Court File Nos.: 38663 and 38781

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

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT,* SC 2018, c. 12, s. 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL TO THE COURT OF APPEAL FOR ONTARIO UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C.43, s. 8

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA,ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF QUEBEC

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(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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(ON APPEAL FROM COURT OF APPEAL FOR SASKATCHEWAN)

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Appellant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

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PART I – OVERVIEW AND FACTS

A) Overview

1. Global climate change is an urgent threat to humanity. Greenhouse gases (GHGs) in the atmosphere enable global warming, causing climate change and creating national and international risks to human health and well-being. GHG emissions cannot be contained within geographic boundaries. Their deep and urgent reduction requires an integrated pan-Canadian and international approach to prevent significantly worsening consequences of climate change.

2. The *Greenhouse Gas Pollution Pricing Act* (*Act*) ensures that GHG emissions pricing meeting minimum national standards of stringency applies throughout Canada. Carbon pricing is recognized as essential in achieving the necessary global GHG emissions reductions. Parliament rationally considered it integral to meeting the emissions reduction target agreed to by all provincial and territorial Premiers in 2016. The *Act*'s essential character relates to the matter of *establishing minimum national standards integral to reducing nationwide GHG emissions*.

3. The *Act* falls within Parliament's jurisdiction to legislate for the peace, order, and good government of Canada on matters of national concern. Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern that only Parliament can address. To deny Parliament jurisdiction to address this matter would leave a gaping hole in the Constitution: we would be a country incapable of enforcing the measures necessary to address an existential threat.

4. Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern that is constitutionally distinct from matters within provincial jurisdiction. The provincial inability test confirms Parliament's jurisdiction and defines its limits. Provinces are constitutionally incapable of legislating to address this matter. The *Act* is an evidence-based plan integral to reducing nationwide GHG emissions. It implements a national measure for which the non-participation of one or more provinces or territories would jeopardize its successful operation in other parts of the country.

5. Recognizing Parliament's ability to address this matter of national concern has a reconcilable scale of impact on the Constitution's distribution of powers; it respects the principles of federalism

and subsidiarity. The Constitution permits overlapping federal and provincial jurisdiction. Parliament's authority to enact minimum national standards integral to reducing nationwide GHG emissions does not impair provincial legislative powers. Precise definition of the matter of national concern and a careful pith and substance analysis precludes federal overreach. The double aspect doctrine and the restrained application of the paramountcy doctrine ensure ample room for robust provincial legislation.

6. The *Act* was designed to complement and respect provincial jurisdiction to enact carbon pricing systems. It provides provinces with flexibility to implement carbon pricing systems that suit their own circumstances, but fills in gaps with a federal pricing system where provincial pricing systems do not meet minimum national standards of stringency.

7. The charges under the *Act* are valid regulatory charges that are connected to the objects and scheme of the *Act*. The charges are the means by which Parliament seeks to achieve the regulatory purposes of the *Act* – the charges incentivize the behavioural changes and innovation necessary to reduce GHG emissions. Their dominant purpose is clearly regulatory because their purpose is to influence the behaviour of the persons concerned. The necessary relationship between the charges and the scheme is met; there is no requirement that the revenues be used to advance the purposes of the *Act*. Thus, the charges are not taxes. Even if they are taxes, their enactment complies with the requirements of s. 53 of the *Constitution Act, 1867*.

B) Facts

8. Except where otherwise stated, Canada generally agrees with the statement of facts set out by both Saskatchewan and Ontario. Canada provides the following additional facts and clarifications that are relevant to the issues before this Court.[1]

[1] Throughout Canada's footnotes, reference is made to Canada's Record [**CR**], Volumes 1 to 4, without reference to Tabs 14 through 17 of Part III of the Record of the Attorney General of Ontario [**ONR**], which respectively contains those volumes of Canada's Record before the Court of Appeal for Ontario. Canada's record in the Court of Appeal for Saskatchewan is replicated in the evidence

i. Climate change caused by GHG emissions is a global and national concern

9. Climate change is happening now and is having real consequences on people's lives throughout Canada, and globally. As Chief Justice Richards observed, "climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time."[2] The decisions we make today are critical to ensuring a safe and sustainable world for everyone, now and in the future.[3]

10. Burning fossil fuels releases GHGs into the atmosphere, which cause climate change. The scientific properties of GHGs and their role in climate change are not in dispute. GHGs trap solar energy in the earth's atmosphere. Higher levels of GHGs trap more solar energy, increasing air and water temperatures, which is significantly affecting our global climate. Carbon dioxide (CO_2) is the most abundant GHG emitted by human activity. Climate records show that atmospheric concentrations of CO_2 are higher today than at any time in the past million years and are still climbing.[4]

11. Increasing atmospheric concentrations of GHGs correlates with the rising global temperatures that cause climate change. Seventeen of the eighteen warmest years on record have occurred since 2001. The years 2014 to 2017 are the hottest four years on record.[5]

12. The climate change impacts in Canada are significant. While climate change encapsulates far more than warming temperatures, temperatures in Canada have increased at roughly double the average global rate. In the Arctic, average temperatures have increased at a rate of nearly three

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Canada filed in Ontario. To eliminate duplication, Canada's footnotes refer only to Canada's Record before the Court of Appeal for Ontario.

[2] *Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 4 [**SKCA Reasons**].
[3] CR, Vol 1, Tab 1, Affidavit of John Moffet, affirmed January 29, 2019, at paras 6, 9-26, Exs A-G [**Moffet**].
[4] CR, Vol 1, Tab 1, Moffet at paras 7-9, 30-31, 61, Ex A at 61, Ex C at 161-67.
[5] CR, Vol 1, Tab 1, Moffet at paras 7-15, Exs A, C; *House of Commons Debates*, 42-1 [***Debates***], No 146, (23 February 2017) at 9290-91 (Jonathan Wilkinson, Parliamentary Secretary to the Minister of Environment and Climate Change [Wilkinson]), Canada's Book of Authorities [**CBA**], Tab 2.

times the global average. Predictions are that Canada's temperature will continue to rise at a faster rate than the world as a whole.[6]

13. Some of the existing and anticipated impacts of climate change in Canada include: changes in extreme weather events such as droughts, floods, longer fire seasons, and increased frequency and severity of heat waves (causing illness and death); degradation of soil and water resources; and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus. Melting permafrost in the North will undermine infrastructure (foundations) and winter roads. Indigenous Peoples are among the most vulnerable to climate change and experience unique challenges.[7]

14. The increasing frequency and severity of extreme wildfire and weather events has significant economic costs. In the past decade, insurance claims in Canada from extreme weather events have risen dramatically, now costing up to $1.2 billion a year.[8]

15. The Intergovernmental Panel on Climate Change reports that global net human-caused GHG emissions must fall rapidly by 2030 and reach "net zero" around 2050 to avoid significantly more deleterious impacts of climate change. Thus, GHG emissions create a risk of harm to human health and the environment upon which life depends.[9]

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[6] CR, Vols 1, Tab 1, Moffet at paras 14, 17-18, 20-21, 23, Exs G at 284-87; *Debates*, No 289 (1 May 2018) at 18957, 18960 (Hon Catherine McKenna, Minister of Environment and Climate Change [ECC Minister]), CBA, Tab 6, No 146 (23 February 2017) at 9291 (Wilkinson), CBA, Tab 2.

[7] CR, Vol 1, Tab 1, Moffet at paras 10, 14, 16-20, 22-26, Exs D at 200-04, Exhibit E at 236-37, Exhibit G at 289-95; *Debates*, No 289 (1 May 2018) at 18957 (ECC Minister), CBA, Tab 6, No 146 (23 February 2017) at 9290-91 (Wilkinson), CBA, Tab 2.

[8] CR, Vol 1, Tab 1, Moffet at paras 22, Ex G at 290; *Debates*, No 289 (1 May 2018) at 18957 (ECC Minister), CBA, Tab 6, No 294 (8 May 2018) at 19211 (Wilkinson), CBA, Tab 7, No 146 (23 February 2017) at 9291 (Wilkinson), CBA, Tab 2.

[9] CR, Vol 1, Tab 1, Moffet at paras 11-15, Ex B at 97, Ex C at 172-75, Ex E at 228, 230-31; House of Commons, *Journals*, 42-1, No 435 (17 June 2019) at 5660-64.

a. International agreements identify climate change as an "urgent" priority

16. The United Nations has identified climate change caused by GHG emissions as an urgent global threat. GHG emissions circulate in the atmosphere, so emissions anywhere raise concentrations everywhere. In 1992, emerging international concern about the risks associated with climate change caused by GHG emissions led to the adoption of the *United Nations Framework Convention on Climate Change* (*UNFCCC*). Subsequent international agreements and actions under the *UNFCCC* reflect the escalating crisis.[10]

17. The *UNFCCC*'s ultimate objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Under the *UNFCCC*, Canada committed to taking GHG emissions mitigation measures. The *UNFCCC* created a framework for its implementation by establishing the "Conference of the Parties" (COP). All State Parties to the *UNFCCC* are represented at the COP, which reviews implementation of the *UNFCCC* and makes decisions necessary to achieve its objectives.[11]

18. The *UNFCCC* defines "greenhouse gases" as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." The concept of "global warming potential" allows comparison of each GHG's ability to trap solar energy relative to CO_2, which has a nominal global warming potential of 1.[12]

19. In December 2015, the COP adopted the *Paris Agreement* in which Canada and 194 other countries committed to strengthening the global response to the threat of climate change. These State Parties formally recognized "that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global emissions". They agreed to accelerate and intensify the actions and investments needed for a sustainable low-carbon future. The *Paris*

[10] CR, Vols 1-2, Tab 1, Moffet at paras 8, 27-45, Exs H, I.
[11] CR, Vols 1-2, Tab 1, Moffet at paras 29, 32-45, Ex H at 322-25 (art 2, art 4, paras 2(a), 2(b)), 328-30 (art 7).
[12] CR, Vols 1-2, Tab 1, Moffet at paras 30-31, 61, Ex H at 322; CR, Vol 3, Tab 2, Affidavit of Dr. Dominique Blain, affirmed January 25, 2019, at paras 3, 6-11 [**Dr. Blain**].

Agreement aims to hold "the increase in the global average temperature to well below 2˚C above pre-industrial levels and pursu[e] efforts to limit the temperature increase to 1.5˚C above pre-industrial levels."[13]

20. The *Paris Agreement* requires State Parties to establish, report, and account for their progress towards achieving their nationally determined contribution. Canada first communicated its intended nationally determined contribution prior to ratification, on May 15, 2015. Canada ratified the *Paris Agreement* on October 5, 2016, after consulting with the provinces. When Canada became a Party to the *Paris Agreement*, it reconfirmed its previously communicated target, which is to reduce Canada's GHG emissions by 30% below 2005 levels by 2030. Along with other State Parties, Canada must communicate its next, more ambitious, target by 2025.[14]

21. The *Paris Agreement* recognizes the importance of carbon pricing[15] and market mechanisms to combat climate change. Article 6 provides a framework for international cooperation in implementing a market mechanism.[16]

b. International support for and trend towards widespread carbon pricing

22. Contrary to paragraph 13 of Ontario's Factum, the factual record before the courts below supports the Court of Appeal for Saskatchewan (SKCA) majority's finding that carbon pricing is an essential aspect of GHG emissions mitigation measures.[17] There is international consensus that carbon pricing is an essential, though not sufficient, measure to achieve the necessary global GHG emissions reductions. The International Monetary Fund describes carbon pricing as the most effective emissions mitigation instrument because it establishes the price signals needed to redirect

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[13] CR, Vols 1-2, Tab 1, Moffet at paras 35, 37-38, 40, Ex I at 345, 365-66 (art 1, para 1(a), art 2, art 4) (quotes from 345, 365).
[14] CR, Vol 1, Tab 1, Moffet at paras 42-45, 53-55.
[15] Pricing for GHG emissions is typically referred to as "carbon pricing" even though pricing applies to a range of GHG emissions. This nomenclature reflects the dominant role of CO_2 in total GHG effects and the practice of equating GHGs emissions on a CO_2 equivalent basis: CR, Vols 1-2, Tab 1, Moffet at paras 1 (footnote 1), 61, Ex I at 363, Ex R at 640.
[16] CR, Vols 1-2, Tab 1, Moffet at para 41, Ex I at 367-68.
[17] SKCA Reasons at para 147.

technological changes towards low-emission investments. Recently, the High-Level Commission on Carbon Prices, comprised of economists, and climate change and energy specialists, reported that "a well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way."[18] There is no dispute that additional federal and provincial measures are needed to meet Canada's GHG emissions reduction target.

ii. Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern

a. Canada's GHG emissions

23. Canada prepares annual GHG inventory reports in accordance with the *UNFCCC* Reporting Guidelines. Canada's 2018 National Inventory Report (NIR) reported emissions estimates between 1990 and 2016. These estimates show that Canada's 2016 GHG emissions decreased by 3.8% from Canada's 2005 GHG emissions. Under the 2018 NIR, Canada's calculated 2030 target was 513 Mt of CO2 equivalent (CO_2e), which is 191 Mt CO_2e less than 2016 emissions (704 Mt CO_2e).[19]

24. GHG emissions and emissions trends vary by province. From 2005 to 2016, GHG emissions increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories, and Nunavut, while emissions decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Yukon. The top five emitters in 2016 were Alberta (37.3% of Canada's GHG emissions in 2016), Ontario (22.8%), Quebec (11%), Saskatchewan (10.8%), and British Columbia (8.5%). Among the provinces, from 2005 to 2016, Alberta's and Saskatchewan's GHG emissions increased by both the largest percentage and the largest amount. Saskatchewan's increased by 10.7% (7.4 Mt CO_2e) to 76.3 Mt CO_2e in 2016 and Alberta's increased by 14% (31.9 Mt CO_2e) to 262.9 Mt CO_2e in 2016. Ontario's emissions

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[18] CR, Vols 1-2, Tab 1, Moffet at paras 46-48, 50-52, Exh K at 394, 398-400, 406, Ex N at 475, Ex R at 640.

[19] CR, Vol 3, Tab 2, Dr. Blain at paras 10-18; CR, Vol 1, Tab 1, Moffet at paras 62, 64. On April 15, 2019, Canada's published its 2019 NIR, which reported emissions up to 2017, but the 2019 NIR was not in the record before the Courts of Appeal for Saskatchewan or Ontario.

decreased by 22% (44.1 Mt CO_2e). Its reductions are primarily due to the closure of coal-fired electricity generation plants.[20]

b. The Vancouver Declaration on Clean Growth and Climate Change and the Working Group on Carbon Pricing Mechanisms

25. The Government of Canada is working with the provinces and territories to reduce GHG emissions. Before Canada signed the *Paris Agreement*, the Prime Minister met with all provincial and territorial Premiers in Vancouver to discuss actions to address climate change. At that meeting, the First Ministers, including the Premiers of Saskatchewan and Ontario, committed to implement GHG mitigation policies in support of meeting or exceeding Canada's *Paris Agreement* target and agreed to work together to develop an integrated pan-Canadian framework on clean growth and climate change.[21]

26. The Vancouver Declaration led to four joint Federal-Provincial-Territorial working groups including a Working Group on Carbon Pricing Mechanisms. The Carbon Pricing Working Group's mandate was to "provide a report with options on the role of carbon pricing mechanisms in meeting Canada's emission reduction targets, including different design options taking into consideration existing and planned provincial and territorial systems." The Final Report was prepared on a Federal-Provincial-Territorial consensus basis.[22]

27. The Carbon Pricing Working Group's *Final Report* explained that many experts regard carbon pricing as a necessary tool for efficiently reducing GHG emissions. Extensive modelling supported the Carbon Price Working Group's examination of the economic and GHG emissions reduction impacts carbon pricing could have in Canada. Each carbon pricing scenario modelled resulted in significant GHG emissions reductions at the national level. The *Final Report* also discussed considerations relevant to implementation, including "revenue recycling" options to address the impacts of carbon pricing, engagement with Indigenous Peoples, and minimizing inter-

[20] CR, Vol 3, Tab 2, Dr. Blain at paras 21, 24-26, Ex A at 979-80.
[21] CR, Vols 1-2, Tab 1, Moffet at paras 53-55, Ex Q at 620.
[22] CR, Vols 1-2, Tab 1, Moffet at paras 56-57, Ex R.

provincial and international competitiveness impacts and carbon leakage.[23] Carbon leakage is a term to describe an increase in carbon emissions in one country or jurisdiction as a result of a reduction in emissions in another country or jurisdiction with a stricter climate policy. It is "a phenomenon where GHG pricing increases the cost of production, and thereby affects competitiveness, leading businesses to shift jobs or investments to lower GHG cost jurisdictions."[24]

c. The Pan-Canadian Approach to Pricing Carbon Pollution

28. Based on the Working Group's *Final Report*, the Prime Minister announced in Parliament the pan-Canadian approach to pricing carbon pollution to "help Canada reach its targets" for reduced GHG emissions. The Government of Canada concurrently published the *Pan-Canadian Approach to Pricing Carbon Pollution* document. Both presented the pan-Canadian Benchmark for carbon pricing (Benchmark) and its underlying principles.[25]

29. The Benchmark emphasizes carbon pricing as a foundational element of Canada's overall approach to fighting climate change. It expresses the objective of ensuring "that carbon pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time to reduce GHG emissions".[26]

30. Rather than imposing a single carbon pricing system throughout Canada, including in the four provinces with then-existing systems (British Columbia, Alberta, Ontario, and Quebec), the federal government articulated a commitment to ensure a consistent approach to carbon pricing across Canada that both respected existing provincial systems and left room for other provinces and territories to develop their own carbon pricing systems. The Benchmark provides guidance on a core set of stringency criteria. It sets out the scope of GHG emissions to be covered by carbon pricing, provides criteria for each type of system, and includes minimum escalating stringency requirements. Finally, it provides that the Government of Canada will implement an explicit price-

[23] CR, Vol 1-2, Tab 1, Moffet at paras 58-70, Ex R at 637-38, 653-58, 660-69, 673, 676; CR, Vol 4, Tab 3, Affidavit of Warren Goodlet, affirmed January 29, 2019, at paras 8-20 [**Goodlet**].
[24] SKCA Reasons at para 155. See also CR, Vols 1-2, Tab 1, Moffet at para 65, Ex R at 667-69.
[25] *Debates*, No 86 (3 October 2016) at 5359-61 (Rt Hon Justin Trudeau, Prime Minister of Canada), CBA, Tab 1; CR, Vols 1, 3, Tab 1, Moffet at paras 71-72, Ex S.
[26] CR, Vols 1, 3, Tab 1, Moffet at para 72, Ex S (quote from 696).

based carbon pricing system, as a "backstop". The federal backstop carbon pricing system would apply in jurisdictions that do not develop a system that at least meets the Benchmark, or where a province or territory requests the backstop.[27]

d. The Pan-Canadian Framework on Clean Growth and Climate Change

31. The *Vancouver Declaration* and the four Federal-Provincial-Territorial working group reports led to the adoption of the *Pan-Canadian Framework on Clean Growth and Climate Change* (*Pan-Canadian Framework*). The *Pan-Canadian Framework* is a First Ministers' agreement that commits the federal, provincial, and territorial governments to taking action to reduce GHG emissions. It aims to achieve the behavioural and structural changes needed to transition to a low-carbon economy, stimulate clean economic growth, and build resilience to the impacts of climate change. Eight provinces, including Ontario, and all three territories joined the *Pan-Canadian Framework* on December 9, 2016. Manitoba has since joined later. Saskatchewan has not.[28]

32. Pricing carbon pollution is one of the four main pillars of the *Pan-Canadian Framework*. It noted the "growing consensus among both governments and businesses on the fundamental role of carbon pricing in the transition to a decarbonized economy." The *Pan-Canadian Framework* rearticulated the pan-Canadian approach to carbon pricing and annexed the Benchmark, as well as provincial and territorial statements, including Ontario's statement on carbon pricing. Because carbon pricing on its own is not sufficient for Canada to reach its *Paris Agreement* emissions reduction target, the *Pan-Canadian Framework* also outlined extensive complementary measures, both federal and provincial.[29]

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[27] CR, Vols 1, 3, Tab 1, Moffet at paras 72-76, 89-90, Exs S, W, X.
[28] CR, Vols 1-3, Tab 1, Moffet at paras 77-78, 82, Exhibit T at 702-03, 705-09, Exhibit K at 400, 443-46, Exhibit N at 475-76.
[29] CR, Vols 1, 3, Tab 1, Moffet at paras 82-87, 137, Ex T at 710-29 (quote from 710), 740-48, 761-63; House of Commons, Standing Committee on Finance, *Evidence*, 42-1 [**FINA**], No 148 (1 May 2018) at 5, 8 (Moffet); Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 42-1 [**ENEV**], No 44 (1 May 2018) at 44:9-11 (Moffet).

iii. The Greenhouse Gas Pollution Pricing Act

a. Additional pre-enactment consultation and Benchmark guidance

33. Following up on its undertaking to introduce a federal carbon pricing system as a backstop, the Government of Canada released a *Technical Paper* that outlined the elements and operation of the proposed federal system in May 2017 and invited feedback. It explained the two complementary components of the federal system: a fuel charge and an Output-Based Pricing System (OBPS).[30]

34. During 2017, the Government of Canada also published *Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark* and *Supplemental Benchmark Guidance*. These documents provided further guidance on the scope of GHG emissions to which carbon pricing should apply, on the minimum legislated increases in stringency for both explicit price-based systems and cap-and-trade systems, and on the approach to further review.[31]

35. In late 2017, the Ministers of Environment and Climate Change (ECC) and Finance wrote to their provincial counterparts. The letter outlined the process the federal government would follow with provinces and territories to confirm whether their carbon pricing system meets the federal Benchmark.[32]

b. Parliament's objective: ensuring that GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time, to reduce Canada's nationwide GHG emissions

36. The *Act* received Royal Assent on June 21, 2018. As reflected in the preamble, the purpose of the *Act* is to create incentives for the behavioural changes and innovation necessary to reduce GHG emissions by ensuring that GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time.[33]

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[30] CR, Vols 1, 3, Tab 1, Moffet at para 88, Ex V.
[31] CR, Vols 1, 3, Tab 1, Moffet at paras 89-91, Exs W, X.
[32] CR, Vol 1, Tab 1, Moffet at para 92.
[33] *An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other*

37. Parliament's objective of reducing Canada's nationwide GHG emissions by encouraging behavioural change is reflected throughout debate on Bill C-74 and before the Parliamentary Committees considering it. In her testimony before the Standing Senate Committee on Energy, the Environment and Natural Resources, the Minister of ECC explained that "[a] price on carbon creates a powerful incentive to cut pollution" and that pricing carbon "makes pollution more expensive and clean innovation cheaper, so it spurs innovation". During second reading she explained that "pricing carbon pollution is making a major contribution to helping Canada meet its climate targets under the *Paris Agreement*".[34]

c. Architecture and operation of the Act

38. The *Act* provides the legal framework for the federal carbon pricing system and the enabling authorities to ensure that carbon pricing that is, at a minimum, consistent with the Benchmark stringency criteria applies broadly throughout Canada. The Preamble sets out the *Act*'s purpose. Part 1 of the *Act* implements the fuel charge. Part 2 provides the framework for the OBPS and establishes the excess emissions charge for large industrial emitters. Together, Parts 1 and 2 of the *Act* provide a comprehensive federal GHG emissions pricing system, which can apply in whole or in part, as a backstop to ensure that a comparable approach to pricing applies broadly throughout Canada, with increasing stringency over time.[35]

39. Parts 1 and 2 of the *Act* operate in provinces or areas that are listed by the Governor in Council in Parts 1 and 2 of Schedule 1, respectively. The Governor in Council must make listing decisions for "the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in

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Acts, short title *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, s 186 [*Act*], Preamble. See also CR, Vol 1, Tab 1, Moffet at para 101.

[34] Quotes from ENEV, No 46 (22 May 2018) at 46:7-8, and *Debates*, No 289 (1 May 2018) at 18958 (ECC Minister), CBA, Tab 6. See also *Debates*, No 283 (23 April 2018) at 18588 (Minister of Finance) and 18605 (Wilkinson), CBA, Tab 5, No 305 (31 May 2018) at 19957 (ECC Minister), CBA, Tab 9, No 279 (16 April 2018) at 18291 (Joël Lightbound, Parliamentary Secretary to the Minister of Finance), CBA, Tab 4, No 294 (8 May 2018) at 19214 (Wilkinson), CBA, Tab 7; FINA, No 146 (25 April 2018) at 5-6 (Judy Meltzer, Director General, Carbon Pricing Bureau, ECCC); Senate, Standing Senate Committee on Agriculture and Forestry, 42-1 [**AGFO**], No 50 (1 May 2018) at 50:9-10 (Moffet); ENEV, No 44 (1 May 2018) at 44:9-10 (Moffet).

[35] *Act*, Preamble, Part 1, ss 3-168, Part 2, ss 169-261; CR, Vol 1, Tab 1, Moffet at paras 101-02.

Canada at levels that the Governor in Council considers appropriate" and requires the Governor in Council to "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions".[36]

40. The fuel charge under Part 1 applies to GHG emitting fuels that are produced, delivered, or used in a listed province, brought to a listed province from another place in Canada, or imported into Canada at a place in a listed province. The fuels and their charge rates are set out in Schedule 2 of the *Act*. The charge rate for each fuel represents $20 per tonne of CO_2e emitted from each fuel in 2019, rising to $50 per tonne in 2022, consistent with the Benchmark price trajectory for explicit price-based systems. Most commonly, registered distributors are fuel producers or wholesale level fuel distributors. Generally, they pay the fuel charge for fuel they deliver to others. It is anticipated that they will adjust the price at which they sell the fuel to their customers accordingly, however the *Act* does not require them to do so.[37]

41. Part 1 provides for specific circumstances in which no charge is applicable on fuels delivered to individuals or industries with an exemption certificate. Most significantly, an industrial facility subject to the OBPS under Part 2 of the *Act* is exempted from the fuel charge because its excess GHG emissions are priced under Part 2 of the *Act*. Similarly, the *Act* includes the flexibility to enable coordination with provincial industrial emissions pricing systems, so an industrial facility subject to a provincial pricing system is exempted from the fuel charge.[38]

42. Part 2 of the *Act* sets out the main powers and authorities for the OBPS for GHG emissions of large industrial facilities. Part 2 has the additional objective of creating a pricing incentive in a way that reduces competitiveness impacts and the risk of carbon leakage for industries that engage in trade with cross-border aspects – emissions-intensive and trade-exposed industries. Part 2 applies to "covered facilities" and sets out registration and GHG emissions reporting requirements. Covered facilities are required to determine the quantity of GHGs they emit and compare this

[36] *Act*, ss 166(2), 166(3), 189(1), 189(2); FINA, No 157 (23 May 2018) at 12-14; CR, Vol 1, Tab 1, Moffet at para 102.
[37] *Act*, s 55, Item 6 of Table 2 in Schedule 2; CR, Vols 1, 3, Tab 1, Moffet at paras 104-05, Ex S at 696; CR, Vol 4, Tab 5, Affidavit of Dr. Nicholas Rivers, affirmed January 25, 2019, at para 6, Ex B at 1091, 1093-96 [**Dr. Rivers**].
[38] *Act*, ss 28-36, esp ss 36(1)(b)(i), (v), (vii); CR, Vol 1, Tab 1, Moffet at paras 106-08.

quantity against the prescribed emissions limit. Schedule 3 lists the GHGs to which Part 2 applies, being the *UNFCCC*-defined GHGs, and their global warming potential.[39]

43. The OBPS complements the fuel charge system. Rather than paying the fuel charge, covered facilities provide compensation for the portion of their GHG emissions that exceed their applicable emissions limit, based on an activity-specific output-based standard. The output-based standards are prescribed in the *Output-Based Pricing System Regulations* and represent a percentage of the quantity of GHGs emitted on average by facilities conducting the particular activity (i.e. production of a product). In developing the output-based standards, Environment and Climate Change Canada used a three-phased approach to assess potential competitiveness and carbon leakage risks from the OBPS.[40]

44. If a covered facility's GHG emissions exceed the prescribed emissions limit in a year, it may compensate for its excess emissions in three ways. It may: (1) submit surplus credits it earned in the past, or that it has acquired from other facilities; (2) submit other prescribed credits that it acquired; or (3) pay an excess emissions charge. The excess emissions charge rates are set out in Schedule 4 of the *Act* and are equivalent to the escalating fuel charge rates. Conversely, a facility that emits less than its prescribed emissions limit will receive surplus credits, which it may use for future compliance obligations or sell to other regulated facilities. In this way, the system creates an incentive for continuous emissions reductions. The more a covered facility emits GHGs above its emissions limit, the more it will have to pay. The more a covered facility reduces its GHG emissions below its limit, the more it will be able to earn by selling its credits.[41]

45. In October 2018, the Government of Canada announced the outcome of its initial stringency assessments. The Benchmark and the two supplemental Benchmark guidance documents set out

[39] *Act*, ss 169, 190, Schedule 3; ENEV, No 44 (1 May 2018) at 44: 14 (Philippe Giguère, Manager, Legislative Policy, ECCC), 44:20-21 (Moffet); CR, Vol 1, Tab 1, Moffet at paras 39, 110-12; CR, Vol 3, Tab 2, Dr. Blain at para 8.
[40] *Act*, s 174; CR, Vol 1, Tab 1, Moffet at paras 106-07, 111, 113, 117, 127-28; CR, Vol 4, Tab 3, Goodlet at para 5; *Output-Based Pricing System Regulations*, SOR/2019-266.
[41] *Act*, ss 174, 175, 185, Schedule 4; CR, Vols 1-2, Tab 1, Moffet at paras 114-15, Ex P at 608-09.

the criteria used for this assessment. Pursuant to the Governor in Council's decisions,[42] the OBPS under Part 2 started applying in Ontario, New Brunswick, Manitoba, Prince Edward Island, and partially in Saskatchewan on January 1, 2019, and the fuel charge under Part 1 started applying in Ontario, New Brunswick, Manitoba, and Saskatchewan on April 1, 2019. For the territories, Parts 1 and 2 of the *Act* started applying in Yukon and Nunavut on July 1, 2019.[43]

46. On May 30, 2019, Alberta repealed the carbon levy it imposed in 2017 under its *Climate Leadership Act*. As a result, Alberta now only partially meets federal Benchmark stringency requirements. Consequently, on June 13, 2019, the federal government announced its intent to implement the fuel charge under Part 1 of the *Act* in Alberta, as of January 1, 2020, to ensure that carbon pricing meeting the minimum national standards of stringency set out in the Benchmark continues to apply in Alberta.[44]

47. Where the federal carbon pricing system applies, all direct proceeds from the charges are returned to the jurisdiction or area of origin. In provinces where the fuel charge applies, the federal government returns the bulk (about 90%) of the proceeds from the fuel charge directly to residents in the province of origin in the form of Climate Action Incentive payments. The direct proceeds from the fuel charge not returned through Climate Action Incentive payments are returned through support to schools, hospitals, small and medium-sized businesses, colleges and universities,

[42] *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*, SOR/2018-212, (2018) C Gaz II, 3760-76; *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act*, SOR/2019-79, (2019) C Gaz II, 979-1043.

[43] The OBPS only applies partially in Saskatchewan, because Saskatchewan implemented its own industrial pricing system on January 1, 2019. The federal backstop applies to the emission sources not covered by Saskatchewan's system (electricity generation and natural gas transmission pipelines). Prince Edward Island asked to have Part 2 apply. The Yukon and Nunavut asked to have both Part 1 and Part 2 apply. CR, Vols 1, 3, Tab 1, Moffet at paras 79-81, 119-21, 123, 126, Exs BB, DD-KK.

[44] *An Act to Repeal the Carbon Tax*, SA 2019, c 1; *Part 1 of the Greenhouse Gas Pollution Pricing Act Regulations (Alberta)*, SOR/2019-294, (2019) C Gaz II, 5875-902.

municipalities, not-for-profit organizations, and Indigenous communities in the province of origin.[45]

d. Parliament understood that carbon pricing throughout Canada that meets minimum national standards of stringency is integral to reducing Canada's nationwide GHG emissions

48. Parliament understood the efficacy of carbon pricing as a means to encourage behavioural changes to reduce GHG emissions. Parliament was informed that "[e]xperts around the world, including the vast majority of Canadian economists, agree that carbon pricing is one of the most cost-effective ways to reduce emissions."[46] Throughout the legislative process, the Minister of ECC, and others, reference evidence on the emissions reduction impact of British Columbia's carbon pricing scheme. The testimony of non-governmental witnesses appearing before the Parliamentary Committees confirmed that carbon pricing is effective for reducing GHG emissions, including testimony that, "[c]arbon pricing works. Study after study shows that in jurisdictions with a carbon price, emissions are lower than they would otherwise be."[47]

49. Additionally, on April 30, 2018, the Government of Canada published *Estimated Results of the Federal Carbon Pollution Pricing System*, which was provided to the committees considering the Bill. These estimates were based on a scenario in which the federal carbon pricing system was applied in the jurisdictions that did not have a pricing system in place and on the existing systems remaining in place in British Columbia, Alberta, Ontario, and Quebec. That analysis estimated that, collectively, carbon pricing systems throughout Canada would achieve an 80 to 90 Mt CO2e annual reduction in nationwide GHG emissions by 2022 – significantly contributing towards

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[45] *Act*, ss 165(2), 188(1); *Budget Implementation Act, 2018, No 2*, SC 2018, c 27, s 13; CR, Vols 1, 3, Tab 1, Moffet at paras 122-25, Exs BB-GG, LL-OO.
[46] *Debates*, No 294 (8 May 2018) at 19212 (Wilkinson), CBA, Tab 7.
[47] Quote from ENEV, No 45 (10 May 2018) at 45:47 (Martha Hall Finlay, Canada West Foundation); *Act*, Preamble; *Debates*, No 289 (1 May 2018) at 18958 (ECC Minister), CBA, Tab 6, No 294 (8 May 2018) at 19214 (Wilkinson), CBA, Tab 7, No 304 (30 May 2018) at 19944-45 (Mark Gerretsen), CBA, Tab 8; FINA, No 146 (25 April 2018) at 5 (Meltzer), No 151 (7 May 2018) at 1 (Andrew Leach, University of Alberta), and 3 (Dale Beugin, Canada's Ecofiscal Commission); ENEV, No 46 (22 May 2018) at 46:8 (ECC Minister), No 45 (10 May 2018) at 45:62 (Beugin); AGFO, No 52 (22 May 2018) at 52:34-35 (Beugin); CR, Vol 4, Tab 5, Dr. Rivers at paras 5, 6, Ex B.

meeting Canada's *Paris Agreement* targets.[48] The estimated emissions reduction impact of carbon pricing throughout Canada has since been updated to a 50-60 Mt annual reduction by 2022 due to Ontario's cancellation of its cap-and-trade system. Broadly speaking, the change is based on the decrease in the emissions credits that Ontario entities were projected to purchase from California.[49]

iv. Complementary federal measures to reduce Canada's GHG emissions

50. Ensuring that carbon pricing applies throughout Canada is integral to addressing nationwide GHG emissions. At the same time, there is no dispute that additional measures are needed to meet Canada's GHG emissions reduction target. Complementary federal GHG emissions reduction measures are in place or planned under the *Canadian Environmental Protection Act, 1999* (*CEPA*). The *Estimated Results* document referenced above included the estimated emissions reductions contribution of three of these federal measures. The federal government is also investing in clean technology research, innovation, and other GHG emissions reduction programs.[50]

v. Additional clarifications regarding Appellants' statements of facts

51. At paragraphs 11-13 of its Factum, Saskatchewan states that it supports Canada's commitment under the *Paris Agreement* and describes some of its GHG emissions mitigation measures. While Saskatchewan is taking GHG emissions mitigation measures, its plan does not include an overall emissions reduction target. Saskatchewan's GHG emissions in 2005 were 68.9 Mt CO_2e. If it were aiming to achieve a 30% reduction below 2005 levels by 2030, based on Canada's 2018 NIR, its target would need to be 48.2 Mt CO_2e, which is 28.1 Mt CO_2e less than its 2016 emissions. Nothing in Saskatchewan's plan suggests this level of ambition.[51]

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[48] CR, Vols 1, 3, Tab 1, Moffet at paras 97-99, Ex Z at 831-33; CR, Vol 4, Tab 3, Goodlet at paras 25-26; ENEV, No 44 (1 May 2018) at 44:9-10 (Moffet); FINA, No 148 (1 May 2018) at 5-6 (Moffet), No 152 (8 May 2018) at 7-8 (Moffet).
[49] CR, Vols 1, 3, Tab 1, Moffet at para 123, Ex CC; CR, Vol 4, Tab 3, Goodlet at paras 28, 29.
[50] CR, Vols 1-3, Tab 1, Moffet at paras 82, 87, 123, 129-43, Exs T at 705-09, 712-29, 740-48, J at 382-84, Z at 832, DD-JJ.
[51] *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy*, in Record of the Attorney General of Saskatchewan, Part III, Vol III, Tab 14; CR, Vol 3, Tab 2, Dr. Blain at para 22, Ex B at 979.

52. At paragraph 15 of its Factum, Ontario says it agrees with Canada that climate change is real and needs to be addressed. However, despite joining the *Pan-Canadian Framework*, Ontario revoked its cap-and-trade carbon pricing system in 2018. Ontario also cancelled the programs Canada agreed to fund through the Low Carbon Economy Leadership Fund and a total of 752 renewable energy projects. Under federal and provincial policies in place in September 2018, not including the federal backstop, emissions in Ontario were projected to only decrease by 1 Mt CO_2e between 2016 and 2030. The GHG emissions mitigation targets in Ontario's new proposed climate change plan are substantially less ambitious than under its previous plan. It largely relies on past emissions reductions achieved from phasing out coal-fired electricity generation, which will occur in all provinces by 2030. Going forward, it only aims for a small amount of emissions reductions beyond those that it predicts will occur without any policy support.[52]

53. Under Ontario's current plan, Ontario has committed to reducing its emissions by 30% below 2005 levels by 2030.[53] Based on Canada's 2018 NIR, this would mean a 2030 target of 143.3 Mt CO_2e. Ontario's current target is less ambitious than it was at the time it and Alberta agreed to the *Pan-Canadian Framework*. At that time, Ontario's target was 37% below 1990 levels by 2030, which would have meant a 2030 target of 112.9 Mt CO_2e (a 30.4 Mt CO_2e difference).[54] The parties to the *Pan-Canadian Framework* would have understood that for Canada to meet its current *Paris Agreement* target, either all provinces must achieve a 30% reduction below 2005 levels by 2030, or some provinces must exceed this reduction target to accommodate provinces, like Alberta, that may not be able to do so due to differences in the nature of provincial economies.

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[52] CR, Vol 1, 3, Tab 1, Moffet at paras 79, 135, 138, Exhibit RR; CR, Vol 4, Tab 3, Goodlet at paras 29-32; CR, Vol 4, Tab 5, Dr. Rivers at paras 10-11, Exhibit D; *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan,* in ONR, Part III, Tab 10, Record of the Attorney General of Ontario, Volume 1, Tab 4, at 34-42.
[53] Ontario's Factum at para 15; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 58 [**ONCA Reasons**].
[54] CR, Vol 3, Tab 1, Moffet, Ex T at 761-62; CR, Vol 3, Tab 2, Dr. Blain at para 22, Ex B at 979.

PART II – STATEMENT OF ISSUES

54. Canada's position on the question of whether the *Act* is unconstitutional in whole or in part is as follows:

a) The whole *Act* is constitutional, as an exercise of Parliament's jurisdiction to legislate for the peace, order, and good government of Canada under s. 91 of the *Constitution Act, 1867* to address a matter of national concern. More particularly, the *Act* relates to *establishing minimum national standards integral to reducing nationwide GHG emissions*, which is a matter of national concern.

55. Canada's position on the issues related to the characterization of the fuel charge under Part 1 of the *Act* is as follows:

a) The fuel charge is a valid regulatory charge and, as such, s. 53 of the *Constitution Act, 1867* does not apply;

b) In the alternative, if the Court finds that the fuel charge is a tax, it was validly enacted in accordance with s. 53 of the *Constitution Act, 1867*.

PART III – STATEMENT OF ARGUMENT

A) Characterization – the essential character of the law relates to the establishment of minimum national standards integral to reducing nationwide GHG emissions

56. There is no dispute that the first step in any division of powers analysis is an inquiry into the true nature of the law to determine its essential character. "Both the law's purpose and its legal and practical effects are considered as part of this analysis."[55] This analysis shows that the *Act*'s purpose and effect is to establish minimum national standards of stringency for GHG emissions pricing to reduce nationwide GHG emissions. Without reference to the particular means of carbon pricing, to which both Saskatchewan and Ontario object,[56] the *Act*'s essential character relates to the matter of *establishing minimum national standards integral to reducing nationwide GHG emissions*.

57. A law's purpose may be determined by examining intrinsic evidence, such as the preamble and the structure of the statute, extrinsic evidence, such as a statute's legislative history and other accounts of the legislative process, and the context of its enactment.[57] All of these indicators confirm that the dominant purpose of the *Act* is to ensure GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time, to create incentives for the behavioural changes necessary to reduce nationwide GHG emissions.[58]

58. The *Act*'s preamble affirms Parliament's motivations and intentions. The preamble refers to the impact of GHG emissions on global climate change, the risks resulting from the high level of GHG emissions globally, and the fact that the detrimental impacts of climate change are already being felt throughout Canada. Parliament acknowledges Canada's international obligation to contribute to the global efforts to reduce GHG emissions in pursuit

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[55] *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 29, [2015] 1 SCR 693 [***Firearms Sequel***]; *Reference re Securities Act*, 2011 SCC 66 at paras 63-64, [2011] 3 SCR 837 [***Securities Reference***]; *Reference re Firearms Act*, 2000 SCC 31 at paras 16-18, [2000] 1 SCR 783 [***Firearms Reference***]; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 86, [2018] 3 SCR 189 [***Pan-Canadian Securities***].

[56] Saskatchewan's Factum at paras 21, 37, 54, 55, 101; Ontario's Factum at para 35.

[57] *Securities Reference* at para 64; *Firearms Reference* at para 17.

[58] *Act*, Preamble, paras 8, 11-16, ss 166(2), 166(3), 189; FINA, No 157 (23 May 2018) at 12-14; see paras 28, 30, 32, 33-46, 48-49 above.

of the aims of the *Paris Agreement*, and confirms the Government's commitment to doing so. The preamble notes that "behavioural change … is necessary for effective action against climate change" and that pricing GHG "emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change". The preamble then notes that some provinces are developing or have implemented GHG emissions pricing systems. However, "the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity". The preamble thus concludes that "it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada."[59]

59. In addition to creating the federal GHG emissions pricing scheme, an essential feature of the *Act*'s design is the Governor in Council's discretion in ss. 166 and 189 to determine where the *Act* operates. This discretion must be exercised for "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",[60] taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions"[61] as the primary factor. Contrary to Saskatchewan's assertion that the *Act* does not impose minimum national standards, it is clear from the context surrounding the *Act* and its legislative history that it does: The Governor in Council will schedule provinces to the *Act* when their pricing mechanisms are insufficiently stringent. The Benchmark sets out the minimum national standards of stringency for assessing provincial systems. This does not preclude more stringent provincial systems.[62]

[59] *Act*, Preamble, quotes from paras 11-12, 15-16.
[60] *Act*, s 166(2).
[61] *Act*, s 166(3).
[62] CR, Vol 1, Tab 1, Moffet at para 102; see paras 28-30, 32, 34, 39-40, 45 above; *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*, SOR/2018-212, (2018) C Gaz II, 3760-76. *Contra* Saskatchewan's Factum at paras 26, 44, 87.

60. The *Act*'s effects align with its purpose. "The *effects* of a law include the legal effect of the text as well as practical consequences of the application of the statute".[63] Together, Parts 1 and 2 provide a comprehensive system for pricing GHG emissions in a way that aims to minimize negative competitiveness impacts on emissions-intensive and trade-exposed industries. The *Act*'s operation in provinces and territories that do not have a pricing scheme that meets the Benchmark ensures that GHG emissions pricing will apply broadly throughout Canada, with increasing stringency over time, in keeping with the Benchmark price trajectory for explicit price-based systems. Thus, the *Act* provides the framework and a pricing system to establish minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions.[64] The *Act*'s essential character relates to the matter of *establishing minimum national standards integral to reducing nationwide GHG emissions*.

61. Canada acknowledges that its characterization of the *Act* has evolved. Canada's characterization is informed by the characterizations of both courts below.[65] In identifying the *Act*'s essential character, Canada endorses the SKCA majority's use of "stringency" standards because "stringency" is the language in the *Act* and, like the Benchmark, it embraces more than just the price per unit of GHG emissions. However, Canada's identification of the *Act*'s essential character and the matter to which it relates includes the GHG emissions reduction purpose, as did both the Court of Appeal for Ontario (ONCA) majority and concurring decisions. Like the ONCA majority, Canada's characterization of the matter to which the *Act* relates is not limited to Parliament's specific means of minimum national standards of stringency for GHG emissions pricing. However, as explained below, Canada's characterization of the matter to which the *Act* relates is narrower than that of the ONCA majority.

62. Ontario's broad characterization of the *Act* as "the regulation of GHG emissions", without further definition, conflates the *Act*'s purpose with Canada's broader commitment to achieving Canada's nationally determined contribution under the *Paris Agreement*. Ontario

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[63] *Securities Reference* at para 64 (emphasis in original).
[64] *Act*, Preamble, para 16; see paras 38-47 above.
[65] SKCA Reasons at paras 125, 139 (per Richards, CJ, Jackson and Schwann, JJA); ONCA Reasons at paras 77, 175.

extracts one paragraph of the *Act*'s preamble and ignores the remainder.[66] Ontario's characterization also entirely disregards an essential feature of the *Act* – Parliament's "backstop" approach based on a stringency assessment of provincial or territorial systems relative to the Benchmark.

63. Saskatchewan's characterization of the *Act* as being "to regulate provincial sources of GHG emissions …"[67] does not reflect how GHG emissions pricing works. The *Act* ensures that incentives for the behavioural changes necessary to reduce nationwide GHG emissions apply throughout Canada. It is general legislation directed to pricing GHG emissions as a global pollutant. It internalizes extra-provincial costs of GHG emissions, but it does not set the retail price of products, or otherwise tell industries how to operate. Achieving efficiencies will be a competitive advantage.[68]

64. Further, neither Ontario's nor Saskatchewan's characterization accounts for the possibility that the *Act* could achieve its purpose of ensuring that carbon pricing with increasing stringency over time applies throughout Canada without the federal pricing system operating in any jurisdiction in Canada. Both characterizations are overly broad.

B) Classification – the *Act* comes within Parliament's peace, order, and good government jurisdiction to address a matter of national concern

65. The second step in a division of powers analysis is determining "[i]f the 'matter' of the legislation comes within the 'subject' of the head of power".[69] Here, *establishing minimum national standards integral to reducing nationwide GHG emissions* comes within Parliament's jurisdiction 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."[70] It is a matter of national concern.

[66] Ontario's Factum at para 36.
[67] Saskatchewan's Factum at paras 22, 38, 75.
[68] CR, Vols 1-2, Tab 1, Moffet at paras 100, 113-15, 125, Ex R at 640-41; CR, Vol 4, Dr. Rivers, Ex B at 1094-96, 1109.
[69] *Firearms Sequel* at para 32.
[70] (UK) 30 & 31 Victoria, c 3, s 91.

i. Canadian constitutional law jurisprudence has well established Parliament's power to address matters of national concern

66. The national concern branch of Parliament's "peace, order, and good government" (POGG) power in the *Constitution Act, 1867* is a well-established aspect of Canadian constitutional jurisprudence.[71] Lord Watson first articulated it in the *Local Prohibition* case, where he stated, "[t]heir Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation".[72]

67. In *Crown Zellerbach*, this Court comprehensively reviewed the jurisprudential evolution of the national concern branch of Parliament's POGG power. After confirming that the national concern branch is distinct from the emergency branch, the Court set out criteria to be used in determining whether a matter constitutes a national concern, as follows:

> The national concern doctrine applies both to new matters which did not exist at Confederation and to matters which, although originally of a local or private nature in a province, have since … become matters of national concern;
>
> For a matter to qualify as a matter of national concern in either sense 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 powers under the Constitution;
>
> In determining whether a matter has achieved 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.[73]

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[71] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at pp 17-8 – 17-12, CBA, Tab 16.
[72] *Ontario (AG) v Canada (AG)*, [1896] UKPC 20 at p 9, [1896] AC 348 at 361.
[73] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 423-34 [***Crown Zellerbach***].

68. The matter to which the *Act* relates satisfies each of the *Crown Zellerbach* criteria.

69. The classification stage of the analysis "may require interpretation of the scope of the power."[74] Canada agrees with Ontario that this case provides the Court with an opportunity to modernize the test set out in 1988 by drawing on this Court's decisions applying the general branch of the trade and commerce power. Canada submits that the following three-step test for assessing the proposed matter both captures the essence of the national concern branch and reflects this Court's more recent jurisprudential developments. First, **is there a new matter or has there been a transformation**? Is there a new matter or a "factual matrix that supports [Parliament's] assertion of a constitutionally significant transformation"?[75] This question captures the *raison d'être* of the national concern doctrine. As a matter of evidence, this step provides a significant initial limit to Parliament's resort to the POGG power. Second, **is it distinctly national**? Is there a recognizable matter that is distinctly national; qualitatively different from that which is local? This should be assessed using the provincial inability test as applied under the general branch of the trade and commerce power.[76] Third, **is it reconcilable with the balance of federalism?** Is the impact of recognizing the matter as falling within Parliament's legislative jurisdiction reconcilable with the fundamental distribution of legislative powers under the Constitution?

70. Canada agrees with Ontario that distinctiveness refers to a qualitative difference. But, Canada says that the provincial inability analysis is more than an indicium of distinctiveness, it is the test for distinctiveness. Indeed, Professor Hogg describes provincial inability as "the most important element of national concern".[77] This clarification, through the application of established principles, aids in circumscribing the scope of the POGG power.

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[74] *Securities Reference* at para 65; *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at paras 39-42 [***Desgagnés Transport***].
[75] *Securities Reference* at para 115.
[76] *Securities Reference* at para 118-21, 123; *Pan-Canadian Securities* at paras 113-15.
[77] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at pp 17-14, 17-15, CBA, Tab 16.

71. However, Ontario's proposed "refinement" of the provincial inability test would transform the current provincial inability test into a provincial ability test.[78] It ignores this Court's direction that, when assessing provincial inability, a court should consider the possibility that each province "retain[s] the ability to resile from an interprovincial scheme".[79]

ii. Defining the matter of national concern

72. With respect to Saskatchewan's suggestion that a subject matter must be defined at a high level of generality,[80] Professor Hogg explains that a matter within the national concern branch of POGG must be "sufficiently specific to serve as a limited, justiciable restraint on federal power".[81] Canada's characterization of the matter as *establishing minimum national standards integral to reducing nationwide GHG emissions* adopts the ONCA majority's characterization.[82] However, Canada's definition adds two qualifiers as additional, ascertainable limits.

73. The first addition is the word "integral". This imports an assessment of the extent to which Parliament had a factual basis for enacting the legislation into the definition of the matter. It requires that Parliament must legislate on an evidentiary basis. It limits Parliament's jurisdiction to establishing minimum national standards that Parliament has a rational basis to believe will have a demonstrable impact on Canada's nationwide GHG emissions. A measure that is only tangentially related to reducing Canada's nationwide emissions would not qualify. It is well established that facts can be essential to constitutional adjudication before the courts.[83]

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[78] Ontario's Factum at paras 52-57.
[79] *Securities Reference* at para 119; *Pan-Canadian Securities* at para 113.
[80] Saskatchewan's Factum at paras 41, 54-57, 58.
[81] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at p 15-8 CBA, Tab 16. See also *Desgagnés Transport* at paras 35-37, 166-67.
[82] ONCA Reasons at paras 77, 104.
[83] *Provincial Court Judges' Assn. of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn. v Ontario (Management Board); Bodner v Alberta; Conférence des*

74. In this case, the evidentiary record demonstrates Parliament's rational basis for deciding that minimum national standards of stringency for GHG emissions pricing are integral to reducing nationwide GHG emissions. Contrary to the Appellants' assertions,[84] the case before this Court is not a policy debate, or about engaging this Court in an assessment of policy efficacy. Rather, the evidence regarding the efficacy of carbon pricing, the estimated nationwide GHG emissions reductions resulting from increasingly stringent carbon pricing throughout Canada, and the international consensus that carbon pricing is essential to the global effort to limit GHG emissions is the factual foundation relied on by Parliament. It confirms Parliament's rational basis for enacting the *Act* to achieve a substantial reduction in nationwide GHG emissions.[85]

75. The second qualifier is the reference to "nationwide" GHG emissions, which ensures that Parliament's jurisdiction is limited to truly national mitigation measures. This qualifier incorporates the provincial inability test into the definition of the subject matter itself. This will be explained further below in applying the *Crown Zellerbach* test to this subject matter.

76. Identifying a POGG subject matter with regard to achieving a particular substantive objective further ensures that recognized matters of national concern are defined as narrowly as possible. For example, in *Munro v National Capital Commission*, this Court defined the subject matter as "the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance."[86]

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juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General), 2005 SCC 44 at paras 33-37, [2005] 2 SCR 286; *Firearms Reference* at para 18; *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 422-23; *Desgagnés Transport*, 2019 SCC 58 at para 51; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at p 15-23, CBA, Tab 16; Andrew Lokan, Michael Fenrick & Christopher M Dassios, *Constitutional Litigation in Canada* (Toronto: Thomson Reuters, 2006) (loose-leaf revision 2019-1) at 8-10 – 8-12, CBA, Tab 17.

[84] Saskatchewan's Factum at paras 1, 2, 82-86, 115; Ontario's Factum at paras 29, 56, 74.

[85] See paras 22-24, 32, 36-38, 48-49 above; CR, Vols 1-3, Tab 1, Moffet at paras 46-50, 97-99, Exs K at 406, Z at 832, CC at 864; CR, Vol 4, Tab 5, Dr. Rivers, Ex C; SKCA Reasons at paras 147-48; ONCA Reasons at paras 168-76.

[86] *Munro v National Capital Commission*, [1966] SCR 663 at 671 [***Munro***].

77. With respect to the Appellants' objections to defining the matter in terms of establishing minimum national standards,[87] this Court's jurisprudence supports this approach. In the *Securities Reference*, this Court opined that "[l]egislation aimed at *imposing minimum standards applicable throughout the country* and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole."[88] This Court recently reiterated this statement in *Pan-Canadian Securities*.[89] The *Act* aims only to address the national aspects of controlling Canada's nationwide contribution of GHG emissions to global climate change, which it does by establishing minimum national standards while providing provinces with the flexibility to maintain or establish their own pricing systems.

iii. Establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national concern

78. As set out in paragraph 69 above, the *Crown Zellerbach* test involves a three-step analysis. The first step asks whether there is a new matter or whether the matter has become one "of national concern".[90] To meet this step, "Canada must present the Court with a factual matrix that supports its assertion of a constitutionally significant transformation"[91] through evidence that shows that a matter is new or has attained such dimensions that it affects the nation as a whole. Establishing minimum national standards integral to reducing nationwide GHG emissions meets this threshold question.

79. While the environment is too broad to be identified as a subject matter of national concern, this Court's repeated recognition of the importance of environmental protection provides overarching context:

> ... our common future, that of every Canadian community, depends on a healthy environment. ... This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for

[87] Saskatchewan's Factum at paras 98-100; Ontario's Factum at paras 66-67.
[88] *Securities Reference* at para 114 (emphasis added).
[89] *Pan-Canadian Securities* at para 112.
[90] *Crown Zellerbach* at 432.
[91] *Securities Reference* at para 115.

> preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society"....[92]

80. The undisputed evidence before this Court conclusively demonstrates that GHG emissions, regardless of their origin, have extra-provincial and global impacts; they create a risk of harm to human health and the environment upon which life depends. Their detrimental impacts are significant and their reduction requires urgent, coordinated efforts, including federal action implementing minimum national standards integral to achieving nationwide emissions reductions.[93] As the SKCA majority recognized, climate change is "one of the great existential issues of our time."[94] The ONCA majority found the subject matter to be a new one because "the existential threat to human civilization posed by anthropogenic climate change was discovered" well after Confederation.[95]

81. Contrary to Saskatchewan's characterization,[96] the evidence establishing the impacts of *global* climate change and the urgent need to rapidly reduce *global* GHG emissions to avoid significantly worsening climate change impacts speaks to the dimensions of the problem, not just its importance. The *UNFCCC* and related international agreements also evidence the dimensions of the problem, the international community's concern, and Canada's obligations to address its contribution of GHG emissions to global climate change. Canada is not relying on the *UNFCCC* or the *Paris Agreement* as a source of expanded federal legislative powers. However, as the ONCA majority noted, the "fact that a challenged

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[92] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 7, [2004] 2 SCR 74, citing *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241 [***Spraytech***]. See also *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16 [***Oldman River***]; *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55.
[93] CR, Vols 1-2, Tab 1, Moffet at paras 6-42, Exs A-I; see paras 9-19 above.
[94] SKCA Reasons at para 4.
[95] ONCA Reasons at para 104. See also Spencer R Weart, *The Discovery of Global Warming* (Cambridge, MA: Harvard University Press, 2008) ch 1-2, CBA, Tab 19; James R Fleming, *Historical Perspectives on Climate Change* (Oxford: Oxford University Press, 1998) ch 6, CBA, Tab 13.
[96] Saskatchewan's Factum at para 47.

law is related to Canada's international obligations is pertinent to its importance to Canada as a whole".[97]

82. Juxtaposing Canada's emissions reduction targets with Canada's emissions trends since 1990 demonstrates the necessity of a national approach. Historically, Canada has not been on track to meet its reduction targets. Canada's first target under the *UNFCCC*, which came into force in 1994, was to return Canada's emissions to 1990 levels. Under the *Copenhagen Accord*, Canada pledged to reduce its emissions by 17% below 2005 levels by 2020. Canada's current target under the *Paris Agreement* is 30% below 2005 levels by 2030. Canada's GHG emissions in 2016 were 704 Mt CO_2e, which was 101 Mt CO_2e higher than 1990 levels, but 3.8% lower than in 2005. By 2030, Canada's nationwide annual emissions must be 192 Mt CO_2e lower than in 2016 to meet its current *Paris Agreement* target. Canada is expected to show a progression in ambition by 2025.[98]

83. More generally, timely Canadian action is important to encourage global action to mitigate GHG emissions. Uncertainty in our domestic action on climate change limits our ability and credibility to encourage other countries to take required action. Having this credibility and ability to encourage global action is critical as the rise in temperatures in Canada will be double the global average and even higher in the Arctic.

84. Given the role that increasing atmospheric concentrations of GHG emissions have in causing global climate change and the significant detrimental impacts of climate change throughout Canada, establishing minimum national standards integral to reducing nationwide GHG emissions is a matter of national and international concern.[99]

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[97] ONCA Reasons at para 106; *Crown Zellerbach* at 419, 436-37; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at pp 11-17, 11-18, CBA, Tab 16. *Contra* Saskatchewan's Factum at para 93.
[98] CR, Vol 1, Tab 1, Moffet at paras 28, 32, 34, 36, 43-45; CR, Vol 3, Tab 2, Dr. Blain at paras 18, 21, Ex A at 979-80.
[99] CR, Vol 1, Tab 1, Moffet at paras 7-26, Exs A-G; *Crown Zellerbach* at 436-37; Court of Appeal, The Hague, October 9, 2018, *Urgenda Foundation v The State of the Netherlands*, Case Number: 200.178.245/01 (The Netherlands) at paras 44, 45, 67, 71.

iv. Establishing minimum national standards integral to reducing nationwide GHG emissions is a single, distinct, and indivisible subject matter

85. The second step in the *Crown Zellerbach* test asks whether the subject matter is "single, distinct, and indivisible", informed by the provincial inability test.[100] This criterion requires that there be a discernable distinction or dividing line between the subject matter over which Parliament has jurisdiction and matters that are local in nature, and thus within provincial jurisdiction. *Establishing minimum national standards integral to reducing nationwide GHG emissions* is a single, distinct, and indivisible subject matter. Its two essential defining elements limit the scope of Parliament's jurisdiction and provide a clear dividing line between federal and provincial jurisdiction.

86. Contrary to the Appellants' submissions, the matter is narrower than "GHG emissions" *simpliciter*, which is the matter on which they base much of their distinctiveness arguments.[101] However, including "GHG emissions", a harmful and pervasive pollutant that cannot be geographically contained, as one of the core defining elements in the subject matter is consistent with this Court's jurisprudence. "[B]oth the majority and dissenting judgments in *Crown Zellerbach* support federal legislation that is appropriately targeted at reducing nationally and internationally significant environmental harm."[102]

87. In *Hydro-Québec*, this Court's most recent decision considering whether environmental legislation could be upheld under the national concern branch of Parliament's POGG power, the judgment in which the national concern branch was applied turned on how the pollutant was defined. The majority upheld federal regulation of "toxic substances" under Part II of the former *CEPA* as a valid exercise of Parliament's criminal law power and did not consider the national concern doctrine. The dissent took the view that Part II could not be upheld under Parliament's criminal law power or under the national concern branch of POGG. The broad and amorphous definition of "toxic substance" in the former *CEPA* was

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[100] *Crown Zellerbach* at 432-34.
[101] Saskatchewan's Factum at paras 72, 75, 78, 92; Ontario's Factum at paras 59, 61, 62, 65.
[102] Nathalie Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions" (2016) 36 NJCL 331 at 365-67 [***Canadian Climate Federalism***], CBA, Tab 10.

central to the dissent's reasoning in *Hydro-Québec*. It found that there was "no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects."[103]

88. In stark contrast, the subject matter and the *Act* target a distinct type of pollutant with indisputable persistence, atmospheric diffusion, harmful effects, and interprovincial aspects. GHG emissions are a discrete and distinct form of air pollution. The *UNFCCC* and subsequent international agreements explicitly define and identify GHGs based on specific scientific characteristics, including their global warming potential. GHG emissions are a measurable and persistent atmospheric pollutant. Their interprovincial, national, and global effects are well established.[104] While many sectors generate GHG emissions, setting minimum national standards integral to reducing nationwide emissions affects only one specific aspect of those sectors – the GHG emissions they generate – which is constitutionally permissible.[105]

89. The *Act* could achieve its purposes without the federal pricing scheme established by the *Act* (i.e. the backstop) operating in any jurisdiction. However, contrary to Ontario's submission,[106] where it does operate, it is patently limited to pricing GHG emissions. The Part 1 fuel charge applies to the fuels listed in Schedule 2, each of which emit GHGs when burned and for which the charge rate is based on its CO_2e emissions factor. The Part 2 OBPS applies to the GHGs listed in Schedule 3 of the *Act*, being the *UNFCCC*-defined GHGs. While the *Act* gives the Governor in Council discretion to prescribe additional substances as a "fuel" for Schedule 2 and to add a "gas… and its global warming potential" to Schedule 3, the *Act*'s purpose, and the *UNFCCC*'s reporting requirements, confines this discretion. All

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[103] *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 68-70, 75, 110, 161 [***Hydro-Québec***].
[104] CR, Vols 1-2, Tab 1, Moffet at paras 7-8, 27-45, 61, 112, Ex D at 196, Exs H, I; CR, Vol 3, Tab 2, Dr. Blain generally, esp paras 7-8, 17-20, 22.
[105] *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 669-70 [***General Motors***]; *Securities Reference* at para 79; *Firearms Sequel* at para 32. *Contra* Saskatchewan's Factum at paras 74, 75.
[106] Ontario's Factum at paras 24, 36, 63.

discretionary grants of power are circumscribed by the statutory context in which they arise.[107] This Court's decision in *Hydro-Québec* supports Canada's position.

90. The second core limitation is captured by the remainder of the subject matter's definition: *establishing minimum national standards integral to reducing nationwide GHG emissions*. As noted above, this element incorporates the provincial inability test into the subject matter. Properly considered and applied, the provincial inability test is a substantial limit on the scope of Parliament's jurisdiction.

a. The provincial inability test defines and limits the scope of Parliament's jurisdiction

91. The provincial inability test both confirms Parliament's jurisdiction to establish minimum national standards integral to reducing nationwide GHG emissions and defines the limits of the resulting federal and provincial spheres of authority.

92. The provincial inability test helps define the scope of both Parliament's POGG jurisdiction to address matters of national concern and Parliament's general trade and commerce power. For both, its roots are in a 1976 paper written by Professor Dale Gibson, in which he identified "provincial inability" as an organizing principle for the courts' early national concern decisions, positing that a "national dimension" exists when "a significant aspect of a problem is beyond provincial reach".[108] This Court then explicitly adopted the concept into the test for a matter of national concern and concurrently incorporated it into the test for the general branch of the trade and commerce power.[109] Although the two powers

[107] CR, Vol 1, Tab 1, Moffet at para 104; *Act*, Preamble, ss 3, 166(1), 169, 190, Schedule 2, Schedule 3; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24-28, [2013] 3 SCR 810.
[108] Dale Gibson, "Measuring National Dimensions", (1976) 7 Man LJ 15 at 33-37, CBA, Tab 14.
[109] *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914 at 945; *Schneider v The Queen*, [1982] 2 SCR 112 at 131-32 [***Schneider***]; *Attorney General of Canada v Canadian National Transportation Ltd*, [1983] 2 SCR 206 at 267 [***Canadian National Transportation***]; *Crown Zellerbach* at 428-34; *General Motors* at 662.

are different, they share many similar characteristics. Thus, this Court's jurisprudence on provincial inability in respect of the general trade and commerce power is instructive.

93. In *Crown Zellerbach*, the Court said that the provincial inability test asks, "what would be the effect on extra-provincial interests of a provincial failure" to regulate the matter, which assists "in determining whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view."[110]

94. This Court's decision in *Schneider* demonstrates how the provincial inability test draws a line between matters that are local in nature and those that are federal. In *Schneider*, this Court found that the problem of heroin dependency is not a matter of national concern, as distinct from illegal trade in drugs, based on the provincial inability test. This Court reasoned that "[f]ailure by one province to provide treatment facilities will not endanger the interests of another province."[111]

95. For the general trade and commerce power, the provincial inability test is set out in the fourth and fifth indicia of federal competence. The fourth factor is whether the provinces, acting alone or in concert, would be constitutionally incapable of passing such an enactment. Under this factor, a court should consider the possibility that each province "retain[s] the ability to resile from an interprovincial scheme".[112] The fifth factor is whether the failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country. These *indicia* help determine whether a matter is "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination".[113]

96. The provincial inability test defines and distinguishes *minimum national standards integral to reducing nationwide GHG emissions* from provincial matters for constitutional purposes. This matter is qualitatively different from the provinces' jurisdiction to address GHG emissions, including the provinces' jurisdiction to implement carbon pricing.

[110] *Crown Zellerbach* at 432-34.
[111] *Schneider* at 131-32; *Crown Zellerbach* at 428-29.
[112] *Securities Reference* at para 119.
[113] *Canadian National Transportation* at 267; *General Motors* at 662; *Securities Reference* at paras 108, 118-21; *Pan-Canadian Securities* at paras 101-03, 113-15.

Parliament's jurisdiction under this matter is limited to the national aspects of the problem. Thus, to be valid under Canada's proposed matter of national concern, a statute must not only be substantively related to reducing nationwide GHG emissions, it must implement a national measure for which the failure to include one or more provinces or territories would jeopardize its successful operation in other parts of the country. Such legislation transcends provincial constitutional competence because it protects against the ability of provinces to resile from an interprovincial scheme to the detriment of other provinces.[114]

97. The provincial inability test is inherent in the words of s. 91, which provide for Parliament's POGG power. This power ensures that there are no jurisdictional vacuums in the distribution of powers. Here, denying Parliament jurisdiction to establish minimum national standards integral to reducing nationwide GHG emissions would leave a gaping hole in the Constitution. We would be a nation incapable of enforcing action necessary to combat an existential threat. "Such a gap is constitutional anathema in a federation."[115]

98. Saskatchewan submits that provinces are "willing and able" to address climate change and reduce GHG emissions and Ontario says that "provinces are not incapable of regulating" GHG emissions,[116] but this is not the test.[117] The test asks what would be the effect on extra-provincial interests of a provincial failure to do so. Moreover, both make their provincial ability submissions in relation to GHG emissions generally, not the more narrowly defined matter of national concern to which the *Act* relates.

99. The Appellants' assertions that federal jurisdiction over "minimum national standards" is self-fulfilling under the provincial inability test or would empower Parliament to establish minimum national standards in nearly every area of provincial jurisdiction disregards the detrimental interprovincial impacts requirement of the test.[118] The ONCA majority's view that "minimum national standards to reduce GHG emissions" is a matter of national concern

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[114] *Pan-Canadian Securities* at para 113-15. *Contra* Saskatchewan's Factum at paras 79-82, 90.
[115] *Securities Reference* at para 83.
[116] Saskatchewan's Factum at paras 85, 86; Ontario's Factum at paras 71-75.
[117] *Contra* Ontario's Factum at paras 52-58.
[118] Saskatchewan's Factum at paras 98, 100; Ontario's Factum at paras 66, 68, 69.

was not based on the fact that only a national government can legislate nationally. Rather, the analysis rightly focused on the detrimental interprovincial impacts that would result from a province's failure to act.[119]

100. Saskatchewan's assertion that reliance on the provincial inability test as the factor for determining distinctiveness would expand the national concern doctrine in unprincipled ways is flawed. This view fails to consider how the provincial inability test has effectively operated in this Court's general trade and commerce jurisprudence. It also fails to have regard to the full national concern test, in which distinctiveness is one of three considerations. However, Canada agrees with Saskatchewan that the question of provincial inability and the harms that flow from a provincial failure is both normative and factual, such that evidence is required.[120]

b. A provincial failure to meet minimum national standards integral to reducing nationwide GHG emissions would adversely affect extra-provincial interests

101. Canada's proposed matter of national concern and the *Act* meet the provincial inability test. Indeed, the provincial inability test is embedded in the matter: no single province or territory can constitutionally legislate minimum national standards integral to reducing nationwide GHG emissions to protect itself from another province's decision to resile from a cooperative agreement. For the *Act*, evidence before the courts below established the interprovincial competitiveness and carbon leakage risks that could arise if carbon pricing across the country was not reasonably comparable in stringency. Thus, the efficacy of carbon pricing is systemically undermined without reasonably comparable levels of stringency throughout Canada.[121]

102. At its highest level, a provincial failure to implement measures integral to reducing nationwide GHG emissions will adversely affect extra-provincial interests[122] because

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[119] ONCA Reasons at paras 115-23.
[120] Saskatchewan's Factum at para 88.
[121] See footnote 126 below.
[122] *Pan-Canadian Securities* at paras 113-16; *Interprovincial Co-Operatives Ltd et al v R*, [1976] 1 SCR 477 at 516 [***Interprovincial Co-Operatives***]; *Canadian Climate Federalism* at 367-69, CBA, Tab 10.

reducing its own GHG emissions is a prerequisite to Canada being able to influence the international agenda and thereby get the global action needed to prevent catastrophic outcomes of climate change. "It is a notorious fact that air is not impounded by provincial boundaries."[123] In the case of GHG emissions, this is compounded by their contribution to *global* climate change regardless of the location of their source.

103. Considering New Brunswick's, British Columbia's, and Saskatchewan's GHG emissions is illustrative. From 2005 to 2016, New Brunswick's emissions decreased by 4.8 Mt CO2e and British Columbia's emissions decreased by 3.2 Mt CO2e, while Saskatchewan's GHG emissions increased by 7.4 Mt CO2e.[124] Saskatchewan's increase almost equals New Brunswick's and British Columbia's combined reductions, yet New Brunswick and British Columbia are constitutionally unable to enact legislation reaching beyond their borders – aimed at reducing nationwide GHG emissions.

104. More specifically, federal legislation in relation to establishing minimum national standards integral to reducing nationwide GHG emissions must implement a national measure for which the failure to include one or more provinces would jeopardize its successful operation in other parts of the country. Contrary to Saskatchewan's assertion, recognizing this subject matter does not give Parliament a supervisory jurisdiction;[125] it ascribes to Parliament exactly the type of residual jurisdiction contemplated by the POGG power in s. 91 of the *Constitution Act, 1867*.

105. The *Act* helps demonstrate the focused nature of the concern. The failure of some provinces to implement GHG emissions pricing that meets minimum national standards of stringency would undermine the pricing measures taken by the rest. The evidence shows that interprovincial carbon leakage is a risk resulting from inconsistent emissions pricing among provinces; it could jeopardize the successful operation of carbon pricing in other parts of the country. "Competitiveness between provinces needs to be protected".[126] Contrary to

[123] *Canada Metal Co v R* (1982), 144 DLR (3d) 124 (Man QB) at para 16.
[124] CR, Vol 3, Tab 2, Dr. Blain at para 21.
[125] Saskatchewan's Factum at paras 44, 105-06.
[126] ENEV, No 44 (1-3 May 2018) at 44:30-32 (quote at 44:31) (Peter Boag, President and CEO, Canadian Fuels Association). See also ENEV, No 44 (1-3 May 2018) at 44:14 (Philippe

Saskatchewan's assertion, the backstop nature of the *Act* is consistent with the provincial inability test. Even if all provinces enacted pricing schemes meeting the Benchmark, the *Act* continues to protect in the event of a future failure to do so (*i.e.* resiling).[127] The Constitution must be interpreted in a manner that ensures that a matter of national concern with the gravity of the current crisis may be addressed, and not in a way that prioritizes an economic race to the bottom.

v. Parliament's jurisdiction to establish minimum national standards integral to reducing nationwide GHG emissions has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative powers

106. The final step in the *Crown Zellerbach* test, which asks whether the scale of impact on provincial jurisdiction resulting from Parliament's jurisdiction over the subject matter is reconcilable with the fundamental distribution of powers under the Constitution, is met.[128] Recognizing Parliament's POGG jurisdiction over *establishing minimum national standards integral to reducing nationwide GHG emissions* as a matter of national concern does not skew the constitutional distribution of powers. The scale of impact on provincial jurisdiction is reconcilable with the balance of federal and provincial legislative powers and, thus, respects the principles of federalism and subsidiarity.

107. The Appellant's arguments in relation to this element of the *Crown Zellerbach* test fall into two broad categories – assertions that Parliament's jurisdiction over this matter either (1) authorizes federal overreach into areas of provincial jurisdiction or (2) will displace areas of provincial jurisdiction. However, well-established constitutional doctrines refute both assertions. First, precise definition of the matter of national concern and a careful pith and substance analysis prevents federal overreach into provincial matters. As the ONCA majority opined, "federal jurisdiction in this field is narrowly constrained to address the risk of

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Giguère, Manager, Legislative Policy, ECCC), 44:20-21 (Moffet), 44:65-68 (Adam Auer, Vice President, Environment and Sustainability, Cement Association of Canada); CR, Vols 1-2, Tab 1, Moffet at paras 58, 65, 67, Ex R at 637-38, 667, 673, 676; ONCA Reasons at para 120; SKCA Reasons at para 155. *Contra* Ontario's Factum at paras 72-75.

[127] Saskatchewan's Factum at paras 90, 91.

[128] *Crown Zellerbach* at 432.

provincial inaction regarding a problem that requires collective action."[129] As discussed above, the matter of national concern that Canada asks this Court to recognize is even narrower than the one accepted by the ONCA majority.

108. Second, the double aspect doctrine and this Court's restricted application of the paramountcy doctrine ensure robust provincial jurisdiction. Parliament's jurisdiction over this subject matter "leaves ample scope for provincial legislation in relation to [GHG regulation]",[130] just as the *Act* enables provincial carbon pricing systems. Neither the subject matter nor the *Act* impairs provincial legislative powers, including provinces' jurisdiction over the development, conservation, and management of natural resources and electricity generation under s. 92A(1) of the *Constitution Act, 1867*.

a. The narrow definition of the matter and the pith and substance doctrine preclude federal overreach

109. Parliament's jurisdiction to enact minimum national standards integral to reducing nationwide GHG emissions does not result in a broad expansion of Parliament's authority.[131] The narrow definition of the matter of national concern is the starting point for this analysis – not the "environment", or "pollution", or "all aspects of … regulating greenhouse gas emissions".[132] The pith and substance doctrine dictates that Parliament's jurisdiction would only permit laws, like the *Act*, whose essential character relates to this subject matter. Including "integral" in the subject matter definition limits Parliament's jurisdiction to establishing minimum national standards that Parliament has a rational basis to believe will have a demonstrable impact on nationwide GHG emissions.[133] For the *Act*, the evidence demonstrates that increasingly stringent carbon pricing throughout Canada will reduce

[129] ONCA Reasons at paras 4, 131-133 (quote at para 131).
[130] ONCA Reasons at paras 4, 130.
[131] *Contra* Ontario's Factum at paras 64-70, 79-87 and Saskatchewan's Factum at paras 104-07.
[132] As argued in Ontario's Factum at paras 80-84 and Saskatchewan's Factum at paras 78, 104-06.
[133] See para 73-74 above.

Canada's total annual emissions by 50-60 Mt by 2022.[134] A reduction of this magnitude is patently integral to reducing nationwide GHG emissions.

110. The national focus of the matter is an additional limit on its scope. The pith and substance of any permissible federal legislation must relate to truly national standards, not local ones. The doctrine of colourability would ensure that federal legislation cannot take over areas of provincial jurisdiction under the pretext of purporting to legislate to establish minimum national standards integral to reducing nationwide GHG emissions.[135]

111. Any future legislation remains challengeable on division of powers grounds. "Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers… That impartial arbiter is the judiciary, charged with 'control[ling] the limits of the respective sovereignties'".[136] The ONCA majority expressed precisely this point when it opined that the subject matter "does not result in a massive transfer of broad swaths of provincial jurisdiction to Canada".[137]

b. The double aspect doctrine and the strict application of the paramountcy doctrine ensure robust provincial jurisdiction

112. Parliament's jurisdiction to establish minimum national standards integral to reducing nationwide GHG emissions will not impair a provincial legislature's power to continue regulating all aspects of local matters, including in relation to intra-provincial activities that generate GHG emissions. The double aspect doctrine applies to matters of national concern in the same way it applies to other exclusive federal heads of power. Similar laws can be validly enacted by both Parliament and provincial legislatures, and concurrently applied, where "[t]he federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls

[134] See paras 49-50 above.
[135] *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 23, [2015] 3 SCR 250.
[136] *Securities Reference* at para 55, citing *Northern Telecom Canada Ltd v Communication Workers of Canada*, [1983] 1 SCR 733 at 741.
[137] ONCA Reasons at para 133.

within provincial jurisdiction."[138] GHG emissions mitigation measures, including carbon pricing, have a double aspect. The modern approach to federalism recognizes that areas of overlapping powers are unavoidable.[139]

113. Contrary to Saskatchewan's submissions,[140] the constitutional concept of exclusivity does not have some superordinate meaning under Parliament's power to address matters of national concern. Parliament's POGG power to address matters of national concern is no more exclusive than Parliament's enumerated constitutional powers. An exclusive power is not a full and complete occupation of a subject matter by one level of government to the exclusion of the other.[141] As this Court made clear in *Ontario Hydro*:

> Parliament's power under s. 91 of that Act to make laws for the peace, order and good government of Canada (the "p.o.g.g." power), is not "plenary". Rather, federal jurisdiction over such works [nuclear generating stations] must be carefully described to respect and give effect to the division of legislative authority on which our federal constitutional scheme is based.[142]

114. Contrary to Ontario's submission,[143] the aeronautics and radio communications decisions do not demonstrate that POGG powers are necessarily "sweeping". Instead, they

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138 *Securities Reference* at para 66; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 30 [***Canadian Western Bank***].

139 *Canadian Western Bank* at paras 26, 28-31, 36, 42; *Pan-Canadian Securities* at para 114; *Law Society of British Columbia v Mangat*, 2001 SCC 67 at paras 23, 49, [2001] 3 SCR 113; *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 339-40 [***Ontario Hydro***]; *Desgagnés Transport* at paras 5, 81, 83- 85, 86-87, 153-155; Morris J Fish, "The Effect of Alcohol on the Canadian Constitution … Seriously" (2011) 57 McGill LJ 189 at 204-05, CBA, Tab 12; Stewart Elgie, "Kyoto, the Constitution, and carbon trading: waking a sleeping BNA bear (or two)" (2007-08) 13:1 Rev Const Stud 67 at 81-90, esp 87-8, CBA, Tab 11; Peter W Hogg, "Constitutional Authority over Greenhouse Gas Emissions", (2009) 46:2 Alta L Rev 507 at 510-11, CBA, Tab 15; *Canadian Climate Federalism* at 399-400, CBA, Tab 10.

140 Saskatchewan's Factum at paras 48-53, 92, 104, 113.

141 *Crown Zellerbach* at 434; *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 174-76; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 182-185, [2010] 3 SCR 457; *Rogers Communications v Châteauguay (City)*, 2016 SCC 23 at paras 37-38, [2016] 1 SCR 467 [***Rogers***]; *Desgagnés Transport* at paras 86-87.

142 *Ontario Hydro* at 339-40.

143 Ontario's Factum at para 64. Also *contra* Saskatchewan's Factum at paras 49-53.

are examples of interjurisdictional immunity for, or direct conflict with, POGG powers that were initially assigned broad cores. The location of aerodromes falls within the core of the federal power over aeronautics.[144] Provincial legislation that impairs that core is inapplicable due to interjurisdictional immunity where it significantly restricts that core,[145] or invalid when its pith and substance is the regulation of aeronautics because it specifically seeks to prevent the creation of aerodromes.[146] In *Rogers*, the notice of reserve in question was invalid because its pith and substance was the choice of location of radiocommunication infrastructure,[147] and inapplicable because "the notice of a reserve compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication".[148] The POGG powers over aeronautics and radio communication are unique, initially arising under Parliament's treaty power. They do not demonstrate that POGG powers are differently exclusive than Parliament's enumerated exclusive powers.

115. The double aspect doctrine ensures continued space for the operation of provincial laws enacted in relation to provincial heads of power, including where those powers are exercised in a manner that addresses GHG emissions.

116. To illustrate, the *Pan-Canadian Framework* outlines extensive complementary measures in relation to electricity generation, construction practices, transportation, industry, forestry, agriculture, and waste management,[149] which are within the provinces' jurisdiction. Provincial legislation that is, in pith and substance, directed towards these matters may validly include GHG emissions mitigation measures. Federal statutes establishing minimum national standards integral to reducing nationwide GHG emissions and provincial statutes regulating GHG emissions as a local matter can coexist provided the provincial law does not

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[144] *Johannesson v Rural Municipality of West St Paul*, [1952] 1 SCR 292 at 318-19; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 37, [2010] 2 SCR 536 [***COPA***].
[145] *COPA* at paras 37, 48-60. See also *Desgagnés Transport* at paras 90-93, 95.
[146] *Quebec (AG) v Lacombe*, 2010 SCC 38 at paras 20-30, [2010] 2 SCR 453.
[147] *Rogers* at paras 42-46.
[148] *Rogers* at paras 63-72 (quote at para 71).
[149] CR, Vols 1, 3, Tab 1, Moffet at paras 77-78, 82, Ex T at 712-29.

directly conflict with or frustrate the purpose of a federal law. As the paramountcy doctrine is to be applied with restraint by defining conflict narrowly,[150] an appropriately circumscribed matter of national concern ensures a robust and continued provincial jurisdiction over intra-provincial aspects of GHG emissions, even when they overlap with measures enacted under Parliament's power to legislate for the peace, order, and good government of Canada. As this Court has stated, when "courts apply the various constitutional doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels."[151]

117. While it is the scale of impact of the subject matter that a court must consider under this step of the *Crown Zellerbach* test, the current Canadian legal landscape demonstrates how the double aspect doctrine applies. Provincial systems, such as BC's carbon tax, Quebec's cap-and-trade system, and Saskatchewan's industrial emissions standards employ carbon pricing to reduce GHG emissions in these provinces. In pith and substance, however, they are not aimed at the matter of national concern. Saskatchewan's system and Quebec's cap-and-trade system fit within ss. 92(13), 92(16), or 92A. BC's carbon tax is direct taxation. None of these systems are directed at "minimum national standards". Instead, given their purpose and effect, they address matters of provincial competence, namely intra-provincial activity that generates GHG emissions. Thus, they are examples of valid and operable provincial GHG emissions reduction measures.

118. The *Act* also helps demonstrate how "minimum national standards" as part of the subject matter's definition limits the impact of the subject matter on provincial jurisdiction. Specifically, the *Act*'s backstop architecture is designed to minimize the possibility of conflict, while ensuring that carbon pricing meeting minimum national standards of stringency applies throughout Canada. The *Act* supports provincial GHG emissions pricing

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[150] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at paras 64-66.
[151] *Rogers* at para 38. See also *Desgagnés Transport* at para 101; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44 at para 50, [2013] 3 SCR 53; *General Motors* at 669-70; *Firearms Sequel* at paras 17-21; *Canadian Western Bank* at paras 54-75; *Spraytech* at paras 34-35.

schemes, and responds to provincial or territorial inaction. Contrary to Saskatchewan's assertion,[152] the coexistence of provincial GHG emissions pricing schemes with the *Act* does not turn the establishment of minimum national standards integral to reducing nationwide GHG emissions into a local matter.

119. Parliament's POGG power to establish minimum national standards integral to reducing nationwide GHG emissions is consistent with s. 92A of the *Constitution Act, 1867*. Neither Canada's proposed matter of national concern, nor the *Act*, impairs provincial legislative powers, including provinces' jurisdiction over the development, conservation, and management of natural resources and electricity generation under s. 92A(1) of the *Constitution Act, 1867*.

120. First, the legislative history and the jurisprudential treatment of s. 92A confirm that the provision does not interfere with Parliament's legislative competence under POGG. With respect to s. 92A(1) specifically, federal government officials made it clear during the legislative process that this new provision was not intended to affect existing federal legislative authority, either under the enumerated federal powers in s. 91 or under POGG.[153]

121. This Court's interpretation of s. 92A is consistent with the intent of the provision's drafters. As La Forest J. observed in *Ontario Hydro*, s. 92A(1) responded to provincial insecurity by restating pre-existing provincial powers in contemporary terms, with the other provisions in s. 92A authorizing the provinces, for the first time, to legislate in the areas of interprovincial trade and indirect taxation.[154] As to whether s. 92A affected federal legislative authority under POGG, La Forest J. opined: "I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power

[152] Saskatchewan's Factum at para 90.
[153] Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Evidence*, 32-1, No 54 (5 February 1981) at 54:19-20, 29-30, 33, 57-58, 60, 72-76 (Hon Jean Chrétien, Minister of Justice and Attorney General of Canada, and B L Strayer, QC, Assistant Deputy Minister, Public Law, Department of Justice).
[154] *Ontario Hydro* at 376-78.

(or for that matter Parliament's general power to legislate for the peace, order and good government of Canada)".[155]

122. Second, the *Act*'s pith and substance is not "in relation to" electricity generation. "The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government."[156] Federal legislation may validly affect local matters without being unconstitutional.[157]

c. Parliament's authority to establish minimum national standards integral to reducing nationwide GHG emissions respects underlying constitutional principles

123. There is no dispute that federalism is one of the foundational principles underlying Canada's constitution. However, the federalism principle "does not mandate any specific prescription for how governments within a federation should exercise their constitutional authority."[158] It does not alter the text of the *Constitution Act, 1867*, which remains supreme,[159] and does not preclude Parliament from enacting proportional legislation validly addressing a matter of national concern.

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[155] *Ontario Hydro* at 378. See also *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 80-84 (per Iacobucci and Major JJ). Relying on La Forest J's reasons in *Ontario Hydro*, Iacobucci and Major JJ concluded, at para 84: "Nothing in s. 92A was intended to derogate from the pre-existing powers of Parliament."

[156] *Canadian Western Bank* at para 29. See also *Desgagnés Transport* at paras 86-87.

[157] *Canadian Western Bank* at para 28.

[158] *R v Comeau*, 2018 SCC 15 at para 87, [2018] 1 SCR 342.

[159] *Firearms Sequel* at para 18; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53; *Securities Reference* at para 62.

124. Saskatchewan's reliance on the principle of subsidiarity[160] is misplaced. This principle does not support provincial jurisdiction over a subject matter that a province is constitutionally unable to address.[161] In short, this principle does not assist its argument.

125. With respect to the Appellants' listing of enumerated federal heads of power to regulate GHG emissions,[162] it is already well established that Parliament's legislative powers, including its POGG power to legislate on matters of national concern, can embrace specific environmental matters in appropriate circumstances.[163] One of those circumstances is where a defined type of pollution cannot be contained within geographic boundaries.[164] Recognizing *establishing minimum national standards integral to reducing nationwide GHG emissions* as a matter of national concern will not alter the balance of legislative power under the Constitution. Federal jurisdiction to legislate as a matter of national concern provides Parliament with a flexible tool, reflecting the scale of the problem.

126. The legislation at issue encourages provinces to come up with a made-in-the-province solution and responds to provincial inaction. Further, Parliament adopted an approach that encourages companies, investors, and consumers to change their behaviour. Parliament designed the *Act* to intrude minimally on facilities' operations. Rather than using its criminal law power to enact specific prohibitions or obligations aimed at reducing GHG emissions, the *Act* implements the "polluter pays" principle, which is "firmly entrenched in environmental law in Canada."[165] Regulations that require specific outcomes or use of particular technologies in specific sectors are less flexible and more intrusive.

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[160] Saskatchewan's Factum at paras 108-11.
[161] Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21 at 28-29, CBA, Tab 18.
[162] Saskatchewan's Factum at para 114; Ontario's Factum at para 84.
[163] *Hydro-Québec*; *Oldman River* at 63-64; *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at paras 8-12, 20, 41-45, 77, 93, 101; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at p 30-21, CBA, Tab 16.
[164] *Crown Zellerbach*; *Interprovincial Co-Operatives*.
[165] *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 23, [2003] 2 SCR 624.

127. Parliament's use of its taxation power would have also been less flexible and more intrusive. Parliament would unquestionably have the constitutional authority to adopt a national carbon tax that applies across Canada and across all sectors, without regard to GHG emissions prices already in place in many provincial jurisdictions. As set out in the *Regulatory Impact Analysis Statement* for the *Output Based Pricing System Regulations*,[166] this approach would have a far greater economic impact on emissions-intensive trade-exposed industries. Recognizing Parliament's power to legislate in this vital area under its POGG power does not shift the balance of legislative power, but rather provides Parliament with increased flexibility, reflecting the scale of the problem.

128. Finally, Saskatchewan says that it is "also open for Parliament to approach the Provinces to coordinate action on climate change on a cooperative basis".[167] The factual context leading to the enactment of the *Act* shows that the *Pan-Canadian Framework* reflects a cooperative approach, including using carbon pricing as a mechanism for reducing Canada's GHG emissions. The backstop architecture of the *Act* fosters and accommodates this cooperative approach.

129. Ultimately, cooperative federalism does not necessarily include the right not to cooperate on a matter of national concern. Indeed, in describing the Supreme Court's decision in *Munro*,[168] Professor Hogg notes that a lack of provincial cooperation may support recognizing Parliament's jurisdiction:

> In the case of the national capital region (*Munro*), the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital. Indeed, in the Munro case the Supreme Court of Canada took judicial notice of the fact that the "zoning" of the national capital region was only undertaken federally after unsuccessful

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[166] *Output-Based Pricing System Regulations*, SOR/2019-266, *Regulatory Impact Analysis Statement*, (2019) C Gaz II, 5374 at 5375, 5407-32.
[167] Saskatchewan's Factum at para 114.
[168] *Munro*.

efforts by the federal government to secure cooperative action by Ontario and Quebec.[169]

C) The charges under the *Act* are valid regulatory charges tied to the scheme of the *Act*

130. The fuel charge and the excess emissions charge imposed by the *Act* are valid regulatory charges under the *Westbank* analysis. The charges meet both steps of the test: (1) a relevant regulatory scheme exists; and (2) the necessary relationship between the charge and the scheme exists in view of the charges' purpose of modifying behaviour.[170]

i. There is agreement that a relevant regulatory scheme exists

131. In this Court, Ontario accepts that a relevant regulatory scheme exists and that its purpose is to regulate GHG emissions, but argues that because the revenues are not expended in aid of the regulatory purpose, the charge must be classified as a tax. Saskatchewan does not join issue on the characterization of the levy. Instead, it supports the approach of the SKCA minority, which found that the charge bears the hallmarks of a tax, but held that the *Act* does not meet the requirements of a valid system of taxation.[171]

132. In its decision in *620 Connaught*, this Court laid out a series of principles for determining whether a government levy is a tax or a regulatory charge. "[T]he *primary purpose* of the law… is determinative",[172] and the character of the law is determined by "its dominant or most important characteristic".[173] If a levy is imposed primarily for a regulatory

[169] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at p 17-14, CBA, Tab 16; *Munro* at 667; ONCA Reasons at para 108.
[170] *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 at para 17, [2008] 1 SCR 131 [***620 Connaught***]; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at paras 24, 30, 44 [***Westbank***].
[171] Ontario's Factum at paras 92, 108-15; Saskatchewan's Factum at paras 22, 117-25.
[172] *620 Connaught* at para 17 (emphasis in original).
[173] *620 Connaught* at para 16.

purpose, or as necessarily incidental to a broader regulatory scheme, it will be a regulatory charge.[174]

133. Both the ONCA majority and the SKCA majority accepted that the fuel charge and the excess emissions charge imposed by the *Act* are valid regulatory charges because their dominant purpose is to modify behaviour in order to reduce GHG emissions.[175] As the SKCA majority held, "[i]t is difficult to see how the *Act*, which is ultimately wholly disinterested in generating revenue, can nonetheless be seen as a law with a *primary purpose* of raising revenue for general purposes."[176]

134. The pricing system established by the *Act* and regulations constitutes a complete, complex, and detailed code of regulation for pricing GHG emissions. The charges are intended to create a financial incentive for businesses and individuals to change their behaviour in ways that will reduce GHG emissions and encourage innovation in low-emissions technologies. The need to regulate GHG emissions is caused by industry, by the producers and importers of GHG-emitting fuels, and by consumers. The obligation to compensate for excess emissions applies directly to industrial emitters. The fuel charge applies directly to fuel producers, importers, and distributors. While the fuel charge is not imposed directly on end-use consumers, the expectation is that it will be passed on to them in the form of a higher price for the fuel they purchase, which serves as a financial incentive for them to consume less.[177]

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[174] *620 Connaught* at para 24. See also *Westbank* at paras 30, 43; *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1070 [***Exported Natural Gas***].
[175] ONCA Reasons at paras 76, 154, 191; SKCA Reasons at para 87-88.
[176] SKCA Reasons at para 87.
[177] CR, Vols 1-3, Tab 1, Moffet at paras 101-16, 123, 125, Exs R at 640-41, CC; CR, Vol 4, Tab 3, Goodlet at paras 17-18, 24, 26-29; CR, Vol 4, Tab 5, Dr. Rivers, Ex B at 1093-103; *Act*, Preamble, paras 10-12.

ii. The nexus between the revenues and the scheme is established

135. Contrary to Ontario's position, the requisite relationship between the charges and the scheme is present. As the ONCA majority ultimately held, "[r]egulatory charges need not reflect the cost of administration of the scheme."[178]

136. According to this Court in *Westbank*, for a valid regulatory charge to exist, there must be a relationship or nexus between the charges and the overall scheme. This relationship exists in either of two situations: where "the revenues are tied to the cost of the scheme", or where the charge itself has "a regulatory purpose of influencing the behaviour of the persons concerned."[179] In *Westbank*, this Court explained that charges that "proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour" are regulatory charges.[180] As explained by the ONCA majority, the nexus test for behaviour-changing regulatory charges does not require that the use of the resulting revenue be tied to the regulatory scheme.

137. The charges imposed by the *Act* are related to the scheme because they are the means by which Parliament seeks to achieve the regulatory purpose of the *Act*. This Court's jurisprudence confirms that "regulatory charges themselves may be the means of advancing a regulatory purpose". Where a charge is the regulatory mechanism, set to influence behaviour, there is no need for the revenue it generates to be "tied to" the administrative costs or to be expended in any particular manner in order for the requisite nexus between charge and scheme to exist. The nexus is inherent in the charge's regulatory purpose. [181]

138. Ontario's focus on the use of the charges' revenue is misplaced. To the contrary, requiring a connection between the level of a charge and the costs of the scheme is

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[178] ONCA Reasons at para 159.
[179] *Confédération des syndicats nationaux v Canada (AG)*, 2008 SCC 68 at para 72, [2008] 3 SCR 511 [***Confédération des syndicats***]; *Westbank* at para 44; *620 Connaught* at paras 20, 27; *Canadian Association of Broadcasters v Canada*, 2008 FCA 157 at paras 44, 53, [2009] 1 FCR 3, leave to appeal to SCC granted, 32703 (18 December 2008), appeal discontinued 7 October 2009 [***Canadian Broadcasters***].
[180] *Westbank* at para 29.
[181] *Westbank* at paras 29, 44; *620 Connaught* at paras 20, 27; *British Columbia (AG) v Canada (AG)* (1922), 64 SCR 377 [***Johnnie Walker***], aff'd [1923] 4 DLR 669 (PC).

incompatible with the function and design of a behaviour modification charge; to be effective, its rate must be set at the level that will produce the desired effect of modifying behaviour, irrespective of the cost of the scheme or other factors.

139. Existing jurisprudence recognizes this and does not require the use of revenues raised by a charge with a regulatory purpose to be tied to the costs or purposes of the *Act*. Courts have specifically considered a charge with a regulatory purpose of influencing behaviour in only a few cases, but none have demanded that revenues generated by a charge be used for a specific regulatory purpose. This case presents an opportunity for this Court to reiterate Gonthier J.'s finding that the connection required by the second *Westbank* factor will exist "where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour."[182]

140. *Johnnie Walker* supports this conclusion. In that case, British Columbia claimed the province was exempt from paying customs duties under s. 125 of the *Constitution Act, 1867*. The Supreme Court found that the federal customs duties at issue had elements of both taxation and regulation, with the regulatory element predominating. As described in *Westbank*, the Court in *Johnnie Walker* explained,

> ... that customs duties were the method of advancing the regulatory purpose of encouraging the importation of certain products, and discouraging the importation of others. Anglin J., at p. 387, explained that customs duties "are, it seems to me, something more" than simple taxation.[183]

141. The conclusion drawn from the *Johnnie Walker* case is that customs duties, because their primary purpose is the regulation of trade and commerce under s. 91(2) of the *Constitution Act, 1867*, are properly characterized as regulatory charges. Thus, the "fiscal immunity of the provincial Crown could not prevail". Neither *Johnnie Walker* nor any later case has stated that the use of revenues from customs duties cannot be used for general federal

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[182] *Westbank* at para 44; ONCA Reasons at paras 151-59; *Canadian Broadcasters* at para 53.
[183] *Westbank* at para 29; *Johnnie Walker* at 386-87.

purposes (which they are) but must instead be dedicated exclusively to the regulatory purpose animating them.[184]

142. Ontario points to the *obiter* statement in *620 Connaught* in which this Court suggested that business licence fees imposed in a national park may lose their characterization as a regulatory charge where the revenues exceeded the amount the federal government expended in that park. The statement is of limited assistance here: the fees in issue in *620 Connaught* did not have as their purpose behaviour modification, and the 'nexus' issue that is raised here was not in issue before the Court.

143. As noted by Strathy C.J., the reasoning of the Federal Court of Appeal in *Canadian Association of Broadcasters,*[185] which rejected the notion that fees must be tied to the costs of the scheme, is to be preferred. In that case, the license fees collected exceeded the costs of the regulatory scheme and the question was whether this required that the levy be characterized as a tax. All members of the panel concluded that the necessary relationship exists where the imposition of the charge itself serves the regulatory purpose.[186] As Ryer J.A. held: "where a regulatory purpose for a levy has been established, the requisite nexus between that levy and the regulatory scheme in which it arises will nonetheless exist even if the quantum of the revenues raised by that levy exceeds the costs of the regulatory scheme in which that levy arises."[187] Justice Létourneau similarly found that no nexus is required between the amount of the levy and the costs of the scheme where a regulatory purpose exists and the charge is levied for a benefit or privilege.[188]

144. Properly applied, the *Westbank* approach requires that the charges themselves fulfil a valid regulatory purpose. In addition, the doctrine of colourability would prevent legislation that imposed disguised regulatory charges from passing scrutiny.[189]

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[184] *Exported Natural Gas* at 1069.
[185] *Canadian Broadcasters*.
[186] ONCA Reasons at paras 155-59.
[187] *Canadian Broadcasters* at para 49.
[188] *Canadian Broadcasters* at para 104.
[189] *Allard Contractors Ltd v Coquitlam (District)*, [1993] 4 SCR 371 at 411-12 [***Allard***].

145. The use that may be made of the returned amounts by a particular jurisdiction is not relevant to this Court's determination of the pith and substance of the *Act*'s charges,[190] and should not colour their characterization. The regulatory scheme, however, could be entirely frustrated if a province opposed to carbon pricing takes countervailing policy actions to undermine the price signal created by the *Act*'s charges, so this possibility has been avoided. Even if, in choosing the means for returning the amounts, the federal government could be said to be spending the proceeds for its own purposes, it can permissibly do so.[191]

146. Finally, requiring that the government spend the revenues from the behaviour-changing charges under the *Act* on the singular objective of reducing GHG emissions would be an unwarranted constraint. Parliament's overarching objective is to reduce GHG emissions, which Parliament is pursuing through GHG emissions pricing under the *Act*. Emissions pricing is a distinct approach from dedicated spending in furtherance of emissions reductions. Revenue generation is an effect of pricing GHG emissions, but not the reason for it. Given the significant amount of revenue that is collected under the *Act*, and given that the level of the charges may escalate over time (to $50 per tonne of CO2e by 2022), the Court should refrain from holding that all the revenues must be dedicated to environmental purposes linked to the regulatory regime. Conversely, economic efficiency is retained by maintaining fiscal flexibility to make spending decisions to address the impact of GHG emissions pricing, such as through the Climate Action Incentive payments.[192]

147. For all of these reasons, it is neither necessary from a legal perspective, nor appropriate from an economic or fiscal perspective, for the revenues derived under the *Act* to be dedicated exclusively to GHG emissions reduction purposes. The requisite relationship between the charges imposed by the *Act* and its regulatory scheme exists by reason of the charges' regulatory purpose. They therefore satisfy the test as valid regulatory charges.

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[190] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 48, 124-25, Ex K at 436-37; CR, Vol 4, Tab 5, Dr. Rivers at paras 5-6, Ex B.
[191] *Johnnie Walker* at 382.
[192] CR, Vols 1-2, Tab 1, Moffet at paras 129-136, Ex P at 610-13, Ex R at 655, 659-63; CR, Vol 4, Tab 5, Dr. Rivers at para 8, Ex C.

148. Contrary to Ontario's assertion,[193] it does not follow from *Allard* that s. 53 of the *Constitution Act, 1867* requires a nexus between the use of funds and a regulatory purpose. In that case, the Court was concerned with the interplay between ss. 92(2) and 92(9). The volumetric charge for gravel had no behaviour modification purpose, and the Court expressly stated that it was defining the scope of s. 92(9) and not "taxation" as such.[194] While upholding the charges on the basis that they related to a system of road and gravel regulation, the Court also confirmed that where a charge is ancillary to a regulatory scheme, it will not undertake a rigorous analysis of the revenues and costs, and the fact of a surplus itself does not render the scheme *ultra vires*.[195]

149. Moreover, the provincial taxation power is subject to a limitation that does not constrain Parliament's taxation power: provinces may only impose direct taxes. *Allard* was about whether a provincial body had imposed an indirect tax, which is not at issue here. The purpose of s. 53 of the *Constitution Act, 1867* is ensuring that Parliament has authorized charges that legally qualify as taxes.

150. Federal levies have been struck down under s. 53 on the basis that a bare statutory authorization to set "fees" does not allow the executive branch to establish charges that can be characterized as taxes.[196] In *Confédération des syndicats nationaux*, employment insurance premiums were initially found to have been properly authorized by Parliament, but lost their character as regulatory charges when a legislative amendment delegated the power to set premiums but without the legal framework that maintained the connection between the charges and the scheme.[197] This is not the case here: Parliament has clearly authorized the specifics of both the fuel charge and the excess emissions charge, and has provided a legal framework for their imposition. This meets the requirements of s. 53 and means that the case turns on an ordinary division of powers analysis. As Professor Hogg has noted:

[193] Ontario's Factum at paras 99-100.
[194] *Allard* at 398.
[195] *Allard* at 407-08, 411-12.
[196] *Eurig Estate (Re)*, [1998] 2 SCR 565 at paras 36, 40-41 [***Eurig Estate***]; *Confédération des syndicats* at paras 72-79.
[197] *Confédération des syndicats* at paras 73-77.

> The pith and substance of a law that imposes a charge or a levy may be held to be some matter other than taxation, for example, insurance, unemployment insurance, banking, export trade, labour standards or marketing. In such cases, the validity of the law turns on whether the enacting legislative body had legislative authority over the true matter of the law. The enacting body's taxing power is irrelevant.[198] (emphasis added)

151. With respect to Ontario's suggestion that allowing the nexus requirement "to be met solely by alleging that the charge discourages undesirable behaviour" would undermine s. 53 of the *Constitution Act, 1867,* Canada is not simply alleging that carbon pricing changes behaviour to reduce GHG emissions in the abstract. There is extensive evidence to support the regulatory purposes of the charges.[199]

iii. As the charges are regulatory charges, s. 53 of the *Constitution Act, 1867* need not be considered

152. As the charges under the *Act* are regulatory charges, not taxes, the requirements of s. 53 do not apply. There is no authority for Ontario's assertion that the enactment of a regulatory charge is subject to s. 53. Section 53 of the *Constitution Act, 1867* mandates that bills for imposing any tax shall originate in the House of Commons, so this provision is only relevant if this Court finds that the *Act* imposes a tax. This Court held in *Eurig Estate* that s. 53 does not apply when the fees in question are not taxes.[200]

D) If this Court finds that Part 1 of the Act imposes a tax, it meets the requirements of s. 53 of the *Constitution Act, 1867*

153. Throughout each of the references to date, Canada has maintained that the *Act* was enacted as an exercise of Parliament's power to legislate for the peace, order and good government of Canada, under the national concern branch. It has not sought to rely on s. 91(3). However, if this Court were to hold that the fuel charge imposed is a tax and not a

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[198] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf revision 2018-1) at p 31-2 – 31-3, CBA, Tab 16.
[199] See paras 36-37, 48-49, 57-59, 74 above.
[200] *Eurig Estate* at para 8; *Eurig Estate (Re)* (1997), 31 OR (3d) 777 (CA) at penultimate paragraph, citing *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1229.

regulatory charge, its enactment meets the formal requirements of s. 53 of the *Constitution Act, 1867*.

154. Contrary to Ontario's argument that use of the term "charge" in this context precludes recognition as a tax, it is open to this Court to find that Part 1 of the *Act* imposes a tax despite Canada's stated legislative objective. In *Eurig Estate*, Ontario imposed probate fees under the regulations to the *Administration of Justice Act,* which this Court found to be taxes. In *Westbank*, Westbank First Nation applied its assessment and taxation bylaws to BC Hydro, which this Court found to be taxes. If the fuel charge is not a regulatory charge then it must be, by definition, a tax.[201]

155. The *Act* complies with s. 53 of the *Constitution*. The *Act* originated in the House of Commons. On March 27, 2018, a Notice of Ways and Means Motion was presented to the House of Commons to implement certain provisions of the budget. The motion carried, and the Minister of Finance moved for leave to introduce Bill C-74, a budget implementation bill, Part 5 of which would later become the *Act*. There is no dispute that the House of Commons both debated the Bill and examined it in committee.[202]

156. Saskatchewan argues that the *Act* impermissibly delegates more than the details and mechanisms of the 'tax' and says that such delegation is not clear and unambiguous. The fuel charge does not arise, even incidentally, in any delegated legislation. The fuel charge is imposed in the *Act*. The *Act* is applicable in all provinces, and it establishes a method for determining in which jurisdiction the federal fuel charge and OBPS system will operate. The details of the federal fuel charge are expressly set out in the *Act*: it is computed under the *Act* for time periods that are established by the *Act*. The amount of the charge is set by the *Act* and the Governor in Council's authority to determine the rate is expressly delegated in s. 166(4). If the Court finds that the fuel charge is a tax, there is no delegation problem. It was validly enacted in accordance with s. 53.[203]

[201] Ontario's Factum at paras 94-101; *Eurig Estate*; *Westbank*.
[202] *Debates,* No 276 (27 March 2018) at 18164-66, CBA, Tab 3; Marc Bosc and André Gagnon, *House of Commons Procedure and Practice*, 3d ed (Ottawa: House of Commons, 2017) chapter 18, Financial Procedures, following the heading "The Legislative Phase".
[203] *Act,* ss 3 "rate", 17-41, 68, 69, 71, 166(4), Schedule 2, column 5.

157. In *Ontario English Catholic Teachers' Assn.,* this Court held that "[t]he delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation." The Court further explained:

> When the Minister sets the applicable rates, a tax is not imposed *ab initio*, but it is imposed pursuant to a specific legislative grant of authority. Furthermore, the delegation of the setting of the rate takes place within a detailed statutory framework, setting out the structure of the tax, the tax base, and the principles for its imposition.[204]

158. Parliament expressly delegated the authority to determine the jurisdictions in which Parts 1 and 2 of the *Act* operate to the Governor in Council, and clearly defined the scope of that delegation. The *Act* requires the Governor in Council to consider the stringency of provincial GHG emissions pricing mechanisms as "the primary factor" in making a decision.[205] The exercise of that statutory power is subject to administrative law and is supervised by the Federal Court. In exercising this discretion, the Governor in Council is not imposing a tax *ab initio*, or on its own accord. Parliament has directed the mechanisms by which it is decided where the fuel charge and OBPS system will operate and in what circumstances. Provincial legislatures are free to enact legislation that would prevent the operation of Parts 1 and 2 of the *Act* within their jurisdictions.

159. Moreover, there are no rule of law concerns at play and no issue of democratic accountability. Parliamentarians fully debated the meaning and scope of the Governor in Council's discretion under ss. 166(3) and 189(2). Amendments were proposed and passed during the legislative process in order to expressly limit the scope of discretion. The discretion Parliament granted under the *Act* is defined, explicitly related to the objectives of the *Act*, and is therefore constitutionally valid.[206]

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[204] *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15 at paras 74, 75, 77 (quote at para 75), [2001] 1 SCR 470 [***OECTA***].
[205] *Act*, s 166(3).
[206] *OECTA* at paras 71, 73, 75; *Act*, ss 166(2), 166(3), 189(1), 189(2); FINA, No 157 (23 May 2018) at 12-14.

160. Saskatchewan claims that s. 168(4) of the *Act* offends the rule that in the event of a conflict between a statute and a regulation enacted pursuant to that statute, the statute prevails. The constitutional capacity of legislative bodies to confer this type of power to the delegated authority was recognized in the case of *Re Gray*, which upheld the war measure powers of the Dominion government during World War I.[207] In any event, even if this Court were of the opinion that s. 168(4) is problematic, it would not impugn the entire *Act*.

161. Finally, contrary to Saskatchewan's submissions and the minority decision in the SKCA, there is no legal support to recognize a "principle of uniformity of taxation" as a principle of federalism.[208] There is no principle of uniformity. On this point, the Supreme Court has never wavered:

> As a matter of legislative power only, there can be no doubt about Parliament's right to give its criminal or other enactments special applications, whether in terms of locality of operation or otherwise. This has been recognized from the earliest years of this Court's existence: see, for example, *Fredericton v. The Queen*.[209]

162. The SKCA minority would recognize a principle of tax uniformity based on *Minister of Finance v Smith*.[210] That case raised the question of whether profits arising from the sale of liquor contrary to provincial law were considered income under federal law, and thus subject to taxation. In *Smith,* their Lordships were required to decide the intention of those who drafted the *Income Tax War Act* to determine how it affected income that was illegally obtained under *The Ontario Temperance Act*.

163. In engaging in that exercise, their Lordships noted that they could find no valid reason to hold that the language in the *Act* intended to exclude income that was illicit according to some provincial laws that would be legal in other jurisdictions. If such language had been

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[207] *In Re George Edwin Gray* (1918), 57 SCR 150; *Waddell v Canada (Governor in Council)* (1983), 49 BCLR 305, 5 DLR (4th) 254 (SC); *Re Land Registry Act and Vancouver* (1956), 5 DLR (2d) 512 (BCSC).
[208] SKCA Reasons at paras 374-86.
[209] *R v Burnshine*, [1975] 1 SCR 693 at 715, citing *Fredericton (City) v The Queen* (1880), 3 SCR 505 at 530. See also *Canada c Raposo*, 2019 CAF 208, at paras 24-28, 50.
[210] *Minister of Finance v Smith*, [1926] 3 DLR 709 (PC).

found in the legislation, the result in *Smith* may have been entirely different, notwithstanding their Lordships' statement that "it is natural that the intention was to tax on the same principle throughout the whole of Canada." The passage from *Smith* quoted by the SKCA minority to support its conclusion is an exercise in statutory interpretation, not the birth of a new principle of federalism requiring uniformity of taxation.[211]

164. In any event, all of the provinces are subject to the legislation at all times, whether or not they become a listed province. The *Act* does apply to the provinces uniformly. The backstop mechanism allows for *substantively* fair and equal treatment of the provinces, while ensuring a sufficiently stringent carbon pricing regime that allows provinces to design their own systems if they elect to do so.

PART IV – SUBMISSION CONCERNING COSTS

165. Canada does not seek costs and requests that no costs be awarded against Canada.

[211] SKCA Reasons at para 378.

PART V – ORDER SOUGHT

166. Canada seeks the Court's opinion that the entire *Act* is validly enacted under Parliament's power to pass laws for the peace, order, and good government of Canada respecting the establishment of minimum national standards integral to reducing nationwide GHG emissions, being a matter of national concern.

167. In the alternative, if the charges under Part 1 are found to be taxes, Canada seeks the Court's opinion that Part 1 of the *Act* is validly enacted under Parliament's taxation power in accordance with s. 53 of the *Constitution Act, 1867* and Part 2 of the *Act* is validly enacted under Parliament's power to pass laws for the peace, order, and good government of Canada respecting the establishment of minimum national standards integral to reducing nationwide GHG emissions, being a matter of national concern.

168. As a further alternative, Canada seeks the Court's opinion that the entire *Act* is validly enacted under the emergency branch of Parliament's POGG power, Parliament's criminal law power, or other existing heads of power, as argued by various Interveners in the courts below and as proposed to be argued by various proposed Interveners in this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 3rd day of December, 2019.

Sharlene Telles-Langdon

Christine Mohr

Mary Matthews

Neil Goodridge

Ned Djordjevic
Of Counsel for the Attorney General of Canada

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