SCC No. 38663
(38781 continued on next page)

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
Bill C-74, Part V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012,* SS 2012, c C-29.01.

BETWEEN

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT
(Party Pursuant to Section 4 of
***The Constitutional Questions Act, 2012*)**

and

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Party Pursuant to Section 5(4) of
***The Constitutional Questions Act, 2012*)**

and

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ATTORNEY GENERAL OF QUÉBEC,
ATTORNEY GENERAL OF NEW BRUNSWICK,
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ATTORNEY GENERAL OF BRITISH COLUMBIA,
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INTERVENERS

FACTUM OF THE APPELLANT, ATTORNEY GENERAL OF SASKATCHEWAN #38663 and INTERVENER, ATTORNEY GENERAL OF SASKATCHEWAN #38781

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

(style of cause continued on the next page **38781**)

SCC File No: 38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Ontario Court of Appeal)

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 GOVERNOR IN COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT,* RSO 1990, c C.34, s 8

BETWEEN

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APPELLANT

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ATTORNEY GENERAL OF CANADA

RESPONDENT

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ATTORNEY GENERAL OF QUÉBEC,
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PART I - OVERVIEW AND FACTS

A. Introduction

1. This appeal concerns whether federal legislation that regulates provincial greenhouse gas (GHG) emission sources is constitutional. What is specifically at stake is whether the federal government has jurisdiction to unilaterally impose its chosen policy to regulate sources of GHG emissions on the provinces. The *Greenhouse Gas Pollution Pricing Act* (the "*GGPPA*" or "*Act*")[1] functions as if the federal government is legislating in place of a province itself. It is supervisory, and its legislative machinery reveals that what the federal government is truly doing is passing provincial legislation in those provinces it feels have inadequately adopted the federal policy.

2. This appeal does not concern whether global climate change is real and concerning or if the provinces are taking sufficient action to reduce GHG emissions. All parties agree that global climate change is a significant societal problem and all provinces have and continue to take action to reduce GHG emissions. In the Courts below, many submissions, including those of the Attorney General of Canada, focused on the nature of climate change and the importance of carbon pricing as an effective method of reducing GHG emissions. However, the efficacy of carbon pricing is not relevant to the constitutionality of the *GGPPA,* which must be derived from whether it is within the legislative competence of the federal government.

3. Canada seeks to uphold the constitutionality of the *GGPPA* by relying on Parliament's jurisdiction to enact legislation for the peace, order, and good government ("POGG") of Canada on matters of national concern under the opening words of section 91 of the *Constitution Act, 1867*. In a three to two split decision, the Saskatchewan Court of Appeal held that the *GGPPA* is constitutional, finding that Parliament has authority over the establishment of minimum national standards of price stringency for GHG emissions under the national concern branch.[2]

4. Saskatchewan submits that the *GGPPA* is unconstitutional for three fundamental reasons:

   (a) Properly characterized, the pith and substance of the *Act* is to regulate provincial sources of GHG emissions through the imposition of a charge on fuels and setting industrial

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[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

[2] *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 (the "Saskatchewan Reference") at para 11.

emission limits. To uphold the *Act,* Canada seeks to create a new federal power over GHG emissions, or alternatively, the cumulative dimensions of GHG emissions. Such a power would permanently displace extensive provincial jurisdiction and cannot meet the high threshold of the national concern test. It would profoundly upset the division of powers in the *Constitution Act, 1867*.

(b) Legislation such as the *GGPPA*, which attempts to operate as a backstop on matters that are truly provincial in nature, cannot be constitutionally valid under the national concern branch of POGG. This would give Parliament the exclusive jurisdiction of a plenary nature to legislate over <u>both</u> the inter-provincial and intra-provincial aspects of GHG emissions. The consequence is that provincial legislation on the same subject-matter would be rendered *ultra vires*, which defeats the purpose of the backstop.

(c) Alternatively, Part 1 of the *Act* cannot be upheld under the federal tax power. It violates fundamental constitutional principles that are enshrined in s. 53 of the *Constitution Act, 1867.*

5. This does not leave Parliament without recourse to legislate on GHG emissions under one of its enumerated heads of power under section 91 of the *Constitution Act, 1867*. It is well-established that both the federal and provincial governments have shared jurisdiction over the subject-matter of the environment,[3] and the two levels of government are meant to operate in tandem with respect to it. However, in accordance with the principle of federalism, the federal government must do so in a way that respects the division of powers in the Constitution and does not deprive the provinces of their sphere of jurisdiction to legislate on this issue.

6. The majority of the Saskatchewan Court of Appeal attempted to narrow the proposed new federal head of power to "the establishment of minimum national standards of price stringency for GHG emissions."[4] However, this cannot be sustained. First, the "narrower" description does not reflect the actual nature of the *GGPPA* or what it can become through regulation. Second, the proposed power to set national standards is not clearly distinguishable from the provincial power to regulate the same subject-matter within the provinces. Third, the description "minimum national

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[3] *Friends of the Oldman Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 65 [*Oldman River*].
[4] Saskatchewan Reference at para 163.

standards" does not meaningfully narrow the power. Finally, it embeds Parliament's policy choice into the *Constitution Act, 1867*.

B. Statement of Facts

(i) Background to the GGPPA

7. In 2016, Canada signed onto the Paris Agreement,[5] which commits each signatory state to reducing its GHG emissions by a specific amount by 2030. However, the Paris Agreement does not specify how those reductions are to be achieved. Following the Paris Agreement, the federal government and provinces agreed that combatting climate change in Canada required action at both levels of government. In March 2016, the First Ministers, including the Premier of Saskatchewan, released the Vancouver Declaration, committing to work towards achieving Canada's target in the Paris Agreement. The Vancouver Declaration expressly recognized that provincial and territorial economies are diverse and should have flexibility in designing their own policies to meet the emissions target.[6]

8. After the Vancouver Declaration, a Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms was formed and provided a final report in the summer of 2016.[7] Three options for carbon pricing regimes in Canada were identified. This report did not suggest that all provinces and territories must adopt a carbon pricing policy.

9. On October 3, 2016, the federal government released a document entitled "Pan-Canadian Approach to Pricing Carbon Pollution" (the "Pan-Canadian Approach"),[8] in which the federal government changed its cooperative and flexible approach and instead sought to impose carbon

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[5] Affidavit of John Moffet sworn October 25, 2018 ["Moffet Affidavit"], Exhibit I [Record of the Appellant [ROA], TAB 29, page 153]. Saskatchewan cites the Moffet Affidavit (and has included it in its Record) for the limited purpose of addressing the legislative background of and Parliament's stated intention for passing the *GGPPA*. Saskatchewan does not adopt the entirety of the evidence of the Moffet Affidavit as its own. The same caveat applies to the Goodlet and Blain Affidavits cited below.

[6] Vancouver Declaration on Clean Growth and Climate Change (March 3, 2016) [ROA, TAB 5, page 1].

[7] Moffet Affidavit, Exhibit P [ROA, TAB 31, page 38].

[8] Pan-Canadian Approach to Pricing Carbon Pollution [ROA, TAB 7, page 75].

pricing on all provinces and territories across Canada. The document identified a common set of rules for carbon pricing, referred to as the "benchmark." Most significantly, the Pan-Canadian Approach indicated that the federal government would apply a carbon pricing system in all jurisdictions that do not meet the federal benchmark, referred to as the federal backstop.

10. The *GGPPA* was introduced before Parliament as Part 5 of Bill C-74. The Bill became law on June 21, 2018, and the *GGPPA* substantively came into effect on January 1, 2019.

(ii) Saskatchewan's Approach to Combatting Climate Change

11. In December 2017, Saskatchewan released *Prairie Resilience: A Made-in Saskatchewan Climate Change Strategy*,[9] which outlines the wide range of policies that the Province is employing to address climate change. While Saskatchewan supports Canada's commitments under the Paris Agreement, the Province disagrees with the federal approach to achieve this target. Saskatchewan's focus is on reducing the emissions from its largest industrial emitters.

12. Saskatchewan has adopted its own industrial emission standards under *The Management and Reduction of Greenhouse Gases Act*,[10] which is more stringent than Part 2 of the *GGPPA*. However, the provincial regime does not apply to Crown corporations engaged in the businesses of electricity generation (SaskPower) and the distribution of natural gas (SaskEnergy). Instead, under Saskatchewan's strategy, these Crown corporations have plans to reduce emissions, including expanding renewable sources to provide up to 50% of Saskatchewan's electrical generating capacity by 2030.[11] Saskatchewan previously made significant investment in GHG emissions reduction by retrofitting one of SaskPower's coal-fired electrical generation units with post-combustion carbon capture use and storage. This technology allows emissions from Boundary Dam Unit 3 to be permanently sequestered underground.

13. Further, as part of its climate change strategy, Saskatchewan enacted *The Oil and Gas Emissions Management Regulations*[12] to regulate and reduce methane emissions in the upstream oil and gas industry. Methane from petroleum operations is often flared or vented into the

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[9] *Prairie Resilience: A Made-in Saskatchewan Climate Change Strategy* (December, 2017) ["*Prairie Resilience*"] [ROA, TAB 14, page 39].
[10] *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01.
[11] *Prairie Resilience* at pages 5-6 [ROA, TAB 14, pages 44-45].
[12] *The Oil and Gas Emissions Management Regulations*, RRS c O-2, Reg 7.

atmosphere, producing the largest source of GHG emissions from the industry in Saskatchewan. The regulations are expected to reduce emissions from Saskatchewan's upstream oil and gas industry by 40-45% of 2015 levels, or between 4 and 4.5Mt of CO2e.[13]

(iii) The Saskatchewan Reference

14. Saskatchewan commenced a reference case seeking an advisory opinion from the Saskatchewan Court of Appeal on whether the *GGPPA* is constitutional in whole or in part. A majority of the Saskatchewan Court of Appeal (Richards CJ, Jackson and Schwann JJA, the "Saskatchewan Majority") concluded that the *GGPPA* is constitutional. The Court found that the pith and substance of the *GGPPA* is the establishment of minimum national standards of price stringency for GHG emissions. The Court concluded that the *GGPPA* could be sustained as valid federal legislation under the national concern branch of the POGG power. The majority also concluded that the charges under the *GGPPA* were not taxes, and even if the charges were taxes, they did not violate section 53 of the *Constitution Act, 1867*.

15. In contrast, the minority judgment (Ottenbreit and Caldwell JJA, the "Saskatchewan Minority") concluded that the *GGPPA* was wholly unconstitutional. They rejected the majority's narrow characterization of the *Act*, as it conflated the two separate processes of characterization and classification. If properly characterized, the new power required to cover the true scope of the GGPPA would be too broad to be constitutional. They further concluded that Part 1 of the *GGPPA* was an unconstitutional delegation of Parliament's law making power under section 91(3) of the *Constitution Act, 1867* and was contrary to section 53 of the *Constitution Act, 1867.*

(iv) The Ontario Reference

16. Ontario also commenced a reference seeking the Ontario Court of Appeal's opinion on the constitutionality of the *GGPPA*.[14] The majority judgment in the Ontario Reference (written by Strathy CJO with MacPherson and Sharp JJA concurring, the "Ontario Majority") found that Parliament has the authority to legislate over "minimum national standards to reduce greenhouse

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[13] Letter from the Honourable Dustin Duncan, Minister of Environment to the Honourable Catherine McKenna, Minister of Environment and Climate Change (August 30, 2018) at page 4 ["Minister Duncan Letter"] [ROA, TAB 22, page 135].
[14] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ("Ontario Reference").

gas emissions" under the national concern branch of the POGG power. In concurring reasons, Hoy ACJO agreed the *GGPPA* was constitutional but disagreed with the scope of the new national concern head over power, holding it should be limited to the authority to legislate "minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions". The minority of the Court (Huscroft JA) concluded that the *GGPPA* is not valid federal legislation under the national concern branch of POGG or any other federal power.

PART II - ISSUES

17. Saskatchewan submits that the following questions are at issue in this appeal:

(a) Is the pith and substance of the *GGPPA* to regulate provincial sources of GHG emissions through the imposition of a charge on fuels and setting industrial emission limits?

(b) Should this Court create a new federal head of power for GHG emissions under the national concern branch of POGG?

(c) In the alternative, are the charges imposed by Part 1 of the *Act* unconstitutional taxes?

PART III - ARGUMENT

A. Characterization: the Pith and Substance of the *GGPPA*

(i) The Pith and Substance Doctrine

18. To determine whether a law is constitutional, the Court must always begin with an analysis of the "pith and substance" of the impugned legislation.[15] The first step is to characterize the law by examining the essential character or core of the legislation,[16] or put another way, what the legislation is all about. Only once the essential character of the impugned legislation is determined can the Court address the second step of the analysis, which is to determine whether the law, seen in light of its dominant purpose, can be successfully assigned to one of the enacting government's heads of legislative power.[17]

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[15] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 25, [2007] 2 SCR 3 [*Canadian Western Bank*], *Reference re Firearms Act*, 2000 SCC 31 at para 15, [2000] 1 SCR 783 [*Firearms Reference*]; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 27-29, [2015] 1 SCR 693 [*Quebec (Attorney General)*]; *R v Swain*, [1991] 1 SCR 933 at 998.

[16] *Firearms Reference* at paras 15-17.

[17] *R v Hydro-Québec*, [1997] 3 SCR 213 at para 23 (CanLII) [*Hydro-Québec*].

19. The pith and substance of the *Act* must be analyzed before proceeding to the second stage of classification.[18] If these two steps are not kept distinct, "there is a danger that the whole exercise will become blurred and overly oriented towards results."[19]

20. To determine a law's pith and substance two aspects of the law must be examined: the purpose of the enacting body and the legal effects of the law.[20] The purpose of the legislation can be identified by reference to both intrinsic evidence, such as purpose clauses and the general structure of the statute, and to relevant extrinsic evidence.[21] Extrinsic evidence pertaining to legislative history, Parliamentary debates, Hansard, government publications and similar material may properly be considered so long as they are relevant and reliable.[22]

21. In considering the effects of the law, the Court may refer to both the legal effect of the text and the practical consequences of the statute's application.[23] However, this inquiry does not extend to whether the law will be effective in achieving its purpose. Rather, it examines how the legislation operates as a way to better understand "how the law sets out to achieve its purpose in order to better understand its 'total meaning'."[24] Therefore, care must be taken not to confuse the law's underlying purpose with the means chosen to achieve it.[25]

(ii) The Pith and Substance of the GGPPA

22. Saskatchewan submits that an analysis of the *GGPPA* and its background, Hansard, Canada's own evidence, and Canada's original position in the Court below all lead to a consistent

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[18] *Ontario (Attorney General) v Chatterjee*, 2009 SCC 19 at para 16 [*Chatterjee*]; *Jim Pattison Enterprises Ltd. v British Columbia (Worker's' Compensation Board)*, 2011 BCCA 35 at para 61, 329 DLR (4th) 433, leave to appeal to SCC refused, 34182 (27 November 2011) [*Jim Pattison*].
[19] *Chatterjee* at para 16.
[20] *Firearms Reference* at para 16; *Canadian Western Bank* at para 27.
[21] *Hydro-Québec* at para 148.
[22] *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 470-472, Beetz J, dissenting [*Anti-Inflation Reference*]; *R v Morgentaler*, [1993] 3 SCR 463 at 483-485; *RJR-MacDonald v Canada*, [1995] 3 SCR 199 at 242-243, La Forest J, dissenting.
[23] *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 20, [2010] 2 SCR 453; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 54, [2002] 2 SCR 146.
[24] *Firearms Reference* at para 18.
[25] *Quebec (Attorney General)* at paras 29 and 38.

pith and substance: to regulate provincial sources of GHG emissions through the imposition of a charge on fuels and setting industrial emission limits.

(1) The Legislation and Its Mechanics

23. The legislation, including its full title, the preamble, and its mechanics are indicative of Parliament's intention to ensure provincial GHG emissions are reduced by regulating a broad set of GHG emission sources. The title of the *GGPPA* – "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources…" – identifies the legislation's fundamental purpose of regulating the sources of GHG emissions through the means of a pricing mechanism.

24. The preamble to the legislation makes clear that Parliament was committed to achieving the Paris Agreement targets and reducing GHG emissions through the means of a pricing mechanism and setting industrial emission standards to promote behavioural change. The preamble also shows Parliament's intention to ensure that all provinces are pricing GHG emissions with sufficient stringency. In particular, the preamble states that because some provinces have not adopted GHG emission pricing, it is necessary for the federal government to create a pricing scheme to ensure that, taking provincial GHG emissions pricing systems into account, GHG emissions pricing applies broadly in Canada.

25. One of the fundamental aspects of the *Act* is how it applies to the provinces. The *GGPPA* only applies in the "listed provinces" set out in Part 1 of Schedule 1 of the *Act*. Pursuant to ss. 166(2) and 189(1), "[f]or 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", the Governor in Council has the regulatory power to add, delete or vary any province listed in Schedule 1. The Governor in Council is directed to take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHG emissions (ss. 166(3) and 189(2)).

26. As a result, the *Act* does not create a national standard that applies uniformly across the country. Rather, it serves only as a backstop that applies in provinces that the executive branch of the federal government has determined lack sufficiently stringent GHG emissions pricing.

27. Currently, Part 1 of the *GGPPA* applies in six jurisdictions – Ontario, New Brunswick, Manitoba, Saskatchewan, Nunavut and Yukon Territory. Part 1 applies partially to Nunavut and

Yukon.[26] Part 1 of the *GGPPA* will apply to Alberta starting January 1, 2020.[27] Similarly, Part 2 applies in Ontario, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, the Yukon Territory and Nunavut. Part 2 only partially applies in Saskatchewan.[28]

28. The *GGPPA* is divided into two main legislative schemes. Part 1 of the *GGPPA* imposes a charge on 21 GHG producing fuels (such as gasoline, diesel and natural gas) and combustible waste. The fuel charge operates by imposing a charge on registered distributors, typically fuel producers or wholesale fuel distributors, with the expectation that the added cost will be passed on to consumers.[29]

29. The charge applies based on the fuel's location, namely: fuels that are produced, delivered or used in a listed province;[30] brought into a listed province from elsewhere in Canada;[31] or imported into Canada at a location in the listed province.[32] While the specified rates for 2019 are set out in Schedule 2, the Governor in Council has the regulatory power to amend the fuels to which the charge applies and the charge rates. Pursuant to s. 26, the Governor in Council also has the power to change the character of the regulatory charge, including what persons or classes of persons must pay the regulatory charge and what circumstances or conditions must be met for the charge to apply.

30. Beyond these regulatory powers, the Governor in Council has the power under Part 1 of the *Act* to significantly change the legislation as currently drafted. The Governor in Council has the power to make regulations over any matter that is prescribed,[33] which is referenced at least 430 times in Part 1.[34] The Governor in Council can adapt or modify any provision in Part 1;[35] has the power to make regulations defining any provision used in Part 1, including words already defined

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[26] The fuel charge is reduced on certain fuels in Nunavut and Yukon: see SOR/2019-79, ss 2-3.
[27] SOR/2019-294 August 8, 2019.
[28] See *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213 ("*Facilities Regulation*") at section 2(b)(ii) and 3(a) or 3(c)(x).
[29] Moffet Affidavit at para 126 [ROA, TAB 28, pages 42-43].
[30] s.17, 18, 21(1), 34, and 35 of the *GGPPA*.
[31] s.19(1) and 20(2) of the *GGPPA*.
[32] s.19(2) and 20(3) of the *GGPPA*.
[33] s.166 of the *GGPPA*.
[34] Saskatchewan Reference at para 364.
[35] s.168(3)(a) of the *GGPPA*.

in those sections;[36] and the power to make regulations that any provision does not apply.[37] Significantly, in the event there is a conflict between the legislation and the regulations, the regulations prevail to the extent of the conflict.[38]

31. The second main legislative scheme is found in Part 2 of the *GGPPA*, which establishes emission limits for large industrial facilities located in listed provinces. It applies to "covered facilities" which are: a) located in a listed province; and b) either meet the criteria set out in the regulations for that province or area, or have been designated by the Minister of the Environment as a "covered facility." The Governor in Council may make regulations defining "facilities", which has been done pursuant to the *Facilities Regulation.*[39]

32. Section 3(c) of the *Facilities Regulation* also establishes the covered industrial activity that is subject to the *GGPPA*, and currently contains an extensive list of activities affecting a broad range of industries. For example, Part 2 of the *GGPPA* applies to activities such as processing and transmitting natural gas; generation of electricity using fossil fuels; and the processing, extraction, and production of crude oil. It also includes the production of a wide range of products including certain acid, cement, grain ethanol, steel, metal, coal, potash, pulp or paper, brick, and petrochemicals.

33. Unlike Part 1 of the *GGPPA*, Part 2 does not simply apply a charge to certain GHG producing fuels. Rather, the covered facilities are able to avoid paying a charge so long as they meet their emission limit.[40] The *Act* creates an incentive for covered facilities to emit less GHG's than their respective limits through the use of surplus credits that can be used to offset emission limits in subsequent years or traded to other facilities.[41]

(2) <u>The Background of the *GGPPA* Shows the *Act*'s Overall Purpose</u>

34. Throughout its legislative history, from Canada's commitment to the Paris Agreement through the Vancouver Declaration, Pan-Canadian Approach and Framework, and the ultimate passing of the *GGPPA*, Parliament has consistently been focused on reducing GHG emissions as

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[36] s.168(3)(b) of the *GGPPA*.
[37] s.168(3)(c) of the *GGPPA*.
[38] s.168(4) of the *GGPPA*.
[39] SOR/2018-213.
[40] s.174(1) of the *GGPPA*.
[41] s.175 and 174(2) of the *GGPPA*.

a method of mitigating climate change. Carbon pricing has been the federal government's chosen means to that end.

35. Hansard from the second reading of the *GGPPA* confirms Parliament's purpose was the reduction of GHG emissions:

> Today, through Bill C-74, the government is taking action in order to reduce emissions by introducing the greenhouse gas pollution pricing act. Pricing carbon pollution is the most effective way to reduce emissions. It creates incentives for businesses and households to innovate and pollute less.[42]

(3) Canada's evidentiary record and position

36. The central pillar of Canada's evidentiary record was the Affidavit of John Moffet (the "Moffet Affidavit"), which makes clear the purpose of the *GGPPA* is to reduce Canada's GHG emissions to meet international emissions reduction commitments. The Moffet Affidavit is equally clear that carbon pricing is merely the *policy tool* employed to achieve GHG emission reductions.[43] The Moffet Affidavit confirms Parliament's purpose in enacting the *GGPPA*:

> [101] …The key purpose of the Act is to help reduce GHG emissions by ensuring that a carbon price applies broadly throughout Canada, with increasing stringency over time.

37. In the Court below, Canada submitted that the *Act*'s entire legislative history reflects Parliament's objective of incentivizing behavioural changes to reduce GHG emissions and that pricing GHG emissions is the means by which Parliament seeks to achieve this objective.[44] Canada's own argument is that pricing GHG emissions is the means and not the end of the *Act*.

38. Therefore, Saskatchewan submits that the dominant purpose of the *GGPPA* is to ensure provincial GHG emissions are reduced to lower the risk and impact of climate change in Canada. Parliament seeks to ensure the provinces are regulating a broad set of GHG emission sources, including certain fuels and industrial activities. If in the view of the Governor in Council, the provinces fail to do so, the *GGPPA* will apply in those provinces as a backstop. The intended effect is to increase the price or cost of production of certain products or activities that are associated

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[42] House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 279 (16 April 2018) at 18315 (Joël Lightbound).
[43] Moffet Affidavit at *inter alia* paras 46, 59, 73, 83, 101 and 127 [ROA, TAB 28, page 16].
[44] Saskatchewan Reference at paras 127 and 134.

with high GHG emissions, thus reducing demand, and ultimately lowering GHG emissions in Canada. Accordingly, the pith and substance can be distilled to:

> **the regulation of provincial sources of GHG emissions through the imposition of a charge on fuels and setting industrial emission limits.**

(4) Narrower categorizations of the Courts below are Legally Unsustainable

39. In both the Saskatchewan and Ontario Courts of Appeal, there was very little agreement on pith and substance as summarized in the following table:

Reasons	**Conclusion on Pith & Substance**
SKCA Majority	Establishing minimum national standards of price stringency for GHG emissions (para 123)
SKCA Minority	Part 1: Taxation (para 265) Part 2: Regulating GHG emissions (para 333)
ONCA Majority	To establish minimum national standards to reduce greenhouse gas emissions (para 77)
ONCA Concurring	Establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions (para 166)
ONCA Minority	Regulation of GHG emissions (para 213)

40. Saskatchewan submits that these differences arose as both the majority decisions of the Saskatchewan and Ontario Courts of Appeal attempted to narrow the pith and substance of the *GGPPA* to fit the high threshold of the national concern test of POGG.

41. There are three essential problems with the characterization adopted by the majority of the Saskatchewan Court of Appeal. First, it is results-oriented, which this Court admonished in *Chatterjee*.[45] This error is foundational, as the pith and substance must be determined neutrally and without reference to the head of power the legislation is purportedly supported by. As observed by Professor Albert Abel, it is critical to ensure that the pith and substance of the statute and the power that it comes within are not collapsed into a single inquiry. To do so not only violates the sequence of analysis prescribed by the *Constitution Act, 1867*, it also distorts the ordinary

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[45] *Chatterjee* at para 16; *Jim Pattison* at para 61.

principles of interpretation.[46] The minority reasons of Huscroft JA in the Ontario Reference stated the error succinctly:

> [224] It is important not to conflate pith and substance analysis at the first step – characterizing a law for purposes of classifying it – with the subsequent classification that is required to identify a corresponding head of power at the second step. Conflation results in circularity: if legislation is classified in terms of a particular subject matter it will necessarily be classified as falling under that matter, as they will be one and the same…[47]

42. In the Court below, the Attorney General of British Columbia argued that at the *characterization stage*, the matter that is said to describe the impugned federal law must be defined with as much singleness, distinctiveness and indivisibility as possible, effectively incorporating the test under the national concern branch of POGG into the characterization stage.[48] British Columbia then argued that the matter should be narrowly defined as setting a minimum appropriate standard of stringency for greenhouse gas emission pricing in Canada.[49] The Saskatchewan Majority adopted this pith and substance with minor variations.

43. However, such an approach results in a self-fulfilling pith and substance analysis, as a court can always constrain its characterization of the pith and substance of a law with the view to "fitting" it under a valid head of power. Further, as it did in the Court below, this approach can lead to changing the constitutional agreed-upon balance of division of powers through the judicial process. This creates unpredictability in federalism jurisprudence that could lead to uncertainty in intergovernmental negotiations and paralysis of government action on important policy issues as governments sit in doubt about whether they have jurisdiction.

44. Second, the characterization by the Saskatchewan majority does not actually reflect the full mechanics of the *GGPPA*. The *GGPPA* does not impose a minimum national standard of price stringency for GHG emissions across Canada. Rather, it is a legislative tool allowing Parliament

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[46] Albert S Abel, "The Neglected Logic of 91 and 92" (1969) 19:4 UTLJ 487 at 490.

[47] Ontario Reference at para 224, Huscroft JA, dissenting.

[48] The Saskatchewan Minority noted that this approach is incorrect: Saskatchewan Reference at para 431.

[49] Notably, British Columbia identified a different pith and substance in the Ontario Court of Appeal, arguing that the *GGPPA* should be defined as the cumulative dimensions of greenhouse gas emissions in Canada.

to determine whether provincial regulation of the sources of GHG emissions is sufficiently stringent, and if not, the *GGPPA* applies as a backstop. As noted by the Saskatchewan Minority, it is a supervisory "regulation of the regulator."[50] While the Ontario Majority's pith and substance was less means-oriented than the Saskatchewan Majority, its focus on setting "minimum national standards" did not accurately encapsulate the backstop nature of the *Act*.

45. Third, the description adopted by the Saskatchewan Majority narrowly, and incorrectly, focused on the means employed to give effect to the legislation (price stringency) rather than characterizing the *Act*'s dominant feature.[51] For purposes of characterization, the exercise is not to describe the *GGPPA* in the narrowest possible terms but to accurately describe the essential feature of the legislation.[52] The means or legal effects of the legislation is certainly a relevant tool to characterizing the *Act* but it must not overshadow the overall purpose of the legislation, which is to regulate the provincial sources of GHG emissions.

46. In conclusion, Saskatchewan submits that the pith and substance of the *GGPPA* is the regulation of provincial sources of GHG emissions through the imposition of a charge on fuels and setting industrial emission limits.

B. Classification: The National Concern Branch of POGG

47. In the Court below, Canada placed great emphasis on the importance of climate change as not only a national but an international issue. Saskatchewan does not dispute the importance of reducing GHG emissions. However, national importance under the national concern branch of POGG is not a question of whether the matter is of importance to Canadians. As indicated by Peter Hogg, "such a subjective criterion as importance could hardly serve as a justiciable test."[53] If this was the case, vast swathes of provincial jurisdiction would be swept up by the federal government all in the name of national importance. Rather, national concern must be understood in a constitutional context and the constrained nature of the power that is only permitted when a matter

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[50] Saskatchewan Reference at para 461.
[51] Ontario Reference at para 211; *Quebec (Attorney General)* at paras 29 and 38.
[52] *Firearms Reference* at paras 16-18.
[53] Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2016) (loose-leaf revision updated 2018, release 1) at 17-13 [Hogg].

meets the "singleness, distinctiveness, and indivisibility" portion of the test and does not upset the balance of powers in the federation.

48. Numerous scholars have noted that when considering whether federal legislation falls within federal jurisdiction the initial focus should always be on enumerated powers under section 91 of the *Constitution Act, 1867*.[54] In this case, however, Canada seeks to uphold the *GGPPA* based on the national concern branch of the federal POGG power. As a result, it is important to note that from the outset Canada admits it seeks a permanent displacement of provincial powers that will have a profound effect on the division of powers going forward.

(i) The Exclusive and Plenary Nature of POGG

49. In the Court below, Canada argued that federal jurisdiction to regulate GHG emissions would not impair the provinces' powers to validly enact legislation aimed at GHG emissions reduction pursuant to the double aspect doctrine.[55] However, this view is misplaced and was ultimately unsuccessful.

50. Once a matter falls under the national concern branch of the POGG power, Parliament acquires "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects."[56] As observed by Beetz J in the *Anti-Inflation Reference*, a matter assigned under POGG applies in practice as if it were added to the list of exclusive enumerated federal powers under s. 91 of the Constitution.[57] This transfer of authority to Parliament is permanent and renders provincial legislation *ultra vires* to the extent that its pith and substance is in relation to that federal head of power.[58] As noted in *Law of the Canadian Constitution*: "Once a legislative field is found to be for the peace, order and good government of Canada, anything

[54] Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 UBCL Rev 355 at 371 [Leclair]; William R Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can Bar Rev 597 at 606 [Lederman].
[55] Saskatchewan Reference at para 129.
[56] *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para 34 (CanLII) [*Crown Zellerbach*]; *Johannesson v West Saint-Paul*, [1952] 1 SCR 292 at 311-312; *Anti-Inflation Reference* at 444; *Hydro-Québec* at paras 67, 115, 128.
[57] *Anti-Inflation Reference* at 461, Beetz J.
[58] *Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC 23 at para 5, [2016] 1 SCR 467 [*Rogers Communications*].

required to maintain control over that field will also be found necessary to enable the power and there will be no room for provincial operations."[59]

51. The exclusive fields of jurisdiction listed in ss. 91 and 92 of the *Constitution Act, 1867* cannot be combined to create a concurrent field of jurisdiction governed solely by paramountcy of federal legislation.[60] As observed by Beetz J in *Bell Canada*, "nothing could be more directly contrary to the principle of federalism underlying the Canadian Constitution."[61] In this respect the Saskatchewan Majority correctly observed that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions."[62]

52. In *Hydro-Québec,* La Forest J, writing for the majority, expressed a clear preference for enacting legislation to protect the environment through enumerated powers such as criminal law rather than the POGG power, since "the use of the federal criminal law power in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action."[63] By contrast, the national concern doctrine "inevitably raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power."[64] La Forest J went on to state:

> [128] **The national concern doctrine operates by assigning full power to regulate an area to Parliament**. Criminal law does not work that way. Rather it seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health.[65] [Emphasis added]

53. The exclusive and plenary nature of the POGG power is important in the context of this appeal where the *GGPPA* operates as a backstop. By its very nature, the legislation contemplates that provinces can, and in some cases, already do legislate not only on the reduction of GHG

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[59] Guy Regimbald & Dwight Newman, *Law of the Canadian Constitution*, 2nd ed (Markham: LexisNexis, 2017) at 233-234.
[60] *Bell Canada v Québec (Commission de la santé & de la sécurité du travail)*, [1988] 1 SCR 749 at paras 37-38, Beetz J (CanLII) [*Bell Canada*].
[61] *Bell Canada* at para 37, Beetz J; *Rogers Communications* at para 52.
[62] Saskatchewan Reference at para 130.
[63] *Hydro-Québec* at para 131, La Forest J.
[64] *Hydro-Québec* at para 110, La Forest J.
[65] *Hydro-Québec* at para 128, La Forest J.

emissions generally but even on the more narrow matter of setting standards of price stringency. In fact, it is contemplated that the *GGPPA* will not apply in provinces that meet or exceed the standards set out in the federal legislation. As a result, one of the fundamental issues in this appeal is whether backstop legislation can be reconciled with the exclusivity of a federal power created under the national concern branch of POGG. Saskatchewan submits that backstop legislation cannot be found constitutional under the national concern branch.

(ii) Defining a Matter of National Concern

54. Properly defining the proposed new head of federal power is critical to how the national concern doctrine is applied. The Saskatchewan majority attempted to confine the reach of the proposed new power by defining it solely in terms of the particular policy means chosen by Parliament under the *GGPPA*. This led the majority to evaluate the efficacy of Parliament's policy choice for reducing GHG emissions,[66] which is clearly off limits in judicial constitutional division of powers analysis.[67] This error was noted by Justice Huscroft in the Ontario Reference, who observed that by defining the new POGG power to be as narrow as the pith and substance of the *Act*, the majority embedded the legislation itself into the Constitution.[68]

55. Subject-matters of national concern are permanent heads of federal lawmaking authority and are therefore broader than any specific legislative means chosen by Parliament in a particular statute. They give Parliament the authority to make or unmake any particular legislation that falls within the range of that power.[69] In *Crown Zellerbach*, for example, the federal power of "marine pollution" was broader in scope than the specific provisions of the *Ocean Dumping Act*.[70] Marine pollution included not just the legislative means adopted in that particular statute but covered the totality of legislative means Parliament could employ in the future.

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[66] Saskatchewan Reference at para 147.
[67] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 82, [2018] 3 SCR 189 [*2018 Securities Reference*].
[68] Ontario Reference at para 224.
[69] *Anti-Inflation Reference* at 461.
[70] *Crown Zellerbach* at para 3.

56. The scope of the proposed power under the national concern doctrine should not therefore be limited to the specific legislative means chosen by Parliament in a particular challenged statute. As noted by Jean Leclair:

> "**… the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power**. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its " ... exclusive jurisdiction of a plenary nature to legislate in relation to that matter", Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt."[71] [Emphasis added]

57. In the Ontario Reference, Hoy ACJO (concurring) admonished Canada's attempt to define the proposed matter in such general terms as to "ensure future, court-endorsed legislative flexibility to reduce GHG emissions through the POGG power by any means."[72] However, Saskatchewan submits that the POGG power must be broader than the very pith and substance of the legislation before the Court. Proceeding in the narrow fashion adopted by the majority and concurring opinions creates unacceptable uncertainty in the division of powers. It sets a precedent for Canada to continually return before the Court to constitutionalize its preferred policies on GHG emissions piece by piece. Yet the living tree doctrine "is not an open invitation for litigants to ask a court to constitutionalize a specific policy outcome."[73] This approach would destabilize the federation and the division of powers through death by a thousand cuts.[74]

58. Consistent with these principles, Saskatchewan submits that the proposed head of power should be considered at a level of generality that includes not only the specific policy means in the *Act* but the range of legislative means that Parliament could adopt under that power. Since the matter of the *Act* broadly seeks to regulate not only GHG emissions themselves but the source of those emissions in the provinces, the proposed power must encompass the regulation of GHGs in Canada by any and all means. The question becomes whether this exclusive and plenary federal power amounts to an unacceptable invasion of provincial spheres of power.

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[71] Leclair at 363-364.
[72] *Ontario Reference* at para 177.
[73] *R v Comeau*, 2018 SCC 15 at para 83, [2018] 1 SCR 342 [*Comeau*].
[74] Saskatchewan Reference at para 435.

(iii) The Test under the National Concern Doctrine

59. Canada seeks to permanently add a new matter to the federal list of enumerated powers in the Constitution through the judicial process.[75] This Court's jurisprudence cautions that it must be strictly limited in scope. In particular, Beetz J noted in the *Anti-Inflation Reference* that adding new matters under the national concern branch should only be done in cases where a new matter is not an aggregate of provincial and federal powers but rather has a degree of unity that makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain the bounds of form.[76]

60. The matter before the Court in the *Anti-Inflation Reference* was the federal wage and price controls that were implemented in the 1970's to combat inflation. The constitutional issue concerned the legislation's application to the provincial private sector. While the majority of the Court upheld the legislation on the basis of the emergency branch of POGG, it was not upheld under the national concern test. Beetz J, who wrote the judgment concerning the national concern power, concluded that the "containment and reduction of inflation" was an aggregate of several subjects, some of which form a substantial part of provincial jurisdiction. It was totally lacking in specificity and so pervasive that it knew no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. It is submitted that exactly the same conclusions should be reached in this case.

61. In identifying these principles, Beetz J was greatly influenced by an article written by Professor W.R. Lederman, Q.C. titled "*Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*."[77] This article assists in understanding the purpose behind the high threshold of the national concern branch. Professor Lederman observed the "balance between federal and provincial subjects of primary legislative powers should remain stable [and] reasonably constant" subject only to gradual changes rendered truly necessary from time to time. This approach is critical to the existence of cooperative federalism. Otherwise, the "respective

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[75] *Anti-Inflation Reference* at 458 and 461.

[76] The Court should be aware that creating a new federal power under the national concern branch of POGG deprives the provinces of their ability to "opt out" under section 38(3) of the *Constitution Act, 1982*.

[77] *Anti-Inflation Reference* at 451-452.

bargaining positions of the two levels of government will be too uncertain for federal-provincial agreements to be reached."[78] Therefore, Professor Lederman stressed the need to avoid the addition of sweeping or all-pervasive subjects from being enfranchised as a new subject under the POGG power, since "that could lead to constitutional chaos or to the end of federalism."[79]

62. Professor Lederman considered the necessary test for allowing the Court to add to the existing list of federal subjects through the federal POGG power. He determined that while, as a matter of evidence, the new subject must arise out of the needs of Canadian society as something that necessarily requires country-wide regulation at the national level, need for a national regulation itself is not enough. Leaving aside true emergencies, the new subject should also have an identity and unity that is quite limited and particular in its extent.[80] This natural unity means that the subject can be given quite particular definition that does not trespass upon major areas of existing provincial powers. That is why aviation, which did not take over great portions of the laws of property and civil rights or municipal institutions, was treated as a new federal subject under the POGG power, while labour relations was denied as a new federal power because it was a sweeping subject or theme virtually all-pervasive in its legislative implications.[81] Instead, labour relations was properly dealt with under the constitution by dividing it into several parts and distributing it among the original specific federal and provincial powers.

63. The requirement for singleness, distinctiveness and indivisibility is not only whether the proposed new power is easily identifiable and sufficiently narrow itself, but whether it is <u>single, distinctive, and indivisible from provincial matters</u>. This Court reiterated this in *Crown Zellberbach,* wherein Le Dain J adopted the following high threshold[82] that must be met for a matter to become exclusive federal jurisdiction under the national concern branch of POGG:

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[78] Lederman at 616.
[79] Lederman at 615.
[80] Lederman at 606.
[81] Lederman at 605.
[82] Lamer CJ recognized that the criteria from *Crown Zellberbach* create a high threshold for finding jurisdiction under the national concern branch: *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 352.

> 3. 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 legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

64. The strict application of the national concern test was re-emphasized by Lamer CJ and Iacobucci J in dissenting reasons in *Hydro-Québec,* namely that because of the high potential risk to the Constitution's division of powers presented by the broad notion of "national concern", there must be a basis for determining "precisely what it is over which the law purports to claim jurisdiction."[83] Otherwise, recognition of a matter of "national concern" could quickly "expand to absorb all areas of provincial authority."[84]

65. The application of this legal test must be particularly strict where the reduction of GHG emissions falls within the broader matter of the environment, which has not been assigned to either the provinces or Parliament.[85] Similar to the example of labour relations, the environment is an aggregate of many different areas of federal and provincial constitutional responsibility. By the very fact that it was not assigned to one level of government, the environment's shared nature signals that the two levels of government are meant to operate in tandem with regard to that subject-matter. As indicated by the dissent of Lamer CJ and Iacobucci J in *Hydro-Québec,* it follows that "[o]ne level should not be allowed to take over the field so as to completely dwarf the presence of the other."[86] Rather, both levels of government can legislate on matters of the environment as long as those laws are connected to some matter under their jurisdiction.

66. It is under this lens that this Court must determine whether a new federal power should be created that would give Parliament exclusive jurisdiction over the matter of GHG emissions or

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[83] *Hydro-Québec* at para 67.
[84] *Hydro-Québec* at para 67.
[85] *Oldman River* at 63-64.
[86] *Hydro-Québec* at para 59.

minimum national standards of price stringency of GHG emissions. What follows below is an analysis of the two-part test of the national concern doctrine in the context of this appeal.

(iv) The Correct Formulation: the matter of GHG Emissions is not Distinctive from Matters of Provincial Concern

67. GHGs are generated by industrial, commercial and private activities that are virtually all regulated pursuant to existing provincial heads of power. GHG emissions are tracked and analyzed in Canada by reference to the economic sector from which emissions originate,[87] which includes the following broad sectors:[88] oil and gas; transportation; electricity; heavy industry; buildings; agriculture; waste management; manufacturing, construction and the forestry and logging industry.[89]

68. In the Moffet Affidavit, Canada referred to the Special Report on Global Warming of 1.5˚C by the Intergovernmental Panel on Climate Change (IPCC), which acknowledged the breadth of activities that generate GHG emissions, since limiting global warming to 1.5˚C would require "rapid and far-reaching transitions in land, energy, industry, buildings, transport and cities."[90] This breadth is reflected in the activities that are subject to the *GGPPA*, including the covered industrial activities that are subject to Part 2 of the *Act*.

69. Traditionally, the provinces have had broad jurisdiction to deal with pollution or emissions arising from these GHG emitting activities. Professor Hogg described it this way:

> At the provincial level, the most obvious sources of power are the following. The power over property and civil rights (s. 92(13)) authorizes the regulation of land use and most aspects of mining, manufacturing and other business activity, **including the regulation of emissions that could pollute the environment.** This power, and the power over municipal institutions (s. 92(8)), also authorizes municipal regulation of local activity that affects the environment, for example, zoning, construction, purification of water, sewage, garbage disposal and noise. The provinces can also control activities on provincial lands (s. 92(5)), which contain much mining and lumbering.[91] [Emphasis added]

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[87] Affidavit of Warren Goodlet (October 25, 2018), Exhibit A ("Goodlet Affidavit") [ROA, TAB 33, page 1].
[88] Affidavit of Dominique Blain, affirmed October 18, 2018 [Blaine Affidavit] at paras 12-13, and 17, Exhibit "A" at page 12 [ROA, TAB 27, pages 170-172, 188].
[89] Goodlet Affidavit, Exhibit A at page 146 [ROA, TAB 33, page 27].
[90] Moffet Affidavit, Vol 1 of 3 at para 15 [ROA, TAB 33, page 8].
[91] Hogg at 30-23 to 30-24.

70. The regulation of GHG emissions also affects the provincial jurisdiction over non-renewable natural resources and the generation and production of electrical energy guaranteed by section 92A(1) of the Constitution. Notably, the provincial powers over these subjects are described in the widest of terms.

71. As a result, there is no doubt that the provinces have jurisdiction to regulate GHG emissions. The Saskatchewan Majority agreed that the production of GHGs is so intimately and broadly embedded in every aspect of intra-provincial life that a general authority in relation to GHG emissions would give Parliament legislative reach extending deeply into areas of historically exclusive provincial authority.[92]

72. Accordingly, if a new federal power over GHG emissions is created through the judicial process, there would be no clear distinction between the activities regulated by the federal government under this new head of power and those that fall under exclusive provincial jurisdiction, especially those falling under property and civil rights pursuant to s. 92(13), matters of a merely local or private nature under s. 92(16), and local works and undertakings under s. 92(10). Providing the federal government with exclusive jurisdiction would give Parliament power over a sweeping subject-matter that is all-pervasive in its legislative implications. Furthermore, the subject of GHG emissions is far too diffuse and uncertain in its nature to delineate clear boundaries between federal jurisdiction and existing provincial jurisdiction.

73. During the hearing in the Saskatchewan Reference, Canada changed its position to argue that the matter under POGG's authority was not "GHG emissions" but rather "the *cumulative dimensions* of GHG emissions." It is submitted that the Ontario and Saskatchewan Courts of Appeal were both correct in rejecting this characterization. As indicated by the Saskatchewan Majority it is "no more than the direct and simple sum of the former."[93] There is no difference between jurisdiction over GHG emissions and cumulative dimensions of the GHG emissions.[94]

74. In the Court below, Canada placed significant emphasis on the fact that unlike "toxic substances," GHG emissions possess readily identifiable characteristics that make them single, distinct, and indivisible since they are defined in the *Act* and internationally and have specific

[92] Saskatchewan Reference at para 128.
[93] Saskatchewan Reference at para 134.
[94] Saskatchewan Reference at para 136.

chemical and scientific parameters.[95] However, as correctly observed by the Saskatchewan Minority, the ability to scientifically identify GHG emissions for regulatory purposes does not make them constitutionally distinct for the purposes of a POGG analysis.[96]

75. Most pertinently, the attempt to identify the singleness, distinctiveness, and indivisibility of GHG emissions by reference to their persistent and inter-provincial, national and indeed global presence in the atmosphere ignores the essence of what is being regulated. The dominant purpose of the *GGPPA* is not to regulate GHGs in their form as global pollutants but rather to regulate a "broad set of GHG emission sources" that fall squarely within provincial borders.

76. In *Crown Zellerbach*, La Forest J (in dissent) emphasized the need to consider the conceptual side of the indivisibility criterion and not simply the physical characteristics of "marine pollution." On this basis, he pointed out that "it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution" and noted that "effective pollution control requires regulating pollution *at its source*." [97] By observing the *sources* of pollution, La Forest J highlighted the wide range of activities falling with provincial jurisdiction:

> [62]…It must be remembered that the peace, order and good government clause may comprise not only prohibitions, like criminal law, but regulation. **Regulation to control pollution, which is incidentally only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in manufacture, as well as the techniques of production generally, in so far as these may have an impact on pollution. This has profound implications for the federal-provincial balance mandated by the Constitution.** The challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution. [Emphasis added]

77. In that case, the newly recognized head of power was contained to marine pollution. This was subsequently recognized by La Forest J, speaking this time for the majority in *Oldman River*, in which he explained that marine pollution was "predominantly extra-provincial and international in character and implications" but went on to clarify that this case cannot be taken to suggest that environmental control has the requisite distinctness to meet the test under the national concern

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[95] Saskatchewan Reference at para 427.
[96] *Ibid*.
[97] *Crown Zellerbach* at para 60, La Forest J, dissenting.

doctrine as articulated by Beetz J in the *Anti-Inflation Reference*.[98] Similarly in *Hydro-Québec*, La Forest J emphasized that when both the majority and minority opinions are taken into consideration in *Crown Zellerbach* and *Oldman River*, "this is hardly consistent with an enthusiastic adoption of the 'national dimensions' doctrine."[99]

78. Unlike marine pollution, which has a specific and narrow geographical source, the *GGPPA* seeks to regulate the source of all intra-provincial GHG emissions, which are virtually limitless in scope and cover an enormous range of activities falling within exclusive provincial jurisdiction. As a result, the concerns raised by La Forest J in *Crown Zellerbach* with respect to the sources of pollution, while alleviated in the discrete case of marine pollution, are orders of magnitude more problematic in the context of GHG-emitting activities.

79. The lack of singleness, distinctiveness, and indivisibility from matters within provincial jurisdiction is exemplified by the application of Part 2 of the *GGPPA* in Saskatchewan. Saskatchewan has enacted *The Management and Reduction of Greenhouse Gases Act.*[100] Section 13 establishes baseline emissions for each facility owned or operated by a regulated emitter. Pursuant to s. 18, for each prescribed year, every regulated emitter must reduce its GHG emissions by a prescribed amount below its baseline level. Pursuant to s. 20, for each calendar year in which a regulated emitter has not reduced its GHG emissions as required, the regulated emitters shall pay a carbon compliance payment in accordance with a specified formula, which takes into account offset credits. Saskatchewan's legislation is similar to Part 2 of the *GGPPA* but more stringent.

80. Part 2 of the *GGPPA* does not apply to regulated emitters that are subject to Saskatchewan's *Management and Reduction of Greenhouse Gases Act.*[101]

81. Saskatchewan Power Corporation, the provincial Crown utility that is responsible for generating electricity, and SaskEnergy Incorporated, the provincial Crown utility responsible for natural gas transmission have not been prescribed "regulated emitters" under the Saskatchewan *Management and Reduction of Greenhouse Gases Act*. This is because these entities have broader, more effective, customized plans to reduce emissions that would be impaired by the *GGPPA* or

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[98] *Oldman River* at 64, La Forest J; Leclair at 366.
[99] *Hydro-Québec* at para 116; Leclair at 367.
[100] *The Management and Reduction of Greenhouse Gases Act*, SS 2010, M-2.01.
[101] See *Facilities Regulation*, s 2(b)(ii).

the Saskatchewan *Management and Reduction of Greenhouse Gas Act*.[102] However, pursuant to s.171(4) of the *GGPPA*, and the *Facilities Regulation*,[103] the Governor in Council has exercised its discretion and determined that Part 2 of the federal *GGPPA* will apply specifically to SaskPower and SaskEnergy's GHG emissions, while other industrial emitters are still subject to Saskatchewan's *Management and Reduction of Greenhouse Gases Act*.

82. Part 2 of the *GGPPA* and Saskatchewan's *Management and Reduction of Greenhouse Gases Act* are not legislating over different subject-matter. In fact, they are legislating over exactly the same subject-matter – the GHG emissions of industrial emitters. There is nothing conceptually or functionally different between them. Rather, Parliament is attempting to impose its policy over entities that the Saskatchewan government, pursuant to its provincial power, has exempted from the provincial legislation.

83. In the Court below, the Saskatchewan Majority placed significant emphasis on the "provincial inability test" and 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.[104] However, in defining the matter in terms of the means by which Parliament intended to reduce GHG emissions, the majority analyzed the effect of one province's failure to adopt a minimum GHG pricing scheme. Once again, this analysis is premised on the conclusion that carbon pricing is a superior method to reduce GHG emissions, analysis which is not properly part of a division of powers analysis.

84. The policy-laden nature of this approach, and in particular the reference to the establishment of minimum standards of price stringency for GHG emissions, equates the failure of a province to impose a *carbon pricing* scheme within federal standards of stringency with a failure to take action on climate change and the reduction of GHG emissions generally. However, this view cannot be sustained.

85. First, carbon pricing is only one means of addressing GHG emissions. The efficaciousness of the federal approach is not a relevant factor in the division of powers analysis. To make a finding of provincial inability on this basis would "improperly require the Court to choose between the

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[102] Minister Duncan Letter at page 4 [ROA, TAB 22, page 137].
[103] See Section 2(b)(ii) and 3(a) or 3(c)(x) of the *Facilities Regulation*.
[104] Saskatchewan Reference at para 153.

policies, benchmarks and approaches of the Provinces and those of the federal government as they apply to the people and economy of the Provinces that do not meet the federal idea of stringency."[105] As noted by this Court in *R v Comeau*, "the question for a court is squarely constitutional compliance, not policy desirability…".[106]

86. Second, the provinces are willing and able to address climate change and reduce GHG emissions and have already taken steps to do so. This is evident from the Vancouver Declaration,[107] where the Prime Minister and First Ministers of Canada *all* committed to "increase the level of ambition of environmental policies over time in order to drive greater GHG emissions reductions, consistent with the Paris Agreement."[108] Significantly, the Vancouver Declaration recognized that provinces and territories "have been early leaders in the fight against climate change and have taken proactive steps." While this included carbon pricing mechanisms in some provinces, it importantly included other measures, such as implementing emissions caps, involvement in international partnerships, closing coal plants, carbon capture and storage projects, renewable energy production and targets, and investments in energy efficiency.[109] As noted by the Saskatchewan Minority, the history of federal-provincial dealings on this issue demonstrate that "this is not a circumstance where the Saskatchewan government is jurisdictionally unable to address GHG emissions." Rather, it is a reflection of policy disagreement on how to most effectively address GHG emissions.[110]

87. Third, the *Act* does not impose a national standard that is uniformly applied across all provinces. The backstop nature of the *GGPPA* contemplates variable carbon pricing and emission limits across provinces, meaning some jurisdictions will still have higher prices and emission limits than others. As a result, this gives rise to the very same "leakage" or jurisdiction shopping that Canada raises as a concern if the *GGPPA* were not in place.[111] As observed by the

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[105] *Ibid* at para 451.
[106] *Comeau* at para 83.
[107] Vancouver Declaration [ROA, TAB 5, page 1].
[108] *Ibid* [Emphasis added].
[109] *Ibid*.
[110] Saskatchewan Reference at para 448.
[111] Saskatchewan Reference at para 452.

Saskatchewan Minority, if this were truly a concern, "the Act would benchmark a ceiling as well as a floor price for carbon."[112]

88. Fourth, in *Crown Zellerbach*, Le Dain J cautioned that the provincial inability test is only one factor for determining whether a matter has the character of singleness or indivisibility and must not become a standalone justification to allow only one order of government to deal with any legislative problem. This would *expand* the national concern doctrine in unprincipled ways. For example, Katherine Swinton (as she then was) warned about the centralizing effect that this would have on the balance of powers and describes "the ease with which one can characterize problems as national because they occur in more than one province or have spillover effects."[113] This was shown in the majority decisions themselves, which attached undue importance to provincial inability on a conjectural basis.[114] If there is to be any emphasis on these concerns, the Court should require a solid evidentiary basis, since "questions of provincial inability and the harm that flows therefrom are both factual in part."[115]

89. Regardless, the *indicia* of provincial inability must not be allowed to overwhelm the purpose of the test, which determines whether a matter can be clearly distinguished from matters falling within provincial jurisdiction. The far-reaching and pervasive nature of GHG-emitting activities within exclusive provincial jurisdiction cannot therefore be brushed aside in the name of legislative or economic efficiency. As noted by Barry Friedman, federalism rests on the democratic idea that there is some benefit to inefficiency, which is best achieved if power is diffused. Indeed, it would be improper to "test a system designed to some extent to defeat efficiency solely against efficiency's metric."[116]

90. Fifth, the operation of the *GGPPA* as backstop legislation undermines the suggestion that the provinces are incapable of regulating on the matter of GHG emissions. As noted by the Saskatchewan Majority in the context of analyzing whether the *GGPPA* fits within the federal power of taxation, the *GGPPA* could "fully accomplish its objectives" if all the provinces

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[112] *Ibid*.
[113] Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp Probs 121 at 126 [Swinton].
[114] Ontario Reference at para 20; Saskatchewan Reference at para 155.
[115] Swinton at 134 and 136.
[116] Barry Friedman, "Valuing Federalism" (1997) 82 Minn L Rev 317 at 386.

implemented a provincial pricing scheme consistent with the stringency of pricing set by the Governor in Council. In such a circumstance, the *GGPPA* would not be applied anywhere in Canada.[117] This illustrates that the *GGPPA* does not address anything that cannot be "fully accomplished" by provincial regulation to mitigate GHG emissions.

91. In *Hydro-Québec*, Lamer CJ and Iacobucci J drew a similar conclusion with respect to the provisions of *CEPA*, which they found could not be sustained under the national concern doctrine. They noted a provision that exempted provinces from application of federal regulations if they had equivalent provincial regulatory schemes in force. This was taken as evidence that the matter was inherently or potentially divisible and therefore undermined the assertion that the provinces were incapable of regulating toxic substances.[118] Similarly, the backstop feature of the *Act* suggests that the matter is divisible and that provinces are fully capable of regulating GHG emissions. Indeed, the leadership shown by the provinces on climate change to date on an inter-provincial and even international level reflects their significant constitutional abilities to address environmental issues using global approaches.[119]

92. However, if the *GGPPA* is upheld under the national concern test of POGG and the full power to regulate is assigned to Parliament, provincial jurisdiction is displaced. The unintended consequence of this feature is that if Parliament were to repeal or scale-back the rigour of its climate change policy, provincial governments would be left without adequate constitutional jurisdiction to address an issue falling under exclusive federal power. This exemplifies the short-sightedness of the Attorney General of British Columbia's argument. While the federal policy is currently aligned with that of British Columbia, this could change, and British Columbia would be left without jurisdiction to take its own provincial action on the reduction of GHG emissions.

93. Sixth, as part of the provincial inability test, the Saskatchewan Majority noted that on an international level, Canada is expected to make national commitments with respect to GHG reduction or mitigation targets, which are self-evidently difficult for Canada to meet if not all provincial jurisdictions are prepared to implement GHG emissions pricing regimes.[120] However,

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[117] Saskatchewan Reference at para 87.
[118] *Hydro-Québec* at para 77.
[119] Alex Belanger, "Canadian Federalism in the Context of Combatting Climate Change" (2011) 20 Const F 21 at 25.
[120] Saskatchewan Reference at para 156.

special treaty commitments must not be confused with the provincial inability test. It is well-established that treaties are not self-executing and caution must be exercised not to confer jurisdiction over a subject-matter to Parliament that it otherwise would not have merely because it has made promises to other countries in regards to that subject-matter.[121]

94. In summary, Canada has not carefully carved out a proposed power with "clear and ascertainable limits"[122] that is "qualitatively different"[123] from the jurisdiction the provinces already possess. There is no clear boundary line around the proposed new federal jurisdiction to keep its limits strict and narrowly confined. Rather, what Canada really proposes is a broad jurisdiction to deal with the reduction of provincial GHG emissions. Canada particularly says it has exclusive jurisdiction over its preferred policy of addressing GHG emissions, which it will impose on the provinces to the extent that the provinces take a different approach. This cannot meet the test of singleness, distinctiveness, and indivisibility that is demanded under the national concern branch and will have profound implications on federalism in Canada.

(v) The Saskatchewan and Ontario Formulations are not Distinctive from Provincial Concerns

95. While the Saskatchewan and Ontario References agreed that GHG emissions, or alternatively the cumulative dimensions of GHG emissions, were not distinctive enough to meet the national concern test, the majority opinions attempted to carve out narrower POGG subject-matters. However, there are numerous problems with these proposed matters.

96. First, the Saskatchewan formulation – the establishment of minimum national standards of price stringency for GHG emissions – is unduly narrow. The *GGPPA* legislates on a much broader subject-matter than simply "price stringency for GHG emissions." In the context of the *Act,* the term "stringency" encompasses a wide range of parameters that are not limited to price. Most notably, Part 2 does not set a minimum standard of price stringency, but instead sets industrial emission limits, which if met do not require the payment of any charge.

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[121] *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 673 (JC PC).
[122] *Crown Zellberbach* at para 39.
[123] *Reference re Securities Act,* 2011 SCC 66, [2011] 3 SCR 837 [*2011 Securities Reference*] at para 79.

97. Further, in the context of Part 1 of the *Act,* the term "stringency" goes beyond the charge itself to include the scope or breadth of the charge, including the fuels to which the charge applies, how it applies, and who is subject to, or alternatively exempt from, paying the charge. More problematic, all of these parameters are subject to change at the discretion of the Governor in Council. Therefore, the *Act* regulates a broad spectrum of factors beyond price and has the potential to become even broader than its current terms. The Saskatchewan Minority noted that these provisions "create the disturbing potential for an off-the books widening of the practical and legal scope of the Act and of its effects as and whenever the policies or objectives of the executive branch of the federal government change."[124]

98. Second, the observation by the majority opinions in Saskatchewan and Ontario that the federal government has the power to set "national" standards is self-fulfilling, since the provinces are, by their very nature, unable to legislate national standards. This does not have a singleness, distinctiveness and indivisibility that clearly distinguishes it from the provincial power to regulate the same subject-matter within the provinces. If simply prefixing the words "national standards" to a matter could create a new federal head of power, Parliament would be able to legislate over nearly every area of provincial jurisdiction simply by resting its jurisdiction in "national standards." As the minority of the Ontario Court of Appeal questioned – could "Parliament establish "minimum national standards" governing such provincial matters as home heating and cooling? Public transit? Road design and use? Fuel efficiency? Manufacturing processes? Farming practices?"[125]

99. Allowing the federal government to have an exclusive power over setting national standards is not a small or gradual change to the Constitution. It would mark a significant departure from not only constitutional jurisprudence but, and importantly, the express language of the Constitution itself, which limits the POGG power to "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." It would violate the well-established principle of federalism that the federal and provincial powers must be respected, and one power may not be used to eviscerate another.[126]

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[124] Saskatchewan Reference at para 466.
[125] Ontario Reference at para 237.
[126] *Securities Reference* at para 7. See also, section 94 of the *Constitution Act, 1867*.

100. Third, the reference by both majorities to "minimum standards" does not meaningfully narrow the power. Regulating minimum standards of GHG emissions is not functionally distinct from regulating GHG emissions altogether. A minimum standard could be set so high that it effectively regulates the entire matter.

101. Fourth, the Saskatchewan majority's creation of a new federal power over price stringency embeds the federal policy into a constitutional head of power. In determining whether this federal head of power had the requisite singleness, distinctiveness, and indivisibility, the majority concluded that there are no apparent difficulties in drawing a distinction between a national minimum standard of price stringency for GHG emissions and other aspects of regulatory work that might be concerned with such emissions. However, this appears to draw the constitutional line by suggesting that the federal government would have exclusive jurisdiction over its preferred policy choice to address GHG emissions, which it could then impose as a national standard across Canada, leaving other policy options available to the provinces.

102. The formulations adopted by the majority opinions in Saskatchewan and Ontario depart from the spirit of the unanimous *2011 Securities Reference,* where this Court rejected the attempt to bring securities under federal jurisdiction as an optimum policy, stating: "one should not confuse what is optimum as a matter of policy and what is constitutionally permissible."[127] Provincial powers cannot be eroded because it is believed that federal national standards are a more effective policy. The federal-provincial constitutional bargain cannot be rewritten unilaterally by Parliament in the name of efficacy.

(vi) Scale of Provincial Impact

103. Even if the matter in question could be found to have the requisite singleness, distinctiveness, and indivisibility required (which it does not) it would still be necessary to consider whether it can be reconcilable with the fundamental distribution of legislative power under the Constitution.

104. Saskatchewan submits that the proposed new power also fails this part of the test. The effect of a federal power over GHG emissions would "embrace and smother provincial powers"[128]

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[127] *2011 Securities Reference* at para 90. See also section 94 of the *Constitution Act, 1867*.
[128] *Anti-Inflation Reference* at para 50.

and upset the constitutional balance of power. As previously discussed, the sources of GHG emissions are related to extensive industries and activities that are currently regulated by the provinces. Creating a new exclusive head of federal power over GHG emissions would have a centralizing effect, preventing provincial efforts to legislate in relation to the matter. Indeed, exclusive authority to regulate the sources of GHG emissions, like marine pollution, "is a carte blanche to regulate every conceivable activity known to humankind, be they inter-or-intra-provincial in nature."[129]

105. The *GGPPA* is a supervisory attempt by Parliament to ensure the provinces adopt federal policy in areas of exclusive provincial jurisdiction.[130] This is highlighted by the backstop nature of the *GGPPA*, which only applies in a province to the extent that Parliament deems that the provincial GHG pricing stringency is not set at appropriate levels. As previously mentioned, the effects of this intrusion have the potential to become even broader due to the Governor in Council's discretionary power to change the terms of the *Act* that could rapidly expand to absorb extensive areas of provincial authority.

106. The scale of impact created by this unfettered supervision and corresponding displacement of provincial authority is contrary to the principle of federalism, which "emphasizes balance and the ability of each level of government to achieve its goals in the exercise of its powers under ss. 91 and 92 of the *Constitution Act, 1867*."[131] The approach taken by this Court in relation to matters respecting environmental protection has been "to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[132] Indeed, the need to protect the environment is cited as one of the major challenges of our time "that requires action by governments *at all levels*."[133] The permanent displacement of vast areas of provincial authority to address GHG emissions implies that the scale of impact on provincial jurisdiction is not reconcilable with the federal balance of powers under the *Constitution Act, 1867*.

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[129] Leclair at 362.
[130] Saskatchewan Reference at para 473.
[131] *Comeau* at para 85.
[132] *Hydro-Québec* at para 116, La Forest J.
[133] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3, [2001] 2 SCR 241 [*Spraytech*]; *Hydro-Québec* at para 116, La Forest J.

107. As previously indicated by this Court, "[t]he Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other."[134] However, the *Act* entails a significant federal intrusion into the exclusive jurisdiction of the provinces and, by imposing its preferred policy solution in wholesale fashion, impairs their ability to fashion solutions that are best suited to local needs and regional diversities. Such an impact on provincial jurisdiction therefore further engages the principle of subsidiarity.

108. The principle of subsidiarity recognizes that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.[135] In the context of the national concern doctrine, it calls for restraint in creating new federal powers through the judicial process that unduly centralizes power away from existing spheres of democratic government under the pretext of efficiency or importance. The current balance of powers should not be significantly altered based on determinations by the Court as to what may or may not be effective government policy. As observed by Eugenie Brouillet:

> In practice, matters considered to be important in contemporary society are the most likely to be covered by a presumption of provincial inability or ineffectiveness and, as a result, to be placed in the category of matters of national concern. **However, a judgment about provincial responsibilities and ability should be made by electors and not by the judicial powers, since the electors can, through a democratic process, sanction what they consider to be provincial ineffectiveness. In addition, the division of powers should be modified by the constituent rather than by the judicial power**.[136] [Emphasis added]

109. Courts should therefore be slow to create a broadly conceived environmental matter under POGG. To do so not only invalidates existing provincial legislation aimed at reducing GHG emissions, but also inhibits the existing power of provincial governments to develop their economies in a manner that reflects the concerns of citizens most closely affected.[137]

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[134] *2011 Securities Reference* at para 71.
[135] *Spraytech* at para 3.
[136] Eugenie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR (2d) 601 at 622.
[137] Kai D Sheffield, "The Constitutionality of a Federal Emissions Trading Regime" (2014) 4:1 Western Journal of Legal Studies at 21.

110. This is exemplified by evidence filed by SaskPower in the court below. As previously mentioned, SaskPower was exempt from the Saskatchewan *Management and Reduction of Greenhouse Gases Act.* However, through the *Facilities Regulation*, the Governor in Council has exercised regulatory discretion to make Part 2 of the *GGPPA* apply to SaskPower. SaskPower has calculated that this will increase SaskPower's customers' bills by an average of approximately 5.1%. Since SaskPower must account for affordability and competitiveness concerns when setting its rates, there are limits on the costs that it will be able to pass on to customers.[138] According to the affidavit of Bruce Ughetto, this will leave SaskPower with less capital resources to invest in green technologies such as wind and solar power and to upgrade its transmission grid infrastructure.[139] This illustrates the need for a province-sensitive approach and region-specific strategies to transition to lower carbon economies.

111. Saskatchewan does not provide this example to argue that one particular policy approach is more effective than the other. Rather, it illustrates the underlying reason why the principle of subsidiarity informs the limited nature of the national concern branch of the POGG power – law-making and implementation are often best achieved at a level of government that is closest to the citizens affected, and thus most responsive to their needs and local distinctiveness.[140] As indicated by this Court in the *2011 Securities Reference* "it is in the nature of a federation that different provinces adopt their own unique approaches consistent with their unique priorities when addressing social or economic issues."[141]

112. As a result, the Court must carefully circumscribe the application of the national concern branch of POGG so as not to create a new federal exclusive head of power that has an unprecedented impact on provincial jurisdiction. Saskatchewan submits that the following extract from this Court's analysis in the *2011 Securities Reference* is equally applicable here:

> [73] The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism – the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction. As stated in the *Secession Reference*, "[t]he federal structure of our country also facilitates

[138] Affidavit of Bruce Ughetto sworn December 17, 2018 at para 17 [ROA, TAB 34, page 62].
[139] *Ibid* at para 19 [ROA, TAB 34, page 63].
[140] Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21.
[141] *2011 Securities Reference* para 119.

> democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity" (para. 58).[142]

113. A finding by this Court that the *GGPPA* is unconstitutional will not undermine existing legislative efforts in Canada to combat climate change. On the contrary, it will protect the federal structure of the Constitution and ensure that current provincial legislation to reduce GHG emissions is not rendered *ultra vires*. As this Court noted in the *2011 Securities Reference*,[143] a finding of unconstitutionality does not preclude a legislative way forward that meets the needs of both the country as a whole and its constituent parts. An approach that recognizes the essentially provincial nature of GHG-emissions regulation remains available while still allowing Parliament to take significant steps to deal with climate change on a national level.

114. Parliament has ample constitutional powers, legislative authority, and administrative instruments available to address climate change.[144] For instance, Parliament could seek to reduce GHG emissions through the criminal law power. Indeed, this Court has affirmed that "stewardship of the environment is a fundamental value of our society" and that attacking pollution in its various forms is an evil that Parliament may legitimately seek to suppress.[145] Alternatively, Parliament could raise general revenues from GHG-emitting activities by valid use of the power of taxation. It is also open for Parliament to approach the Provinces to coordinate action on climate change on a cooperative basis that respects the equilibrium of the Constitution.

115. The Reference below arose because Parliament chose not to make use of its valid law-making powers to legislate in a manner that respects the division of powers under the *Constitution Act, 1867*. The national concern branch of the POGG power is not an instrument of first resort to be used whenever Parliament seeks to implement its preferred policy means in place of provincial policy on matters falling within exclusive provincial jurisdiction. Complementary approaches to combatting GHG emissions between federal and provincial governments are not only possible but desirable to the extent that each level of government pursues objectives that fall within their respective spheres of exclusive jurisdiction. As succinctly put by the minority opinion in the Saskatchewan Reference, "federalism in Canada means that all governments of Canada must bring

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[142] *2011 Securities Reference* at para 73.
[143] *2011 Securities Reference* at para 130.
[144] Saskatchewan Reference at para 476.
[145] *Hydro-Québec* at paras 123-128, La Forest J.

all law-making power to bear on the issue of climate change, but in a way that respects the division of powers under the *Constitution Act, 1867*."[146]

116. As a result, Saskatchewan submits that the proposed new matter of GHG emissions cannot meet the national concern test. Therefore, the *GGPPA* cannot be found constitutional under the national concern branch of POGG.

C. The *GGPPA* does not fall under the Federal Taxation Power

117. The Saskatchewan minority found the charge on fuel in Part 1 to bear the hallmarks of a tax but concluded it could not be found constitutional under the federal taxing power. While there is no dispute that Parliament could seek to enact valid tax legislation on various GHG-emitting fuels and combustible waste, the *GGPPA* is structured in ways that cannot meet the special rules and requirements of a valid system of federal taxation.[147]

118. Saskatchewan submits that the minority opinion was correct in finding that if any fuel levy imposed pursuant to Part 1 of the *GGPPA* is a tax, three constitutional principles are irremediably violated. First, the *Act* fails to comply with s. 53 of the *Constitution Act, 1867*, since it allows taxation powers to arise *ab initio* in secondary or delegated legislation. Second, it violates the principle of the rule of law by permitting the executive branch of government to widen the scope of the *Act* without ratification by legislative authority. Third, the principle of tax uniformity under federal law is violated by the backstop of the *Act*, which allows the executive branch to "impose a *national* tax in one Province only."[148] Violation of these constitutional principles are inherent features of the *GGPPA* and cannot be rectified by remedial legislation. As such, in the alternative, Part 1 is unconstitutional as a federal scheme of taxation.

(i) The GGPPA offends section 53 of the Constitution Act, 1867

119. Section 53 of the *Constitution Act, 1867* ensures Parliamentary control and accountability for taxation by prohibiting the Crown from levying a tax except with the authority of Parliament or the legislature.[149] Part 1 of the *GGPPA* offends this requirement in two principal ways. First,

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[146] Saskatchewan Reference at para 476.
[147] Saskatchewan Reference at para 347.
[148] Saskatchewan Reference at para 383.
[149] *Eurig Estate, Re*, [1998] 2 SCR 565 at para 32 (CanLII) [*Eurig Estate*].

while Parliament may vest control over the "details and mechanism" of taxation to a statutory delegate, the *Act* does not "clearly and unambiguously express its intent to delegate the authority."[150] While the *GGPPA* authorizes the Governor in Council to levy a "fuel charge", it does not clearly or impliedly state the Governor in Council is being delegated the power to tax.[151] Moreover, legislation ostensibly enacted for the purpose of altering behaviour cannot also be a valid tax. It cannot be a disguised regulatory instrument within provincial jurisdiction.[152] If this was the case, Parliament could circumvent constitutional limitations on its taxing power.[153]

120. Second, the powers delegated go beyond the "details and mechanism" and allow taxation "by executive and bureaucratic edict."[154] Part 1 of the *Act* delegates the authority to the executive branch to determine, *on its own accord*, whether provincial regulation of the sources of GHGs is sufficiently stringent and, if not, it has the power to apply the *Act* as a backstop in any given province. In particular, a province becomes a "listed province" in Schedule 1 under ss 166(2) and (3) of the *Act* by *regulation* by taking into account "as the primary factor," the stringency of provincial pricing mechanisms for GHG emissions.[155] These are not the "details and mechanism" of a tax imposed by legislation but are rather broad powers of the executive to decide *whether* to impose a new tax *ab initio* in the secondary legislation.[156]

(ii) Rule of Law

121. In the *2018 Securities Reference*, this Court described the principle of Parliamentary sovereignty as a foundational principle of the Westminster model of government.[157] In *Eurig Estate*, this Court also emphasized that citizens being taxed in a democracy have the right to have elected representatives debate whether money should be appropriated and to determine how it should be spent.[158] It is necessary to avoid the autocratic mischief created by quietly offloading

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[150] *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 88, [2008] 3 SCR 511 [*Confédération*].
[151] Saskatchewan Reference at para 358; *Eurig Estate* at para 41.
[152] *Attorney General Canada v Attorney General Ontario*, [1937] 1 DLR 684 at 687 (CanLII).
[153] *Eurig Estate* at para 40; Saskatchewan Reference at para 356.
[154] Saskatchewan Reference at para 373.
[155] Saskatchewan Reference at para 280.
[156] *Eurig Estate* at para 31.
[157] *2018 Securities Reference* at paras 53-54.
[158] *Eurig Estate* at paras 53-54; Saskatchewan Reference at para 374.

this fundamental and often unpopular power of government.[159] These principles are violated by Part 1 of the *GGPPA* for two reasons.

122. First, the power of the statutory delegate to prevail over the primary legislation in case of conflict under s. 168(4) of the *Act* "expressly afford the executive branch of government the power to circumvent the exercise of law-making power by the legislative branch of government."[160] This provision, known as a "Henry VIII clause,"[161] is inherently contrary to established notions of parliamentary democracy and offends the rule of law, particularly when used in the context of taxation.

123. Second, the discretion afforded under s. 166(4) of the *Act* confers unprecedented powers to the executive to amend the terms of the *Act* itself. As noted by the Saskatchewan Minority, the word "prescribed" is used in the *Act* more than 430 times.[162] Most of the critical features of the fuel levy under Part 1, including almost every definition under s. 3, are subject to change by the executive branch of government.[163] Section 26 of the *Act* illustrates the nature of this virtually unfettered discretion, which alone uses the word "prescribed" seven times. Put simply, the presence of these two features in a single statute does exactly what section 53 prohibits – it allows the executive to raise taxes without legislative authority of the House of Commons.

(iii) Uniformity of Federal Taxation

124. Saskatchewan further submits that in accordance with the Saskatchewan Minority's recognition of the principle of uniformity of federal taxation, Part 1 of the *Act* fails to ensure that the burden of the fuel levy is borne uniformly throughout Canada. Rather, it is only borne by ratepayers in listed provinces and, even then, to varying degrees of *stringency* determined by the executive branch of the federal government.[164] This violates the principle that a national tax must be co-extensive within the nation and extended to all elements subject to that tax within the nation.

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[159] Hogg at 14-8; Saskatchewan Reference at para 356.
[160] Saskatchewan Reference at para 372.
[161] *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 DLR (4th) 346 at paras 48-61 (CanLII) (ON SC).
[162] Saskatchewan Reference at para 364.
[163] Saskatchewan Reference at para 365.
[164] Saskatchewan Reference, para 384.

125. In light of the foregoing, Saskatchewan submits that Part 1 of the *GGPPA* is unconstitutional on the alternative finding that it is a federal tax.

PART IV - COSTS

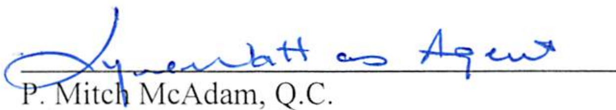
126. Saskatchewan is not seeking costs of this appeal.

PART V - ORDERS SOUGHT

127. Saskatchewan submits that the appeal should be allowed and the Court should provide an advisory opinion to the Lieutenant Governor in Council of Saskatchewan that the *GGPPA* is unconstitutional in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Regina, Saskatchewan, this 16th day of October, 2019.



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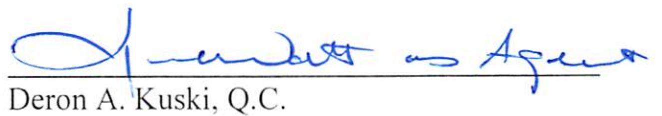

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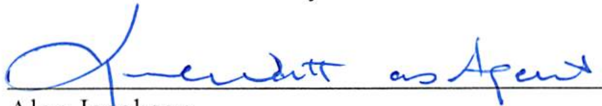

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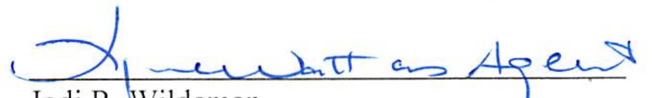

Jodi R. Wildeman
Counsel for the Attorney General of Saskatchewan

PART VI - SUBMISSIONS ON CASE SENSITIVITY

128. There are no sensitivity issues associated with this appeal.

PART VII - TABLE OF AUTHORITIES AND LEGISLATION

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