27.	*Hunt v. T & N PLC*, [1993] 4 SCR 289
28.	*Ontario (AG) v. Canada Temperance Federation*, [1946] 2 DLR 1 (PC)
29.	*Re Regulation & Control of Radio Communication in Canada*, [1932] 2 DLR 81 (JCPC)
30.	*Irwin Toy Ltd. v. Quebec (AG)*, [1989] 1 SCR 927
31.	*Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292
32.	*Air Canada v. Ontario (LCB)*, [1997] 2 SCR 581
33.	*Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, para. 189
34.	*Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292, 2005 SCC 20 at paras. 4-8

TAB IN BOA	DOCUMENT
	SECONDARY SOURCES
35.	Speech of the Hon. John A. Macdonald to the Legislative Assembly of the Province of Canada, 6 February, 1865 in ed. P.B. Waite *Confederation Debates in the Province of Canada, 1865*. McLelland and Stewart, 1963, p. 44.
36.	*House of Commons Debates,* No. 289 (1 May 2018) at 18982 (Minister McKenna),
37.	Cooter, Robert & Siegel, Neil, "Collective Action Federalism: A General Theory of Article 1, Section 8" 63 *Stanford L.R.* 115 (2010)
38.	Farber, Daniel, "Environmental Federalism in a Global Economy" 83 *Virginia L.R.* 1283 (1997)
39.	LeDain, Gerald, "Sir Lyman Duff and the Constitution", 12:2 *Osgoode Hall L.J.* 261 (1974)
40.	W. Lederman, "Unity and Diversity in Canadian Federalism", 53 *Can. Bar. Rev.* 596 (1975)
41.	Paris Agreement, Art. 2, para 1(a)
42.	Revesz, Richard, "Federalism and Interstate Environmental Externalities" 144 U. *Penn. L.R.*: 2341 (1996)
43.	United Nations Framework Convention on Climate Change, 1992, Art. 1

SCHEDULE "B"
RELEVANT STATUTES

The *Greenhouse Gas Pollution Pricing Act* is already before the Court.