In the Court of Appeal of Alberta

Citation: Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74

Date: 20200224
Docket: 1903-0157-AC
Registry: Edmonton

In the Matter of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c. J-2, s. 26

Corrected judgment: A corrigendum was issued on March 25, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Elizabeth Hughes
The Honourable Mr. Justice Kevin Feehan

Opinion of the Honourable Chief Justice Fraser,
the Honourable Mr. Justice Watson and
the Honourable Madam Justice Hughes

Concurred in by the Honourable Mr. Justice Wakeling

Dissenting Opinion of the Honourable Mr. Justice Feehan

Reference by the Lieutenant Governor in Council
Order in Council 112/2019
Dated/Filed the 20th day of June, 2019

TABLE OF CONTENTS

Opinion

I. Introduction

[1] Calls to action to save the planet we all share evoke strong emotions. And properly so. The dangers of climate change are undoubted as are the risks flowing from failure to meet the essential challenge. Equally, it is undisputed that greenhouse gas emissions caused by people (GHG emissions) are a cause of climate change. None of these forces have passed judges by. The question the Lieutenant Governor in Council referred to this Court though – is the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 (*Act*) unconstitutional in whole or in part – is not a referendum on the phenomenon of climate change.[1] Nor is it about the undisputed need for governments throughout the world to move quickly to reduce GHG emissions, including through changes in societal behaviour. The federal government is not the only government in this country committed to immediate action to meet this compelling need. Without exception, every provincial government is too.[2]

[2] Nor is this Reference about which level of government might be better suited to address climate change or GHG emissions. Or whether a uniform approach is desirable. Or who has the best policies. Or what are the best policies. Or who could do more to reduce GHG emissions in the world. This Court cannot compare causes with causes, means with means, provinces with provinces or nations with nations in the global struggle against climate change. But what it can do is offer our opinion on the constitutionality of the *Act* under Canada's federal state.

[3] Greenhouse gases (GHGs) in quantity have been part of our atmosphere since the dawn of mankind. Every human and animal activity is a source of GHGs. GHG emissions have picked up pace since the industrial revolution and the rapid increases in the world's population. GHG emissions result from virtually every aspect of individuals' daily lives, work, social and personal, from how many children they have to what they eat and how much they consume; what car they drive and how far they travel for work and pleasure; how large their home is and what temperature they choose to live at; what kind of furnace, appliances and lighting they have; and on and on.

[4] Equally, GHG emissions follow from virtually every aspect of provincial industrial, economic and municipal activity too, including construction, transportation, roadways, schools, hospitals, heating and cooling of buildings, generation of electrical power, farming, mining and development of natural resources.

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[1] The Order in Council filed June 20, 2019 was issued under the *Judicature Act*, RSA 2000 c J-2, s 26.

[2] Hence the unanimous agreement by all First Ministers on March 3, 2016 to the *Vancouver Declaration on Clean Growth and Climate Change* [*Vancouver Declaration*]. First Ministers committed to implementing greenhouse gases mitigation policies to meet or exceed Canada's 2030 target of a 30% reduction below 2005 levels of emissions.

[5] To answer the question the Reference poses, we must address a core element of our constitutional architecture – that is the division of powers between the federal Parliament and the provincial Legislatures. What is fundamental to Canada's constitutional democracy and our continued existence is federalism.[3] And what is essential to federalism is preservation of the carefully calibrated division of powers between the federal and provincial governments.

[6] The reasons for the division of powers can be found in the history leading up to Confederation.[4] The three provinces that originally entered Confederation – the Province of Canada (consisting of Ontario and Quebec)[5], New Brunswick and Nova Scotia – did so on the basis that Canada would be a federation, not a unitary state where ultimate power rests with a central government.

[7] Federalism, including the division of powers, reflects the balance the Fathers of Confederation chose between diversity and unity: ***Reference re Secession of Quebec***, [1998] 2 SCR 217 at para 43 [***Secession Reference***].[6] It is not "just a second best alternative to a legislative union".[7] It was the preferred choice. Another objective of federalism was, and still is, to promote democratic participation by reserving meaningful powers to the local or regional level: ***Canadian Western Bank v Alberta***, 2007 SCC 22 at para 22, [2007] 2 SCR 3 [***Western Bank***]. Thus, under the Canadian Constitution, the provinces possess exclusive powers in certain areas. And deliberately so.

[8] In particular, Quebec had been understandably concerned to protect its jurisdiction especially over property and civil rights. It recognized its minority position and vulnerability to the consequences of majority rule. It was determined that control over property and civil rights, which typically goes to a central government, be vested in the provinces. The other provinces agreed. Thus, under Canada's Constitution, power over property and civil rights – the Crown jewel of legislative powers – was vested in the provinces and not the central government. That is why

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[3] The Constitution of Canada includes, but is not limited to, the *Constitution Act, 1867* (UK), 30 & 31Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, and the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11. It also includes written and unwritten conventions principles, values and norms: ***Reference re Secession of Quebec***, [1998] 2 SCR 217 at para 32 [***Secession Reference***].

[4] For an excellent historical review of the allocation of powers, see K Lysyk, "Constitutional Reform and the Introductory Clause of s. 91" (1979) 57:3 Can Bar Rev 531 [Lysyk]. See also WR Lederman, "Unity and Diversity in Canadian Federalism" (1975) 53:3 Can Bar Rev 597 [Lederman]; and WH McConnell, *A Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977) at 1.

[5] On creation of the Province of Canada, Upper Canada (which became Ontario on Confederation) had been known as Canada West and Lower Canada (which became Quebec on Confederation) had been known as Canada East.

[6] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2017, release 1) at 5-14 [Hogg].

[7] Hogg at 5-14.

the list of powers assigned to the federal government under s 91(1) of the *Constitution Act, 1867*[8] is much longer than the list assigned exclusively to the provinces. Had many of these not been carved out, they would have been subsumed under the provinces' exclusive power over property and civil rights.[9]

[9] Exclusive provincial powers include not only those originally allocated under s 92 of the *Constitution Act, 1867* but also those allocated to the provinces under s 92A of the *Constitution Act, 1982* with respect to non-renewable natural resources in their province. Section 92A was added to the Constitution at repatriation in 1982 following extensive negotiations between the federal government, on the one hand, and Saskatchewan and Alberta, as the lead negotiators for the provinces, on the other.

[10] In addition, provincial powers include the proprietary powers flowing from another Crown jewel under our federal state, namely the provinces' ownership of their natural resources under s 109 of the *Constitution Act, 1867*. These are distinct from the provinces' legislative powers under the division of powers. Hence, the provinces' proprietary rights as owners of their natural resources must also be taken into account in assessing the constitutionality of the *Act*.[10]

[11] Time has not eroded the provinces' rights to have the powers assigned to them under our Constitution sedulously respected.[11] While some may view the division of powers as anachronistic or a barrier to uniform action in service of a common good, the division of powers remains key to our federal state. It is part of the fabric of Canada itself. The federal and provincial governments are co-equals, each level of government being supreme within its sphere.[12] The federal government is not the parent; and the provincial governments are not its children.[13]

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[8] (UK), 30 & 31Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[9] Hogg at 17-4, citing Lederman at 603, notes that "the federal list was not just superfluous grammatical prudence, it was compelled by historical necessity [the broad scope of "property and civil rights"] and has independent standing".

[10] See ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 25, [2014] 3 SCR 31 (... "particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole").

[11] The Supreme Court's comments about the federal trade and commerce power in ***Desgagnés Transport Inc. v Wärtsilä Canada Inc.***, 2019 SCC 58 at para 57, [2019] SCJ No 58 (QL) [***Wärtsilä***] apply equally to the division of powers: "An overly broad interpretation of the federal power over 'trade and commerce' could entirely subsume – and potentially displace through paramountcy – the provinces' legislative authority over property and civil rights and over matters of a purely local nature .... The balance between federal and provincial powers would inevitably be upset".

[12] ***Secession Reference*** at para 58; ***Liquidators of the Maritime Bank of Canada v New Brunswick***, [1892] AC 437 at 441-442 (PC) (Can): "The object of the [*Constitution Act, 1867*] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."

[13] See ***Alberta (Attorney General) v Moloney***, 2015 SCC 51 at para 15, [2015] 3 SCR 327: "Legislative powers are exclusive, and one government is not subordinate to the other...".

[12] In resolving division of power disputes, the courts must respect the structure of government that the Constitution seeks to implement: ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 26, [2014] 3 SCR 31. Provincial powers ought not to be swept aside irrespective of how laudable or expedient a federal objective may be.[14] Accordingly, it remains the high duty of the courts to ensure that Parliament does not overstep the limits of its constitutional mandate.[15]

[13] The *Act*, as currently worded, mandates minimum national standards for pricing (often referred to as carbon pricing) of commodities and activities that produce GHG emissions. The theory, according to the *Act*'s Preamble, is that layering additional costs on those commodities and activities – costs to be borne largely by end users – should change behaviour, leading to a reduction in GHG emissions and, in turn, mitigation of climate change. These minimum standards come into force, so the *Act* says, only if provincial standards fall below benchmarks incorporated in the contested federal law. Those benchmarks are not frozen.

[14] Part 1 of the *Act* sets a levy on various fuels. Part 2 provides for output-based limits on large industrial emitters – oil sands and mines, for example. They are required to reduce their GHG emissions or pay under the prescribed output-based pricing system (OBPS) if those emissions exceed certain limits. For Alberta, the combined effect of Parts 1 and 2 covers essentially the entire oil and gas industry from small wells up to and including large plants.

[15] Before this Court, Canada defended the constitutionality of the *Act* on one basis only, namely that it falls within the national concern doctrine of Parliament's peace, order and good government (POGG) power. That power, found in the opening paragraph of s 91(1) of the *Constitution Act, 1867*, allows Parliament "to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Canada did not contend that the *Act* fell within either of the other two branches of POGG – the gap branch (which covers new subject matters)[16] or the "emergency" branch.[17]

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[14] See ***Reference re Securities Act***, 2011 SCC 66 at para 62, [2011] 3 SCR 837 [***First Securities Reference***].

[15] See ***Re BC Motor Vehicle Act***, [1985] 2 SCR 486 at 496-497 quoting Dickson J in ***Amax Potash Ltd. v. Government of Saskatchewan***, [1977] 2 SCR 576 at 590: "The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power".

[16] Hogg at 17-5 to 17-7. See eg ***Citizens Insurance Company of Canada v Parsons*** (1881), 7 App Cas 96 (PC); ***Reference Re: Offshore Mineral Rights***, [1967] SCR 792. We recognize that in ***Re Anti-Inflation Act***, [1976] 2 SCR 373 [***Anti-Inflation***], Beetz J chose to include "new matters" as one part of the national concern doctrine, as did Le Dain J in ***R v Crown Zellerbach Canada Ltd***, [1988] 1 SCR 401 [***Crown Zellerbach***]. Though Canada did not argue that the *Act* was valid as a "new matter", we address below why it does not qualify on this basis regardless.

[17] As noted in Hogg at 17-5, "[t]he p.o.g.g. power has been the trunk from which three branches of legislative power have grown: (1) the "gap" branch; (2) the "national concern" branch; and (3) the "emergency" branch".

[16] To put the judicially-created national concern doctrine in its proper historical and legal context, in the entire 153 year history of this country, there have only been three instances in which the Supreme Court of Canada has relied on this doctrine alone to expand the powers of the federal government: ***Johannesson v Municipality of West St. Paul***, [1952] 1 SCR 292 [***Johannesson***] (aeronautics); ***Munro v National Capital Commission***, [1966] SCR 663 [***Munro***] (National Capital Region); and ***R v Crown Zellerbach Canada Ltd***, [1988] 1 SCR 401 [***Crown Zellerbach***] (marine pollution).[18] And there have only been three instances in which the Privy Council did so during the period it was the final appeal court for Canada, all involving temperance legislation: ***Russell v The Queen*** (1882), 7 App Cas 829 [***Russell***]; ***Attorney-General for Ontario v Attorney-General for the Dominion***, [1896] AC 348 [***AG Ontario***]; and ***Attorney-General for Ontario v Canada Temperance Federation***, [1946] AC 193 [***Temperance Federation***]. During that 80 year period, the Privy Council's approach to this doctrine went from seemingly oblivious creation in ***Russell*** to reserved acceptance in ***AG Ontario*** to outright rejection for decades[19] before settling on resigned recognition in ***Temperance Federation***.

[17] That there have only been six such instances since Confederation is telling.[20] For generations, courts have been highly reluctant to use the national concern doctrine to create new judge-made heads of federal power.

[18] The deep concern amongst Canadians about the worldwide threat of climate change and its calamitous potential are not lost on this Court. We also recognize the appeal of using a means such as minimum national standards for GHG emissions to address climate change. And since a number of provinces agree – at least for now – on the minimum standards, it is tempting to conclude that this should translate into a "national concern" constitutionally. After all, are we not all expected to do our part?

[19] But courts do not determine constitutionality based on the preference of a majority of provinces or Canadians. Majoritarianism is not superior to the Constitution. Indeed, Canada's Constitution and the Rule of Law are protections against majoritarianism.

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[18] *Hogg* at 17-12 notes that a fourth decision, ***Ontario Hydro v Ontario (Labour Relations Board)***, [1993] 3 SCR 327 [***Ontario Hydro***] (atomic energy), could be added to this list though the national concern doctrine was not the sole ground for that decision since the federal declaratory power in s 92(10)(c) was also considered a basis for jurisdiction. In ***R v Malmo-Levine***, 2003 SCC 74 at paras 67-72, [2003] 3 SCR 571 [***Malmo-Levine***], the Supreme Court overruled ***R v Hauser***, [1979] 1 SCR 984 which held that the *Narcotic Control Act* came within the national concern doctrine of POGG: see Hogg at 17-19.

[19] ***Attorney General for Canada v Attorney General for Alberta***, [1916] 1 AC 588; ***Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919***, [1922] 1 AC 191 (PC) [***Board of Commerce***]; ***Toronto Electric Commissioners v Snider***, [1925] AC 396 (PC); ***Reference re Natural Products Marketing Act***, [1936] SCR 398 at 422-426, aff'd [1937] AC 377 at 387; ***Reference re Unemployment Insurance Act***, [1937] AC 355 (PC).

[20] At least two can be explained as falling within the gap branch of the POGG power, that is ***Johannesson*** and ***Munro***.

[20] The *Act* does not fall under any heads of power assigned to Parliament by the *Constitution Act, 1867* or any other enactment. Rather, the regulation of GHG emissions and any variations on this matter fall within heads of powers assigned to the provinces under ss 92A, 92(2), 92(10), 92(13) and also under 109 of the Constitution. We are speaking here of GHG emissions within provincial jurisdiction. This excludes GHG emissions from, for example, a federal work or undertaking which falls under the federal government's jurisdiction: 92(10)(a); ***Westcoast Energy Inc v Canada (National Energy Board)***, [1998] 1 SCR 322 at paras 43-45.

[21] For reasons explained in detail below, the regulation of GHG emissions or any variation on this theme does not qualify for inclusion as a federal head of power under the national concern doctrine. Assigning this *Act* or a class of laws of this nature to Parliament would forever alter the constitutional balance that exists between the heads of power allotted to Parliament and the provincial Legislatures in the federal Canadian state. None of the cases in which the national concern doctrine has been successfully invoked contemplates a wholesale takeover of a collection of clear provincial jurisdictions and rights. But this *Act* does. There is no principled basis to judicially expand the heads of federal powers to concentrate such extensive law-making powers in Parliament. We take no issue with the federal government's virtuous motives for the *Act*; we are assessing only its constitutionality under division of powers.

[22] The *Act* is a constitutional Trojan horse. Buried within it are wide ranging discretionary powers the federal government has reserved unto itself. Their final shape, substance and outer limits have not yet been revealed. But that in no way diminishes the true substance of what this *Act* would effectively accomplish were its validity upheld. Almost every aspect of the provinces' development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. It would substantially override ss 92A, 92(13) and 109 of the Constitution.

[23] Thus, in answer to the question posed by the Lieutenant Governor in Council, we have concluded that Parts 1 and 2 of the *Act* are unconstitutional in their entirety.

[24] We did not receive any submissions on the constitutionality of Parts 3 and 4 and therefore decline to express any opinion on those Parts.

II. The Positions of the Parties

[25] Alberta contended that the *Act* was wholly unconstitutional and does not fall within the national concern branch of Parliament's POGG power. Ontario, New Brunswick, Saskatchewan, Saskatchewan Power Corporation and SaskEnergy Incorporated all intervened in support of Alberta's position. In short, in their view, the "matter" of the *Act*, what is often called its "pith and substance", is the "regulation of GHG emissions" and to give the federal government exclusive authority over such a matter under the national concern doctrine would unduly intrude into the provinces' jurisdiction to regulate their own natural resources. Alberta stressed, however, that the result would be the same even if the *Act* were characterized more narrowly.

[26] Saskatchewan also reiterated the position it took in the ***Saskatchewan Reference*** that the *Act* involves a "tax" under s 91(3) that Canada has impermissibly delegated to the executive branch of government in contravention of s 53. The intervenor Canadian Taxpayers Federation supported this view.

[27] In response, Canada maintained it has the authority to pass the *Act* under the "national concern" doctrine. Before this Court, it contended that the "matter" of the *Act* is "the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions". Canada claimed there is a difference between the matter of the *Act* and the matter for purposes of applying the national concern doctrine. It characterized the "matter" of national concern as "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions".

[28] British Columbia, which intervened in support of Canada's position that the *Act* is constitutional, disagreed with Canada on two points. It contended that the "matter" of the *Act* and the "matter" of national concern are one and the same. It also advocated for a narrower matter synonymous with what it contended is the *Act*'s pith and substance, namely "establishing minimum national pricing standards to allocate part of Canada's overall targets for greenhouse gas emissions reduction".

[29] Climate Justice Saskatoon et al, Athabasca Chipewyan First Nation (ACFN), Assembly of First Nations (AFN) and Canadian Public Health Association (CPHA) all intervened in supporting Canada's ability to enact the *Act* under the national concern doctrine. The ACFN and AFN also stressed the need to read ss 91 and 92 of the *Constitution Act, 1867* in light of s 35 of the *Constitution Act, 1982*.

[30] The CPHA also argued the *Act* is valid on the basis of Parliament's criminal law power under s 91(27). The International Emissions Trading Association supported the constitutionality of the *Act* on this basis and on the basis of Parliament's trade and commerce power under s 91(2). Finally, the David Suzuki Foundation argued the *Act* is justified under the "emergency" branch of Canada's POGG power.

III. Overview of the *Greenhouse Gas Pollution Pricing Act*

[31] The *Act* deals with 33 different greenhouse gases of which carbon dioxide (CO_2) is by far the most prevalent. Other GHGs include methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons and nitrogen trifluoride (NF_3). Most of these gases contain carbon; some do not. Accordingly, "carbon pricing" is somewhat of a misnomer. While the phrase "GHG pricing" better reflects what the *Act* actually prices, for convenience, we use these terms interchangeably. Carbon dioxide's prevalence means that the *Act* uses CO_2 as the baseline for purposes of pricing. Thus, the price on all GHGs is converted into a CO_2 "equivalent" (also expressed as CO_2e).

[32] Sections of the *Act* confer certain decision-making authority on the Governor in Council: see s 166, ss 189-195, s 198, s 263.[21] Others confer other decision-making authority on the Minister of National Revenue.[22] Some Minister of National Revenue authority appears to be delegated to the Commissioner of Revenue.[23] Other authority rests with the Minister of Environment, now called the Minister of Environment and Climate Change.[24] There is also reference to the Minister of Finance and the Minister of Public Safety and Emergency Preparedness.[25] Other officials are contemplated by the *Act* as well. Given this spread of discretion, this Opinion uses the term "Executive" in reference to one or more of these.

[33] There are two main Parts to the *Act* relating to GHG pricing. Part 1 establishes a "fuel charge" on 22 GHG producing fuels (e.g., gasoline, natural gas, propane), that is various transport and heating fuels sold and consumed in listed provinces. This is characterized as a demand side charge because it is expected the fuel charges will be passed on to end users, that is consumers.

[34] Part 2 establishes an OBPS for industrial GHG emitters. The Minister of Environment evaluates the sectors of the provincial economy and sets different output-based standards for different industries along with different stringency levels for different industries, all of which are subject to change at the Governor in Council's discretion. Those whose GHG emissions are priced under Part 2 are exempt from paying the fuel charge under Part 1.

[35] Each Part only applies to a "listed province".[26] The *Act* allows the Governor in Council to "list" a province in respect of Part 1 or Part 2 or both. This feature of the *Act* is sometimes referred to as the "backstop" because the federal standards are only imposed in a given province if the stringency of the province's pricing mechanism for GHG emissions under either Part is not satisfactory to the federal government or if the province does not have a carbon pricing plan: ss 166(2)(3), 189(1)(2). In that event, the "backstop" applies and the federal government will impose either the fuel charge set out in Part 1 or the OBPS set out in Part 2 or both on the residents, businesses and industries in that province. If the federal government agrees that the pricing mechanisms in a province meet the federal minimum standards for price stringency under Part 1

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[21] This regulatory authority is extremely important since regulations made under an enactment benefit from a "presumption of validity": see eg ***Katz Group Canada Inc v Ontario (Health and Long-Term Care)***, 2013 SCC 64 at para 25, [2013] 3 SCR 810. The inquiry into the *vires* of a regulation under its enabling enactment "does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice": para 27. "They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose": para 28. See also ***West Fraser Mills Ltd v British Columbia (Workers Compensation Appeal Tribunal)***, 2018 SCC 22 at para 12, [2018] 1 SCR 635.

[22] See definition in s 1 for Part 1 and many references to "Minister" in that part of the *Act*, in particular in s 165.

[23] Except for ss 95, 96 and 164.

[24] See ss 5, 57 and importantly for Part 2, in ss 169, 270 and other locations.

[25] Section 164(6).

[26] As defined in Part 1 of Schedule 1.

or 2, then the province will be left to collect the charges in respect of that Part or Parts and the federal government will stand back.

[36] The fuel charge under Part 1 is paid by a "registered distributor". This includes those who produce applicable fuel in a listed province as well as those who process, import, deliver and use those fuels. The rate for the years 2018-2022 is set out in Schedule 4, beginning at $10 per tonne of CO_2 equivalent in 2018 and increasing $10 per tonne per year to $50 per tonne in 2022. While the same CO_2 equivalency rate applies to all applicable fuels (e.g. $20 per tonne in 2019), each fuel type is assigned its own amount per unit (e.g. $0.0442/L on gasoline in 2019 as opposed to $0.0310/L for propane) given the differing amounts of CO_2 produced.

[37] Part 2 sets individual limits for covered facilities with charges for excesses of those limits. The CO_2 equivalency rate applies equally to the OBPS under this Part. "Covered facilities" are required to calculate and report their GHG emissions. A "covered facility" is one that emits "a quantity of GHGs equal to 50 kt [kilotons] or more of CO_2e" as part of certain prescribed activities: *Output-Based Pricing System Regulations*, SOR/2019-266, s 8 [*OBPS Regs*]. Compensation must be provided for all GHG emissions in excess of the prescribed limit. This can be done by paying an "excess emissions charge" or remitting "compliance units" or credits: s 174.[27]

[38] In the case of both the fuel levy under Part 1 and the OBPS under Part 2, the *Act* presently contemplates that all revenues collected will be distributed back to the province from which the revenue originated. However, the *Act* also provides for discretion as to whether and when it is distributed to the province itself, prescribed persons, or a combination of both: ss 165(2), 188(1).[28]

[39] Since Alberta no longer has a carbon tax,[29] it is subject to Part 1 of the *Act* as of January 1, 2020. Alberta is not presently subject to Part 2 of the *Act* since the Executive has accepted Alberta's current OBPS – its Technology Innovation and Emissions Reduction (TIER) system – as being sufficiently stringent with regards to large emitters. Facilities subject to the TIER system must reduce their emissions by 10% in 2020, and then by an additional 1% each year after 2020. Facilities which fail to meet their annual reduction targets must pay a charge of $30 per tonne in CO_2 equivalent to the province or reimburse the province through an equivalent amount in credits or offsets, depending on the circumstances. Emitters which fall below their emissions maximum will be rewarded with credits equivalent to $30 per tonne.

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[27] Emissions by a covered facility are calculated by reducing from the total quantity of emissions produced the amount of CO_2 captured and stored in accordance with certain requirements: *OBPS Regs*, s 11(1)(d), 35.

[28] This aspect of the *Act* is discussed further below.

[29] *An Act to Repeal the Carbon Tax*, SA 2019, c 1.

IV. Relevant Provisions of the Constitution

A. *Constitution Act, 1867*

[40] The key provisions of the *Constitution Act, 1867*, 30 & 31 Vict., c 3 (UK) follow:

1. Federal Legislative Powers

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters *not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, –

> 2. The regulation of Trade and Commerce.
> ...
>
> 3. The raising of Money by any Mode or System of Taxation.
> ...
>
> 27. The Criminal Law... .
> ....
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

...

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [Emphasis added]

2. Provincial Legislative Powers

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ...

> 5. The Management and Sale of the Public lands belonging to the Province ...

10. Local Works and Undertakings ....
...

13. Property and Civil Rights in the Province
...

16. Generally all Matters of a merely local or private Nature in the Province.

B. Key Provisions of the *Constitution Act, 1982*

1. Additional Provincial Powers

92A. (1) In each province, the legislature may exclusively make laws in relation to...

(b) *development*, conservation and *management* of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. [Emphasis added]

...

(6) Existing powers or rights – Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

2. Amendments to the Constitution

38. (1) An amendment to the Constitution of Canada may be made by ...

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, ... at least fifty per cent of the population of all the provinces.

(3) An amendment [that derogates from the legislative powers, proprietary rights or any other rights or privileges of the legislature or government of a province] shall not have effect in a province the legislative assembly of which has expressed its dissent therefrom by resolution by a majority of its members ....

V. History of Prairie Provinces' Ownership of Natural Resources and Section 92A

[41] Section 92A is not the only power the provinces have with respect to their natural resources. To this must be added the provinces' proprietary rights under s 109 of the Constitution as owners of those resources. To assist in interpreting the content and scope of the provinces' powers, both legislative and proprietary, it is necessary to step back into history.

A. Prairie Provinces and Ownership of Their Natural Resources – A Long Time Coming

[42] Unlike other provinces, for decades following their entering into Confederation, the prairie provinces were denied ownership of the natural resources in their provinces. When Alberta became a province in 1905, the *Alberta Act*, 4 & 5 Edw. VII, c 3, s 21 continued to vest all Crown lands, including mines and minerals, in the federal Crown. Saskatchewan was not granted ownership of its resources either when it became a province that same year. Nor was Manitoba when it entered Confederation in 1870.

[43] This finally changed with the *Natural Resources Acts* passed in 1930 by Parliament and the legislatures in each of Alberta, Saskatchewan and Manitoba.[30] These *Natural Resources Acts* incorporated Memorandums of Agreement made between the Dominion of Canada and each province dated December 14, 1929.

[44] The Agreements and each of the *Natural Resources Acts* explicitly recognized both as a recital and in their operative provisions that the prairie provinces had been in a position of inequality vis à vis other provinces because they did not own their natural resources. The Agreements provided that the Dominion of Canada would transfer all Crown lands, mines and minerals in each province to that province so that they might be in the same position as the original provinces of Confederation. That confirmation of equality is in the operative provisions of each *Natural Resources Act*, and not just its recitals.

[45] The British Parliament then passed the *British North America Act, 1930*, 20-21 Geo. V, c 26, and made all their provisions law. As a consequence, that Imperial constitutional law entrenched the prairie provinces' ownership of their natural resources in the Constitution, thereby overriding any contrary federal or provincial legislation.[31] This put the prairie provinces in the

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[30] See *Alberta Natural Resources Act*, SC 1930, c 3; *Manitoba Natural Resources Act*, SC 1930, c 29 and *Saskatchewan Natural Resources Act*, SC 1930, c 41. On admission to Confederation, British Columbia surrendered to the federal government certain portions of its natural resources and Crown lands: *British Columbia Terms of Union* (1871), clause 10. It also concluded a Natural Resources Transfer Agreement with the federal government in December, 1929 which was then incorporated in the *Railway Belt and Peace River Block Act*, SC 1930, c 37.

[31] Newfoundland was also placed in the same position by the *Newfoundland Act*, 1949 12 & 13 Geo. V1, c 22 (UK). However, the Terms of Union did not provide for the province to retain ownership of the oil and gas resources lying offshore in what would, absent Union, have arguably belonged to Newfoundland. It was not until the Atlantic Accord

same position as the provinces (Ontario, Quebec, Nova Scotia and New Brunswick) given ownership of their natural resources at Confederation under s 109 of the *British North America Act, 1867*.[32]

[46] This new right of ownership carried with it many powers for Alberta, including limiting production for conservation purposes.[33] However, these ownership rights were still subject to laws enacted by Parliament under its heads of power. This could negatively affect property owned by a province without for that reason alone being rendered unconstitutional.[34] Accordingly, at that stage, ownership rights alone were often considered insufficient to determine jurisdiction over a matter.[35]

[47] That said, ownership of natural resources brought significant legislative power to the provinces who could regulate their Crown-owned resources under s 109 by virtue of s 92(5) of the *Constitution Act, 1867*. This section grants provincial jurisdiction over the management of public lands, including mines and minerals. Ownership also provided provincial revenue in the form of royalties from Crown leases. As for freehold leases, provinces possessed some legislative authority to regulate non-Crown owned resources by virtue of s 92(13) and s 92(16).

[48] This provided Alberta with security over the development of its natural resources for over 40 years (1930-1973). Once large reserves were discovered in Leduc in 1947, the latter period saw a rapid expansion of oil production.

B. Federal Government Interventions Led to Pressures for Constitutional Reform

[49] The federal government instituted a number of comprehensive energy policies over the years, including a National Oil Policy in 1961 that divided the country's oil source between east (foreign) and west (domestic). However, it was not until the 1973 OPEC embargo sharply

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of February 11, 1985 that Canada and Newfoundland and Labrador reached an agreement on the joint management of the province's offshore oil and gas resources and the sharing of revenues from exploitation of those resources.

[32] Gerald V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 34-36 [La Forest]; ***Re Exported Natural Gas Tax***, [1982] 1 SCR 1004 at 1055-1056 [***Natural Gas Tax***].

[33] ***Spooner Oils Ltd v Turner Valley Gas Conservation***, [1933] SCR 629.

[34] La Forest at 147-148; ***Reference re Waters and Water-Powers***, [1929] SCR 200 at 212, 219; ***Attorney General for Canada v Attorney General for Ontario***, [1898] AC 700 at 712-713 (PC); ***Attorney General of Quebec v Nipissing Central Railway***, [1926] AC 715 at 723-724 (PC).

[35] See for example Dale Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada" (1973) 23 UTLJ 54 at 60.

increased world oil prices that federal government actions raised provincial concerns, leading to escalating actions on both sides.[36]

[50] Beginning in 1973, the federal government enacted a series of measures which affected provinces' oil and gas resources including an oil export tax, a national market for oil and the *Petroleum Administration Act*, SC 1974-75-76, c 47 [*Petroleum Act*]. The *Petroleum Act* gave the federal government authority to set oil and gas prices unilaterally.[37] Collectively, these actions directly and adversely affected the western provinces.[38]

[51] Provincial concerns were further heightened by litigation in Saskatchewan that culminated in two Supreme Court decisions, ***Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al***, [1978] 2 SCR 545 [***CIGOL***] and ***Central Canada Potash Co Ltd et al v Government of Saskatchewan***, [1979] 1 SCR 42 [***Potash***]: see J. Peter Meekison & Roy J. Romanow, "Western Advocacy and Section 92A of the Constitution" in J. Peter Meekison, Roy J. Romanow & William D. Moull, eds, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985) [Meekison & Romanow] at 3. In Saskatchewan's view, those decisions undermined the jurisdiction the provinces thought they had over natural resources.

[52] ***CIGOL*** involved Saskatchewan's attempt to capture the increased value of oil after the OPEC embargo.[39] To do so, it placed a "mineral income tax" on oil production subject to freehold leases and a "royalty surcharge" on Crown leases. However, because most of the oil was for export, the Supreme Court labelled them export taxes. That meant the province had no power to impose either. Export taxes involve interprovincial or international trade, a subject of federal jurisdiction under s 91(2). Moreover, both the royalty and income tax were characterized as an "indirect tax" which provinces are incapable of levying under s 92(2).

[53] The Supreme Court similarly struck down provincial legislation in ***Potash*** where Saskatchewan had instituted a rationing scheme to control the amount of potash produced in the province. Notwithstanding a province's general ability to control the production of its natural resources, since most of the potash was marketed outside the province, the scheme in ***Potash*** was

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[36] Susan Blackman et al, "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32:3 Alta L Rev 511 at 513-516.

[37] It also provided for the possibility of agreement between the federal and provincial governments.

[38] This history and the negotiations leading up to the inclusion of s 92A in the Constitution are fully explored in J. Peter Meekison & Roy J. Romanow, "Western Advocacy and Section 92A of the Constitution" in J. Peter Meekison, Roy J. Romanow & William D. Moull, eds, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985) at 3 [Meekison & Romanow].

[39] The Saskatchewan litigation was not principally a federal/provincial dispute, but rather a battle between a province and the private sector: Robert D. Cairns et al., "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24:2 Osgoode Hall L J 299 at 301, 308.

characterized as an impermissible intrusion on federal jurisdiction over interprovincial and international trade under s 91(2).

[54] Consequently, given this history, by as early as 1975, provincial premiers had concluded that discussions on the Constitution should include a general review of the distribution of powers and, in particular, the control of natural resources.[40] This led to a number of First Ministers' Conferences.

[55] Alberta and Saskatchewan, who led the negotiations on behalf of the provinces, sought an amendment to the Constitution to explicitly confirm and strengthen the provinces' exclusive jurisdiction to manage and control their natural resources. The desired amendments also related to: resource taxation, the federal declaratory power under s 92(10)(c), the federal emergency power under POGG and indirect taxation.

[56] In 1980, further problems arose when the federal government introduced the National Energy Program (NEP) and invoked those parts of the *Petroleum Act* enabling it to unilaterally establish prices for oil and natural gas. For years prior to this, the oil producing provinces, Alberta being the largest by far, had not been receiving world prices for their oil consumed domestically.

[57] It was the federal government's view that the rest of Canada, and not just the oil producing provinces, should benefit financially from the rapid rise in oil prices. Alberta saw it differently. So too did other western provinces.[41] As explained in Meekison & Romanow: "The NEP was seen by the three western provinces as a major assault on provincial ownership and jurisdiction over resources."[42] In 1981, Alberta and the federal government signed an oil and gas prices and revenue sharing agreement that brought the immediate dispute to an end.

[58] During this critical time frame, the federal government attempted to unilaterally repatriate the Constitution. After the Supreme Court concluded this was contrary to constitutional convention, the federal government agreed to make certain concessions to secure the provinces' agreements to repatriation.[43]

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[40] Meekison & Romanow at 10.

[41] There is a lot of background that is not possible to fully relate here. It might be noted, however, that the prairie provinces, whose economies were dependent on primary production, had suffered greatly for many years from the contemporaneous disasters of the Great Depression and the catastrophic combination of the dust bowl and crushing winters.

[42] Meekison & Romanow at 24.

[43] ***Re Resolution to amend the Constitution***, [1981] 1 SCR 753.

C. Constitutional Compromise – Resource Amendment and Opt Out Right

[59] It was against this background therefore that the federal and provincial governments finally reached a compromise regarding provincial powers over natural resources. That compromise, which was part of the repatriation package signed April 17, 1982, was the inclusion in the *Constitution Act, 1982* of s 92A (sometimes called the "*Resource Amendment*").

[60] Section 92A provides for *exclusive* provincial jurisdiction in three areas: (1) the development, conservation and management of non-renewable natural resources (s 92A(1)); (2) the export of resources from the province (s 92A(2)); and (3) taxing powers over resources (s 92A(4)).[44] Not only did s 92A clarify the scope of the provinces' proprietary rights, it clarified the provinces' legislative power over natural resources not owned by the Crown.

[61] The compromise also included another significant amendment which informs the purpose and intended scope of s 92A. That is the amending formula and opt out right under the Constitution. Alberta had insisted that provinces' *proprietary rights* to their natural resources be protected in any constitutional amending formula. Thus, the general amending formula under s 38(1) of the *Constitution Act, 1982* (requiring an agreement by at least 2/3 of the provinces with at least 50% of the Canadian population) is subject to a further limitation.

[62] That further limitation is set out in s 38(3) of the *Constitution Act, 1982*. Under s 38(3), if an amendment under the prescribed amending formula derogates from the *legislative powers*, *proprietary rights* or any other rights or privileges of a province, then under 38(3), that amendment *shall have no effect in a province that opts out of the amendment.*[45]

[63] In the view of Meekison & Romanow at 30: "[The western provinces] not only obtained a favourable amending formula, which protected provincial jurisdiction over natural resources and proprietary rights; they also managed to confirm and clarify their existing jurisdiction over natural resources". The significance of the *Resource Amendment* was noted by William D. Moull in "Natural Resources and Canadian Federalism: Reflections on a Turbulent Decade" (1987) 25:2 Osgoode Hall LJ 411 at 413 [Moull]:

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[44] The provinces did not secure a limit on the federal declaratory power. Hence, it still applies: ***Westcoast Energy Inc. v Canada (National Energy Board)***, [1998] 1 SCR 322 at paras 80-84. But in addition to the exclusive power to develop and manage their non-renewable natural resources, the provinces obtained concurrent jurisdiction in interprovincial trade of resources (subject to federal paramountcy). That gives the provinces the ability to regulate their resources without concern for effects on other provinces (though international trade remains off limits). The provinces can now impose taxes indirectly, thereby avoiding any concern a royalty will be labelled an impermissible tax.

[45] A resolution of dissent made for the purposes of s 38(3) may be revoked at any time by the legislative assembly of the province that has opted out of the amendment.

> [The Resource Amendment] was the only component of the 1982 constitutional patriation package that purported to alter the division of federal-provincial legislative powers, and it represents the first amendment to the Constitution since Confederation that has had the effect of enhancing the legislative authority of the provinces.

[64] Thus, s 92A represents a clear, deliberate negotiated amendment to the Constitution designed and intended to confirm exclusive provincial jurisdiction over the *development and management* of a province's non-renewable natural resources, electricity generation and related provincial industries. Nor can s 92A be interpreted in a constitutional vacuum. It is directly linked to another provincial power and that is the provincial opt out right under s 38(3) of the Constitution. Hence, in interpreting the scope of the national concern doctrine, these sections must figure prominently in that analysis. Moreover, courts ought to be careful not to allow the national concern doctrine to be used to sidestep the amending formula and thereby render the opt out right nugatory.

VI. International and Interprovincial Efforts to Address Climate Change

[65] What should be found to be the subject matter of the *Act*, and what motivated its passage, is informed by the history of Canada's participation in international and interprovincial efforts to address climate change. Since 1992, Canada has entered into a series of agreements on the global stage committing it to reduce its GHG emissions. Throughout this period, the federal and provincial governments have also worked together in pursuit of policies to allow Canada to meet or exceed its commitments.

A. International Efforts to Address Climate Change

[66] In 1992, Canada ratified the *United Nations Framework Convention on Climate Change* which came into force March 21, 1994.[46] There are 194 Parties to the *Convention*.[47] The Preamble states that its signatories are:

> concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse gas effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and human kind.

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[46] United Nations Treaty Framework Convention on Climate Change, 12 June 1992, 1771 UNTS (entered into force 21 March 1994) [*Convention*].

[47] Affidavit of John Moffet affirmed on September 30, 2019 and filed on October 8, 2019 [Moffet Affidavit] at para 44. Appeal Record (AR) Canada R16.

[67] The *Convention*'s ultimate objective, as set out in Article 2, is the "stabilization of greenhouse gas concentrations in the atmosphere at a level *that would prevent dangerous anthropogenic interference with the climate system*" (emphasis added). Article 7 established a "Conference of the Parties"[48] that meets annually and makes the decisions necessary to promote the effective implementation of the *Convention*.

[68] Canada committed to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouses gases ... with the aim of returning individually or jointly [greenhouse gas emissions] to their 1990 levels".[49]

[69] The third session of the Conference of the Parties took place in Kyoto in 1997. This session focused on the inadequacy of the targets in the *Convention*. Canada ratified the *Kyoto Protocol* in 2002 and committed to reducing its GHG emissions for the years 2008-2012 to an average of 6% below 1990 levels. In 2011, Canada submitted notification of its withdrawal from the *Kyoto Protocol* in 2011. Canada's GHG emissions in 2008-2012 exceeded these targets.

[70] The fifteenth session of the Conference of the Parties took place in Copenhagen in 2009. Of the 194 parties to the *Convention*, 114 agreed to the *Copenhagen Accord* which declared that "climate change is one of the greatest challenges of our time." Canada pledged to reduce its GHG emissions by 17% from its 2005 levels by 2020.[50]

[71] The twenty-first Conference of the Parties took place in December 2015 in Paris. Canada and 194 other countries committed to strengthen the global response to the threat of climate change through implementation of the *Paris Agreement*.[51] Canada ratified the *Paris Agreement* on October 5, 2016.[52] To date, it has been ratified by 179 States and by the European Union.[53] However, in November 2019, the United States submitted notification of its withdrawal effective November 2020.[54]

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[48] Alberta attended the Conference of the Parties every year between 2004-2016. Affidavit of Robert Savage sworn August 1, 2019 and filed on August 2, 2019 [Savage Affidavit] at para 133. AR Alberta A20.

[49] *Convention*, art. 4(2)(a) & (b).

[50] Moffet Affidavit at para 44. AR Canada R16.

[51] Moffet Affidavit at para 45. AR Canada R16.

[52] *Paris Agreement*, 5 October 2016, UNTS No 54113 (entered into force 4 November 2016) [*Paris Agreement*]. It did so "after extensive consultations with the provinces": Moffet Affidavit at para 50. AR Canada R18.

[53] Moffet Affidavit at para 50. AR Canada R18.

[54] United Nations Treaty Collection Depository Status of Treaties website. Reference: C.N.575.2019.TREATIES-XXVII.7.D (Depositary Notification), dated November 4, 2019.

[72] The parties to the *Paris Agreement* reconfirmed that climate change represents an urgent threat and requires broad international cooperation in order to reduce GHG emissions.[55] Under Article 2 of the *Paris Agreement*, the parties adopted a target of holding the increase in the global average temperature "well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change." Article 4 confirms the parties' aim "to reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases *in the second half of this century* ...."

[73] The *Paris Agreement* does not incorporate a specific plan for reducing global greenhouse gas emissions. Instead, Article 4(2) requires each party to prepare a "nationally determined contribution that it intends to achieve" and file it with the United Nations. Canada agreed to report and account for the progress made towards achieving by 2030 its "nationally determined contribution" of an economy-wide 30% reduction in GHG emissions below 2005 emission levels.[56]

[74] We agree with the observations of Wakeling JA on the differences between treaties with compulsory targets, treaties with less compulsory guidelines and international agreements of different sorts.

B. Federal and Provincial Efforts to Address Climate Change

[75] On March 3, 2016, the Prime Minister and all the provincial and territorial Premiers met in Vancouver and adopted the *Vancouver Declaration on Clean Growth and Climate Change* [*Vancouver Declaration*]. Canada's First Ministers committed to cooperative action to meet or exceed Canada's target under the *Paris Agreement*.[57]

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[55] *Paris Agreement*, Preamble, arts 4(1), 7(6) & (7).

[56] Canada's 2030 target under the *Paris Agreement* is currently 511 megatonnes (Mt) CO_2e. Moffet Affidavit at para 72. AR Canada R26. Canada's emissions were 732 Mt CO_2e in 2005. Expert Report of Dr. Dominique Blain, Exhibit B, *Canada, National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submissions to the United Nations Framework Convention on Climate Change) (2019)* [Blain Report]. AR Canada R1038. Canada's emissions were 726 Mt CO_2e in 2013 and predicted to rise to 815 Mt CO_2e in 2030. Moffet Affidavit at para 70. AR Canada R25. The difference between the projected 815 Mt CO_2e in 2030 and the *Paris Agreement* target of 511 Mt CO_2e is 304 Mt CO_2e. In 2005, Alberta's GHG emissions were 231 Mt CO_2e. Moffet Affidavit at para 89. AR Canada R33. This translated into a 2030 target of 161.7 Mt CO_2e. Alberta's GHG emissions in 2017 were 273 Mt CO_2e. Blain Report at para 22. AR Canada R1019.

[57] Savage Affidavit, exhibit BBBB. AR Alberta A2598-2605. The *Vancouver Declaration* displayed a cooperative approach: "We will ... [develop] a concrete plan to achieve Canada's international commitments through a pan-Canadian framework for clean growth and climate change. Together, we will leverage technology and innovation to seize the opportunity for Canada to contribute global solutions and become a leader in the global clean growth economy" (A2598).

[76] A number of policy instruments can be used to reduce GHG emissions: carbon pricing systems, regulations requiring GHG-reducing actions (such as prohibitions or emission intensity regulations), and subsidies to financially reward GHG-reducing actions (such as funding clean technologies).[58]

[77] The First Ministers established four working groups to identify options for action in four distinct areas: (1) clean technology, innovation and jobs; (2) carbon pricing mechanisms; (3) specific mitigation opportunities; and (4) adaptation and climate resilience.[59] They agreed to meet in "fall 2016 to finalize the pan-Canadian framework on clean growth and climate change, and review progress on the Canadian Energy Strategy."[60]

[78] The Mitigation Opportunities Working Group developed a list of 46 policy non-carbon pricing options. These policy options include:[61]

> **For large industrial emitters**: methane reductions, limiting emissions through abatement and sequestration technology, emission intensity regulations to drive transformative change in technology, zero routine flaring, transition to electrification;
>
> **For electricity**: emission intensity performance standards for fossil fuel-fired electricity generation, accelerated phase-out of coal-fired electricity, non-emitting portfolio standards for electricity generation, financial support to non-emitting electricity generating facilities;
>
> **For construction**: net-zero ready codes for new housing and commercial institutional buildings, improved energy efficiency for existing housing and commercial-institutional buildings, increased interjurisdictional transfers of non-emitting electricity; and

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[58] See for example Canada's Ecofiscal Commission, *Bridging the Gap: Real Options for Meeting Canada 2030 GHG Target* (November 2019). Appeal Record Alberta A2999-A3064. Canada's Ecofiscal Commission considers carbon pricing the most cost effective option for reducing GHG emissions. There are many approaches to meeting the challenges of climate change and reducing GHG emissions. See for further example "A Made-in-Manitoba Climate and Green Plan". AR Alberta A2071-A2130.

[59] Savage Affidavit, exhibit BBBB. AR Alberta A2604-2605.

[60] Savage Affidavit, exhibit BBBB. AR Alberta A2605.

[61] Savage Affidavit at para 249. Appeal Record Alberta A46-A47, exhibit DDDD. *Specific Mitigation Opportunities Working Group, Final Report*. Appeal Record Alberta A2674-2881.

> **For transportation**: vehicle emission regulations and incentives, increased availability of low-carbon fuel, changing transportation usage patterns, reducing congestion, freight efficiency standards.

[79] The Carbon Pricing Working Group reported to the federal, provincial and territorial finance ministers and the Canadian Council of Ministers of the Environment in the fall of 2016.[62] That Group's Final Report was supported by all provinces and territories.[63] It outlined available options:

> There are three main mechanisms that can be used to explicitly apply a broad-based price to carbon: carbon taxes, cap-and-trade as well as performance standards systems [output-based pricing systems].... Each carbon pricing system has advantages and disadvantages, strengths and weaknesses.[64]

[80] The Final Report did not recommend a single carbon pricing solution. Instead, it identified eight principles that "should be key considerations moving forward recognizing that there is a trade-off to be made between economic efficiency for Canada as a whole, reducing GHG emissions, and maintaining successful systems already in place in respect to rules and responsibilities of the federal, provincial and territorial governments."[65]

[81] On October 3, 2016, two days before Canada ratified the *Paris Agreement*, Prime Minister Trudeau announced the *Pan-Canadian Approach to Pricing Carbon Pollution*[66] in which Canada proposed for the first time a national "benchmark" for carbon pricing. The stated goal of the benchmark was to "ensure that carbon pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time to reduce GHG emissions at lowest cost to business and consumers and to support innovation and clean growth."[67]

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[62] Savage Affidavit, exhibit CCCC. *Working Group on Carbon Pricing Mechanisms, Final Report*. AR Alberta A2606-2672. The record does not indicate when the Final Report was completed or when it was submitted to the federal, provincial and territorial finance and environment ministers. However, the Savage Affidavit at para 250 states all working groups had submitted their final reports before October 3, 2016. AR Alberta A47.

[63] Moffet Affidavit at paras 64, 67. AR Canada R23 & R24.

[64] Savage Affidavit. AR Alberta A2620. Hybrid systems combine these different elements into a larger scheme. While cap-and-trade can take many forms, under the basic system, emitters buy allowances to emit GHG emissions. The number of allowances corresponds to the cap which can be decreased over time. Emitters with insufficient allowances to cover their GHG emissions can buy allowances.

[65] Savage Affidavit. AR Alberta A2662. The Final Report did note generally that "carbon pricing is one of the most efficient tools available to governments to incent a transition to a low carbon economy...."

[66] Moffet Affidavit, exhibit U. AR Canada R746-R748.

[67] Moffet Affidavit, exhibit U. AR Canada R747.

[82] The benchmark required that all jurisdictions have carbon pricing by 2018 and that the pricing be applied, at a minimum, to the same sources as British Columbia's existing carbon tax.[68] The benchmark also required that carbon pricing be implemented through either an explicit price-based system or a cap-and-trade system. The notion of a backstop was also introduced: if a jurisdiction did not meet the benchmark, the federal government would introduce an explicit price-based carbon pricing system in that jurisdiction.

[83] The benchmark indicated the following targets:

> For jurisdictions with an explicit price-based system, the carbon price should start at a minimum of $10 per tonne in 2018 and rise by $10 per year to $50 per tonne in 2022.
>
> Provinces with cap-and-trade need (i) a 2030 emissions reduction target equal to or greater than Canada's 30 percent reduction target; (ii) declining (more stringent) annual caps to at least 2022 that correspond, at a minimum, to the projected emissions reductions resulting from the carbon price that year in price-based systems.[69]

[84] On December 9, 2016, Canada, British Columbia, Alberta, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* [*Framework*].[70] The *Framework* is Canada's first climate change plan to include commitments from the federal, provincial and territorial governments to reduce GHG emissions.

[85] The *Framework* listed measures under four main pillars: (1) carbon pricing; (2) complementary actions to further reduce emissions; (3) measures to adapt to the impacts of climate change and build resilience; and (4) actions to accelerate innovation, support clean technology, and create jobs. On carbon pricing, it annexed the national benchmark announced October 3, 2016.

[86] Manitoba adopted the *Framework* on February 23, 2018.

[87] Saskatchewan has not adopted it. In 2017, Saskatchewan released its own climate change strategy incorporating a range of steps to address climate change. They included an output-based

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[68] *Carbon Tax Act*, SBC 2008, c 40. The BC carbon tax does not apply to sales of fuel (fuel is defined as including coal) where exported and sold to an end purchaser outside of BC: see British Columbia, Tax Bulletin MFT-CT 001, "Fuel Sellers – Motor Fuel Tax Act and Carbon Tax Act" (October 2018), p. 12, online: https://www2.gov.bc.ca/assets/gov/ taxes/sales-taxes/publications/mft-ct-001-fuel-sellers.pdf.

[69] Moffet Affidavit. AR Canada R747.

[70] Savage Affidavit, exhibit JJJJ. AR Alberta A2909-A2994. Alberta participated in the drafting of elements of the Framework, but not the Framework itself. Cross-examination on Affidavit of Robert Savage, filed 25 October 2019, p 33.

pricing system on heavy emitters and regulations to limit methane emissions in the oil and gas industry.[71]

[88] In 2017, Canada published its *Guidance on the pan-Canadian carbon Pollution pricing benchmark* and the *Supplemental benchmark guidance.*[72] Both documents confirm Canada's belief that carbon pricing is "central" to the *Framework.* The *Guidance* document states that the "federal government is committed to ensuring the provinces and territories have the flexibility to design their own policies and programs, enabling governments to move forward and to collaborate on shared priorities while respecting each jurisdiction's needs and plans."[73]

[89] In December 2017, Canada's Minister of Environment and Climate Change and Minister of Finance wrote their provincial and territorial Ministerial counterparts advising that the federal government's next step was the release, for review and comment, of draft legislation for the federal carbon pricing backstop.[74]

[90] On January 15, 2018, Canada published a draft *Greenhouse Gas Pollution Pricing Act* and a document entitled *Carbon Pricing: Regulatory Framework for the Output-based Pricing System.*[75] The stated aim of the output-based pricing system was to minimize competitiveness impacts and carbon leakage for emissions-intensive and trade-exposed industrial facilities while retaining the carbon price signal and incentive to reduce GHG emissions.[76]

[91] Ontario, Alberta and Manitoba subsequently altered their provincial carbon pricing regimes or proposals.

[92] The *Act* was introduced on March 27, 2018 and became law on June 21, 2018.

[93] Three important conclusions may be drawn from this history. First, the provinces have not resisted efforts to address climate change. Indeed, the contrary is so. Second, the purpose of the various agreements, international and domestic, has been to reduce GHG emissions and thereby mitigate climate change. Third, while carbon pricing (in its various forms) is one option to reduce GHG emissions, it is not the only one.

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[71] Government of Saskatchewan, *Prairie Resilience: A Made-in Saskatchewan Climate Change Strategy.*

[72] Moffet Affidavit, exhibit X. AR Canada R778-R783, and exhibit Y. AR Canada R785-R786.

[73] Moffet Affidavit, exhibit X. AR Canada R778.

[74] Moffet Affidavit at para 107. AR Canada R39.

[75] Moffet Affidavit, exhibit Z. AR Canada R788-R794.

[76] Moffet Affidavit. AR Canada R791. The *Carbon Pricing* document proposed that the starting percentage for all output-based standards would be 70% of the production weighted national average of emission intensity (i.e., the output-based standard would be set 30% below the production-weighted national average of emission intensity).

C. Alberta's Efforts to Address Climate Change

[94] Alberta has taken, and continues to take, steps to reduce GHG emissions.

[95] In 2002, Alberta released its first comprehensive plan to address climate change, *Albertans & Climate Change: Taking Action*,[77] one of the first such plans in Canada. Initiatives under this plan included setting a target for reducing GHG emissions and requiring large emitters in the province to report emissions, thereby allowing Alberta to measure and monitor emission trends and move towards improved management approaches.

[96] Two years later, in 2004, Alberta enacted the *Climate Change and Emissions Management Act*, SA 2003, c C-16.7 [*Climate Change Act*]. Alberta also enacted regulations thereunder requiring reporting by all industrial facilities emitting in excess of 100,000 tonnes of CO_2e per year.

[97] The data Alberta captured allowed it to enact in 2007 a regulation, the *Specified Gas Emitters Regulation*, Alta Reg 139/2007, under amendments to the *Climate Change Act*. This incentivized large emitters to reduce emissions through a GHG emissions trading system. The *Specified Gas Emitters Regulation* applied to approximately 70% of Alberta's industrial GHG emissions. It has been described as imposing "a price on carbon in Alberta that increased over time to a price that is higher than the current federal price on carbon."[78]

[98] In particular, the *Specified Gas Emitters Regulation* established a price signal to ensure industrial facilities were motivated to reduce their emissions intensity by 12% against their historical benchmark. Facilities that achieved emissions reductions greater than their target could earn emission performance credits that they could sell or use in future years. Facilities that failed to upgrade their facilities to meet their reduction target were required to purchase credits from facilities that achieved their reduction targets, purchase emission offsets from the emissions offset system that Alberta had implemented, or pay into the Climate Change and Emissions Management Fund at a rate that increased each year.[79]

[99] In 2008, Alberta issued its 2008 *Climate Change Strategy*. This *Strategy* focused on carbon capture and storage, energy efficiency and greening energy production. It also included

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[77] Savage Affidavit at para 24, AR Alberta A5. See also exhibit A, Alberta Environment, "Albertans & Climate Change: Taking Action" (October 2002). AR Alberta A53-A99.

[78] Savage Affidavit at para 36. AR Alberta A7. Savage also asserted that "[c]arbon pricing has always been part of a suite of policy options used to regulate GHG emissions in Alberta."

[79] Savage Affidavit at para 34. AR Alberta A7. The price on excess emissions was initially $15 per tonne and increased to $20 per tonne in 2016 and $30 per tonne in 2017. The facility-specific, history-based emissions reduction targets also increased over time to 20% in 2017.

incorporating in 2009 the Climate Change and Emissions Management Corporation.[80] Through this vehicle, Alberta has invested, and continues to invest, in clean technology.

[100] The mandate of this independent, not-for-profit organization is to reduce GHG emissions and adapt to climate change by supporting the discovery, development and deployment of clean technologies. It was authorized to invest funds paid into the Corporation under the *Specified Gas Emitters Regulation* for purposes of funding clean technology projects to reduce GHG emissions; supporting research, development, and deployment of transformative technology; and improving the knowledge and understanding of climate change impacts, mitigation strategies, adaptation and technological advancement.[81]

[101] According to the Climate Change and Emissions Management Corporation's 2010 annual report, total national investment in clean technology from governments and industry combined to that date was $11.75 billion. Of that amount, Alberta had contributed $6.1 billion, more than all the other provinces combined.[82]

[102] The Board of Directors of the Corporation is comprised of representatives from industry, academia, the financial sector, the environmental community and government. It continues to take revenue collected by large industrial GHG emitters and recycle it into new technologies to help industry reduce GHG emissions.[83] As of May 2019, the Corporation had provided $571 million in funding to 163 projects. By 2030, those projects are expected to result in cumulative GHG emissions reductions of 42.7 megatonnes (Mt), one megatonne being a million metric tonnes.[84] Technology investments are targeted in the following areas: reducing the GHG footprint of fossil fuel supply; increasing industrial process efficiency; biological resource optimization; and creating low-emitting electricity supply.[85]

[103] From 2008 to 2015, Alberta implemented other initiatives including the continual review of Alberta's carbon pricing under the *Specified Gas Emitters Regulation* and allowing individuals to meet their own electricity needs by generating electricity from renewable or alternative energy sources.[86]

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[80] Emission Reductions Alberta is a registered trade name of the Climate Change and Emissions Management Corporation.

[81] Savage Affidavit at paras 67-68. AR Alberta A12.

[82] Savage Affidavit at para 69. AR Alberta A12, exhibit N. *CCEMC 2010 Annual Report: Charting a Path Forward* at p 7. AR Alberta A375.

[83] Savage Affidavit at paras 70, 73. AR Alberta A12.

[84] Savage Affidavit at para 71. AR Alberta A12, exhibit O. *ERA Stewardship Report May 2019.* AR Alberta A405.

[85] Savage Affidavit at para 72. AR Alberta A12.

[86] Savage Affidavit at paras 61-62. AR Alberta A11.

[104] Beginning in 2015 and through to April 2019, Alberta's efforts were governed by its Climate Leadership Plan [*Climate Plan*] which was based on the following policies: implementing an economy wide carbon tax on GHG emissions, phasing out coal-generated electricity by 2030,[87] capping oil sands emissions and reducing methane emissions from upstream oil and gas.[88]

[105] In 2016, under the *Oil Sands Emissions Limit Act*, SA 2016, c O-7.5, Alberta capped GHG emissions for all oil sands sites combined, subject to certain exclusions, at 100 Mt of CO_2e.

[106] Alberta has historically generated a significant portion of its electricity using coal-fired electricity generation, coal being readily available in Alberta and hydro not. To phase out coal electricity generation in accordance with its *Climate Plan*, Alberta has been required to make a significant financial investment.[89] In 2016, Alberta agreed to transition payments with owners of three coal-fired generators, Capital Power Corporation, TransAlta, and Canadian Utilities. These companies own six coal-fired units expected to operate beyond 2030. They agreed to eliminate emissions from their coal-fired generating units by 2030, and Alberta agreed to make transition payments of $97 million annually from 2017 until 2030. In 2017, the present value of these payments was $1.1 billion.[90]

[107] In 2018, Alberta's coal-fired electricity generation facilities were required to pay a price of $30 per tonne on any emissions in excess of the emissions from Alberta's cleanest natural gas-fired electricity plants.[91] This helped make less emissions-intensive forms of electricity generation more competitive in the electricity market. GHG emissions from coal-fired power plants were 10 Mt CO_2e lower than 2017 levels and 18 Mt CO_2e lower than 2005 levels.[92]

[108] Further, Alberta recognized that methane emissions have a GHG impact 25 to 34 times greater than carbon dioxide over a 100 year period.[93] The largest volume of methane emissions comes from the oil and gas sector. This being so, Alberta decided that one of the most cost effective

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[87] The plan was to replace 2/3 of Alberta's coal-generated electricity with electricity from renewable sources and 1/3 with electricity from natural gas. Savage Affidavit at para 83. AR Alberta A14.

[88] Savage Affidavit at para 82. AR Alberta A13.

[89] Estimates are that, relative to 2011 to 2015 average operating levels, phasing out coal-fired power by 2030 will result in the avoidance of up to 287 Mt of GHG emissions from coal-fired power plants, and the avoidance of 373 million kilograms of nitrogen oxide and 517 million kilograms of sulfur oxides from those same plants between 2030 and 2061, when the normal end of life for Alberta's coal-fired power plants was expected. Savage Affidavit at para 84. AR Alberta A14.

[90] Savage Affidavit at para 85. AR Alberta A14.

[91] Savage Affidavit at para 87. AR Alberta A14.

[92] Savage Affidavit at para 105. AR Alberta A16.

[93] While methane is considered a "short-lived climate pollutant" because it remains in the atmosphere for a much shorter time than CO_2, a tonne of methane is estimated to have 84 times the warming power of carbon dioxide over a 20 year period. Savage Affidavit at para 106. AR Alberta A16.

ways to accelerate reductions in GHG emissions in the oil and gas sector was to reduce methane emissions. Thus, in 2018, Alberta enacted the *Methane Emissions Reduction Regulation*, Alta Reg 244/2018 [*Methane Regulation*] to reduce methane emissions 45% from 2014 levels by 2025.

[109] Alberta and Canada have both contributed to the development of the Alberta Carbon Conversion Technology Centre established in 2018.[94] Its purpose: to test and advance carbon capture, utilization and storage technologies and accelerate reductions in GHG emissions by converting captured CO_2 into commercially-viable products such as strengthened concrete, steel, and fertilizers.

[110] In 2019, Alberta repealed the demand side fuel charge that it had imposed in 2017. While Alberta asserted that this fuel charge amounted to 71% of the revenues collected through economy-wide carbon pricing in 2018-19, preliminary analysis indicated that the charge and associated programs funded by this revenue were responsible for only a small amount of estimated reductions (less than 2 Mt CO_2e).[95] Alberta stressed that this was minor compared to the approximately 29.8 Mt of reductions from the *Specified Gas Emitters Regulation* from 2007 to 2017,[96] 52.6 Mt of reductions from Alberta's emission offset program from 2007 to 2019,[97] 10 Mt of reductions from coal-fired power plants due to the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255/2017 from 2018 to 2019,[98] and 287 Mt of GHG emissions expected to be avoided between 2030 and 2061 by phasing out the use of coal in electrical plants prior to the end of their operational lives.[99]

[111] In 2019, Alberta signed a 20 year contract with Canadian Solar Inc to develop three solar farms for the purpose of generating power equal to over 50% of the Government of Alberta's annual electricity consumption. The balance of the Government's electricity needs is provided by older wind power contracts meaning that the Government of Alberta is striving to be powered by 100% renewable energy.[100]

[112] Alberta continues to invest funds in carbon capture utilization and storage. For example, Alberta contributed monies to Shell Canada's Quest Carbon Capture and Storage project. This project captures and stores about 1/3 of the CO_2 emissions from Shell's Scotford Upgrader. As of May, 2019, Shell asserted it had surpassed 4 Mt of storage of CO_2. According to Shell, Quest has

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[94] Savage Affidavit at para 60. AR Alberta A11, exhibit K. "Alberta Carbon Conversion Technology Centre Officially Opens" (May 25, 2018). AR Alberta A352-358.

[95] Savage Affidavit at para 122. AR Alberta A18.

[96] Savage Affidavit at para 38. AR Alberta A7.

[97] Savage Affidavit at para 45. AR Alberta A8.

[98] Savage Affidavit at para 105. AR Alberta A16.

[99] Savage Affidavit at para 84. AR Alberta A14.

[100] Savage Affidavit at paras 118-119. AR Alberta A18.

now stored underground the most CO_2 of any onshore carbon capture storage facility in the world with dedicated geological storage.[101]

[113] While courts do not determine constitutionality based on the wisdom or efficacy of legislative choices,[102] we have set out a number of Alberta's initiatives to demonstrate two relevant points. First, Alberta has acted, and continues to act, to reduce GHG emissions. Second, a strong linkage exists between environmental choices involving GHG emissions, on the one hand, and development and management of a province's natural resources and its economy, on the other. It would be naive to think there is no linkage between the two. This is particularly so with respect to carbon pricing. After all, the whole purpose of carbon pricing is to reduce reliance on fossil fuels.

VII. References in Other Appellate Courts

[114] This Court is the third appeal court to consider the constitutionality of the *Act*. Both Saskatchewan and Ontario referred this issue to their Courts of Appeal. In both cases, the majority of the Court held the *Act* to be constitutional in its entirety: see ***Reference re Greenhouse Gas Pollution Pricing Act***, 2019 SKCA 40, [2019] 9 WWR 377 [***Saskatchewan Reference***]; ***Reference re Greenhouse Gas Pollution Pricing Act***, 2019 ONCA 544, 436 DLR (4th) 1 [***Ontario Reference***]. Both decisions have been appealed to the Supreme Court.

A. Saskatchewan Reference

[115] Richards CJS (for the majority) rejected arguments that the *Act* could be characterized as law relating to trade and commerce, criminal law, national emergencies or the implementation of treaties.[103] But he determined that the national concern doctrine of Parliament's POGG power served as a valid constitutional basis for the *Act*:

> Parliament...[has] authority over a narrower POGG subject matter – the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a

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[101] Savage Affidavit at paras 55-56. AR Alberta A10, exhibit I. Shell Canada, News Release, "Quest CCS Facility Reaches Major Milestone: Captures and Stores Four Million Tonnes of CO_2" (23 May 2019). AR Alberta A343.

[102] ***Reference re Firearms Act (Can.)***, 2000 SCC 31 at paras 18, 57, [2000] 1 SCR 783 [***Firearms Reference***]; ***Ward v Canada (Attorney General)***, 2002 SCC 17 at paras 18, 22, 26, [2002] 1 SCR 569; ***Malmo-Levine*** at paras 5, 123, 211-212.

[103] ***Saskatchewan Reference*** at paras 165-202.

> limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area.[104]

[116] In his view, the *Act* was valid as being in pith and substance about "establishing minimum national standards of price stringency for GHG emissions".[105] In doing so, he rejected Canada's claim that it was "the cumulative dimensions of GHG emissions".[106]

[117] Richards CJS also considered whether the charges in the *Act* constituted a "tax" under s 91(3) of the Constitution such that s 53 was engaged. He concluded that both Part 1 (fuel charge) and Part 2 (OBPS) of the *Act* impose a "regulatory charge" rather than a "tax" as that term is understood in law, meaning that s 53 need not be addressed. He added that the *Act* was not in violation of s 53 even if it were engaged.

[118] In dissent, Ottenbreit and Caldwell JJA concluded that both Part 1 and Part 2 of the *Act* were invalid. Part 1 was invalid because the fuel levy constituted a "tax" that ran afoul of the requirement in s 53 that taxes be passed by Parliament rather than, as here, improperly delegated, in their view, to the executive. And while the OBPS levy was not a "tax", it was nevertheless not authorized under s 91, including the national concern branch of Parliament's POGG power.

B. Ontario Reference

[119] The majority of the Ontario Court of Appeal upheld the constitutionality of the *Act* on the basis it was a valid exercise of Parliament's power to legislate in the national concern. It found that while the environment was, broadly speaking, an area of shared constitutional responsibility, "minimum national standards to reduce GHG emissions",[107] the pith and substance of the *Act*, were of national concern.

[120] Strathy CJO, for the majority, concluded:

> The application of the "provincial inability" test leaves no doubt that establishing minimum national standards to reduce GHG emissions is a single, distinct and indivisible matter. While a province can pass laws in relation to GHGs emitted within its boundaries, its laws cannot affect GHGs emitted by polluters in other provinces –

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[104] ***Saskatchewan Reference*** at para 11.

[105] ***Saskatchewan Reference*** at para 164.

[106] ***Saskatchewan Reference*** at paras 134-138.

[107] ***Ontario Reference*** at paras 77, 124.

> emissions that cause climate change across all provinces and territories.[108]

[121] Hoy ACJO concurred in the result but characterized the pith and substance of the *Act* more narrowly as being about "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions".[109]

[122] Huscroft JA disagreed. In his view, in pith and substance, the *Act* is about regulating GHG emissions, something that could not be a matter of national concern given the provinces' own interests in combating this problem as they see fit. Accordingly, he rejected the theory that the national concern doctrine authorized federal lawmaking authority wherever there was an "intense, broadly based concern"[110] across the country. In his view, the matter of national concern that the majority had identified was too vague and capacious to properly constrain Parliament's powers.

[123] He recognized the sweeping magnitude of the *Act*'s impact on provincial heads of power:

> Plainly, the *Act* imposes charges on manufacturing, farming, mining, agriculture, and other intraprovincial economic endeavours too numerous to mention, in addition to imposing costs on consumers, both directly and indirectly, as businesses can be expected to pass on increased costs, to a greater or lesser extent – all matters that would be classified as falling under provincial law making authority over property and civil rights (s 92(13)) or matters of a local or private nature (s 92(16)).[111]

[124] Huscroft JA concluded that Parliament could not invoke the national concern doctrine and that both Parts 1 and 2 of the *Act* were invalid. He stressed that the mere fact a province could not establish a national standard did not make carbon pricing a head of power for the central government. He also recognized that carbon pricing is not the only way to reduce GHG emissions:

> There are many ways to address climate change and the provinces have ample authority to pursue them, whether alone or in partnerships with other provinces, using their powers under ss. 92(13) and (16). Put another way, nothing stops the provinces from

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[108] ***Ontario Reference*** at para 117.

[109] ***Ontario Reference*** at para 166.

[110] ***Ontario Reference*** at para 222.

[111] ***Ontario Reference*** at para 215.

> taking steps to reduce their GHG emissions, and hence the emissions of Canada as a whole...[112]

C. Section 92A and Provinces' Proprietary Rights and the Other References

[125] At this point, we note that neither appellate court considered generally the provinces' powers to regulate their natural resources and, in particular, the (1) provinces' exclusive powers to make laws relating to the development and management of non-renewable natural resources under s 92A; and (2) the provinces' proprietary rights as owners of their natural resources. It may well be these issues were not raised before those courts. The only reference in either judgment to s 92A is a short comment in the decision of Richards CJS made in a different context.[113] And neither addresses the provinces' proprietary rights.

[126] However, there are two points in this constitutional analysis at which the provinces' full panoply of powers, both legislative and proprietary, must be taken into account.

[127] First, after determining the subject matter of the challenged legislation, this Court must assess whether the subject matter falls within one of the provinces' enumerated grounds of legislative power (other than s 92(16)) or within the provinces' proprietary rights as owners of the natural resources. If it does, then, as explained below, the national concern doctrine has no application.

[128] Second, under the national concern doctrine itself, the provinces' powers vis à vis the subject matter must be placed on the analytical scale. Why? Those powers figure prominently in what is, in this context, arguably the most consequential element in the national concern doctrine. That is the subject matter's scale of impact on provincial jurisdiction and whether that is reconcilable with the fundamental distribution of legislative powers under the Constitution.

VIII. Foundational Constitutional Principles

[129] In resolving division of powers disputes, courts are guided by certain organizing principles, in particular federalism, including subsidiarity.

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[112] ***Ontario Reference*** at para 230.

[113] Saskatchewan Power and SaskEnergy had apparently argued they were immune from the *Act* by virtue of s 125 (one government cannot tax another) and s 92A. It appears that Richards CJS took this argument to be about the *Act*'s applicability, not its constitutionality. And since that was not part of the Reference, he declined to consider whether the *Act* applied to them.

A. Federalism

[130] Canada is a federal state with two levels of government: ***Secession Reference*** at para 56. Federalism is not merely an interpretive aid to a reading of our Constitution; it is a foundational feature of Canada's constitutional architecture and defining characteristic of Canada as a nation. It recognizes the autonomy of provincial governments to develop their societies within their spheres of jurisdiction: ***Secession Reference*** at para 58.

[131] Federalism has distinct advantages. It enhances efficiency by decentralizing power. And it enhances accountability to the people that governments serve. Moreover, since neither level of government has unlimited power, each serves as a check on the other. In addition, federalism encourages opportunities for innovation and new ways of dealing with old problems especially where provinces or regions face unique challenges. This permits new solutions to be tested locally or regionally first, thereby avoiding the problems invariably inherent in a one-size-fits-all solution for challenges faced by all provinces.[114] Additionally, our federal structure by its nature creates competitive incentives in the marketplace.[115]

[132] In today's interconnected world, cooperative federalism is a valued aspect of federalism. Cooperative federalism calls for the obvious – cooperation. But to be interdependent and cooperate, provincial and federal governments must first be independent. Or as constitutional scholar WR Lederman so aptly stated in "Unity and Diversity in Canadian Federalism" (1975) 53:3 Can Bar Rev 597 at 616 [Lederman]: "Suffice it to say that *before* you can successfully practice co-operative federalism, you must have in place a fundamental distribution of legislative powers and resources between the central government and the provinces" (emphasis in original). To foster that cooperation requires that the division of powers be both stable and maintained.

[133] The *Constitution Act, 1867* grants Parliament the authority to enact laws for the POGG of Canada and in relation to roughly 30 classes of laws described in ss 91, 92(10), 92A(3), 93(4), 94, 94A, 95, 101,132 and other parts of the *Constitution Act, 1867* and other enactments. It, along with the *Constitution Act, 1982*, grants the provincial Legislatures the authority to enact laws as described in ss 92, 92A, 93, 94A and 95. A law enacted by Parliament or a provincial Legislature is valid only if the maker had the power to pass it. Neither has unlimited legislative authority.

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[114] Hogg at 5-14.1.

[115] Indeed, our Constitution also specifically contemplates people seeking opportunities or just voting with their feet: see s 6 of the *Constitution Act, 1982.*

[134] The courts determine the limits of the jurisdiction of Parliament and provincial Legislatures.[116] Generally, a broad view of one level of government's law-making authority results in a corresponding diminution in the other level of government's law-making grant.[117] Thus, the courts must appreciate that an expansive interpretation of one level of government's law-making authority will have an immediate and direct impact on the scope of the other level of government's competing law-making authority. Hence the need to maintain an appropriate balance between federal and provincial heads of power: ***Reference re Firearms Act (Can.)***, 2000 SCC 31 at para 48, [2000] 1 SCR 783 [***Firearms Reference***].

[135] Admittedly, the environment and federalism are not a comfortable fit. Alexis Bélanger has highlighted this challenge in "Canadian Federalism in the Context of Combating Climate Change" (2011) 20:1 Const. Forum 21 at 22 [Bélanger]:

> Whereas the environment is a holistic concept, for its part federalism is based on the very concept of segmentation. Hence, within the Canadian framework, an added difficulty in legislating issues surrounding the environment, and more specifically climate change, arises from our perception of the environment, which is unitary and global, versus the nature of our federal structure, which advocates decentralization and the division of power.

[136] Nevertheless, understandable collective concerns about climate change do not, in themselves, justify overriding federalism. As the Supreme Court explained in ***Reference re Securities Act***, 2011 SCC 66 at para 62, [2011] 3 SCR 837 [***First Securities Reference***]:

> [N]otwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

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[116] ***First Securities Reference*** at para 55: "Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers ... That impartial arbiter is the judiciary."

[117] ***First Securities Reference*** at para 85: "In the end, the *General Motors* test is aimed at preserving the balance that lies at the heart of the principle of federalism, which demands that a federal head of power not be given such scope that it could eviscerate a provincial legislation competence."

B. Subsidiarity

[137] In recent years, subsidiarity has been recognized as an underlying principle of federalism: see Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21 at 26-28. L'Heureux-Dubé J described subsidiarity as "the proposition 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": ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)***, 2001 SCC 40 at para 3, [2001] 2 SCR 241.

[138] In ***Quebec (Attorney General) v Lacombe***, 2010 SCC 38 at para 109, [2010] 2 SCR 453 [***Lacombe***], Deschamps J (in dissent) characterized subsidiarity as "a component of our federalism, and increasingly of modern federalism elsewhere in the world". Then in ***Reference re Assisted Human Reproduction Act***, 2010 SCC 61 at para 273, [2010] 3 SCR 457 [***AHRA Reference***], LeBel and Deschamps JJ[118] suggested the principle of subsidiarity could act as an "interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power".

[139] The principle of subsidiarity also reflects the political realities of our geographically large country whose population is concentrated in certain provinces. Subsidiarity is a counterbalance to centralism and majoritarianism.[119] Those provinces with the largest populations and most Members of Parliament will often have the most substantial influence on the policies of the federal government when, as typically happens, they are responsible for the election of that government. This is reality. So too is the fact that policies chosen by the federal government are often dictated by the wishes of the majority and especially the majority in those areas responsible for their election. That too is reality. What is important to an individual province and its citizens may not be as important to the federal government.

[140] The protection for individual provinces, all of whom may find themselves on the outside looking in at one time or another, lies in the division of powers. This helps ensure that a province, no matter how small or large, is able to defend itself against those asserting the national good trumps that province's interests. As former Alberta Premier Peter Lougheed, who captured these concerns well, once said:

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[118] They wrote for four of the nine judges; a fifth who concurred in the result did not mention subsidiarity.

[119] As stated at para 66 of the ***Secession Reference***, "[n]o one majority is more or less 'legitimate' than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province."

> The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.[120]

[141] Not only is the division of powers largely consistent with the principle of subsidiarity, it has served, as noted by constitutional scholar Peter Hogg, as one of the underlying rationales for the Privy Council's broad interpretations of provincial powers: ***AHRA Reference*** at para 183, per LeBel and Deschamps JJ; Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2017, release 1) at 5-13 [Hogg]. A benefit of the principle of subsidiarity is the proximity of government to the people that government serves. This in turn invigorates confidence in the electors that their voice is heard and valued, which is vital to the rule of law itself. As an interpretive principle, therefore, subsidiarity militates strongly against erosion of provincial powers. It also illuminates the need for caution in judicially expanding federal heads of power under the national concern doctrine.[121]

C. Conclusion

[142] Thus, in determining whether the *Act* falls within the national concern doctrine, both of these principles weigh heavily in the analysis. Federalism is always at stake in any division of powers case because a judicial determination must be made of where the line is drawn as between federal and provincial legislative power. Where that line is drawn cannot shift away from the constitutional text. Rather, the courts must recognize and respect the foundational character of Canadian federalism.[122] And where a doubt arises about classification of a challenged law, the subsidiarity principle, which is an essential aspect of federalism, should weigh in favour of provincial jurisdiction.

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[120] Meekison & Romanow at 11.

[121] That was the view of LeBel and Deschamps JJ in ***AHRA Reference*** in concluding that subsidiarity "would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power" (para 273).

[122] As noted in the ***Secession Reference*** at para 32: "In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities."

IX. Division of Powers Framework

A. The Two Stages in a Division of Powers Analysis

[143] There are two stages to any division of powers analysis: (1) characterization and (2) classification: ***Desgagnés Transport Inc v Wärtsilä Canada Inc***, 2019 SCC 58 [***Wärtsilä***] at para 30; ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48 at para 86, [2018] 3 SCR 189 [***Second Securities Reference***]; ***AHRA Reference*** at para 19.

1. Characterization of the "Matter" of the Challenged Law

[144] The first stage requires that a court characterize the "matter" of the challenged law, to use the wording of ss 91 and 92. The matter is the law's "dominant or most important characteristic", "main thrust" or "essential character": ***Wärtsilä*** at para 31; ***Firearms Reference*** at paras 15-16.

[145] To characterize the "matter" is to describe its "pith and substance", a familiar phrase first articulated by Lord Watson in ***Union Colliery Co. of British Columbia v Bryden***, [1899] AC 580 (PC) at 587; see ***Quebec (Attorney General) v Canadian Owners and Pilots Association***, 2010 SCC 39 at para 17, [2010] 2 SCR 536 [***COPA***].[123] The matter should "always be characterized with precision": ***Wärtsilä*** at para 35, citing ***AHRA Reference*** at para 190, per LeBel and Deschamps JJ ("It is important to identify the pith and substance of the impugned provisions as precisely as possible").

[146] Legislation will not be *ultra vires* simply because it has incidental effects on an exclusive head of power at the other level of government: ***Wärtsilä*** at para 87; ***First Securities Reference*** at para 63; ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23 at para 37, [2016] 1 SCR 467; ***Quebec (Attorney General) v Canada (Attorney General)***, 2015 SCC 14 at para 32, [2015] 1 SCR 693 [***Quebec (AG)***]; ***Global Securities Corp v British Columbia (Securities Commission)***, 2000 SCC 21 at para 23, [2000] 1 SCR 494. The "pith and substance" analysis presumes that such incidental effects are inevitable and thus constitutionally irrelevant, even where they are of "significant practical importance", so long as they are indeed "collateral and secondary to the mandate of the enacting legislature": ***Canadian Western Bank*** at para 28.

[147] In searching for the "pith and substance" of a challenged law, a court will look at both its purpose and effects. The purpose can be gleaned from both intrinsic evidence (the legislation itself) as well as extrinsic evidence (e.g., government publications), while the effect of the law refers to

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[123] In ***Union Colliery Co. of British Columbia v Bryden***, [1899] AC 580 (PC) at 587, Lord Watson also used another phrase, the "leading feature", to describe what a court is searching for in characterizing legislation. While this phrase is more understandable to non-lawyers, and while we agree with Wakeling JA on the need for clarity, we refer to "pith and substance" given its continued prominence in the case law.

both legal effect and practical effect: ***First Securities Reference*** at paras 63-64; ***COPA*** at para 18; ***Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31 at paras 53-54, [2002] 2 SCR 146 [***Kitkatla***].

[148] Legal effect refers to "how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself": ***R v Morgentaler***, [1993] 3 SCR 463 at 482 [***Morgentaler***]. Practical effect refers to "the actual or predicted results of the legislation's operation and administration": ***Morgentaler*** at 486. In other words, in this context, what was Parliament's purpose in passing the *Act* and how does it actually impact those subject to its terms? What happens on the ground?[124]

[149] As part of this analysis, a court should also consider what the challenged law authorizes irrespective of whether discretionary steps permitted under the law have been taken. This is particularly important in cases involving the national concern doctrine of POGG. Why? Because once a *matter* is assigned to the federal government under this doctrine, that new head of power is not only *permanent*, it is also an *exclusive* power of a *plenary* nature. That effectively means the provinces have no power to legislate in a "matter" allocated to the federal government under the national concern doctrine. We say "effectively", recognizing there may be some limited room for provincial governments at the margins, but only if, and to the extent that, Parliament so permits: ***Re Anti-Inflation Act***, [1976] 2 SCR 373 at 442-444, per Beetz J [***Anti-Inflation***].

[150] This point was picked up by Le Dain J in ***Crown Zellerbach***. We disagree with the suggestion that Le Dain J misunderstood Beetz J's reasoning on this point in ***Anti-Inflation***. The import and effect of Beetz J's comments support Le Dain's interpretation of ***Anti-Inflation***. Le Dain J concluded in ***Crown Zellerbach*** at 433 with the statement that what was emphasized by Beetz J in ***Anti-Inflation*** was that:

> where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a *plenary* nature to legislate in relation to that matter, including its intra-provincial aspects. [Emphasis added]

2. Classification Under Head of Power

[151] The second stage requires the court to assign the "matter" to one of the heads of legislative powers: Hogg at 15-6. This is also sometimes referred to as determining the "class(es) of subjects"

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[124] DW Mundell, "Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin" (1955) 33:8 Can Bar Rev 915 at 928.

into which the matter falls: ***Wärtsilä*** at para 38; ***Quebec (AG)*** at para 29.[125] However, since not all powers are limited to a class of subjects, the classification task is more accurately described as being "whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity": ***Second Securities Reference*** at para 86.

3. Importance of Keeping the Two Stages Separate

[152] It is important these two steps be kept separate. That is, the "matter" should be determined "without regard to the head(s) of legislative competence, which are to be looked at only once the 'pith and substance' of the impugned law is determined. Unless the two steps are kept distinct there is a danger that whole exercise will become blurred and overly oriented towards results": ***Chatterjee v Ontario (Attorney General)***, 2009 SCC 19 at para 16, [2009] 1 SCR 624.

[153] Often the characterization of the "matter" will "effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality": Hogg at 15-8. But this will not always be so.

[154] Classification sometimes requires interpreting the scope of the claimed head of power as, for example, in the case of "trade and commerce" under s 91(2) or "criminal law" under s 91(27): ***Wärtsilä*** at paras 39-41; ***First Securities Reference*** at para 65; ***Quebec (AG)*** at para 32. The "national concern" doctrine under the POGG head of power is another such instance.

4. The POGG Power

[155] In assessing whether impugned legislation falls within the national concern doctrine, the first step, in keeping with the analytical framework for division of powers cases, is to characterize its "matter" (or "subject matter", as it is sometimes called): ***Munro*** at 668.

[156] That characterization determines the "matter" said to be of national concern under POGG. In other words, despite Canada's assertion to the contrary, the "matter" of the legislation, that is its "pith and substance", is coextensive with the "matter" of national concern. These are not two different concepts with two different contents for listed heads of jurisdiction and for the national concern doctrine. Thus, there is no justification for classifying the "matter" said to be of national concern differently than the "matter" of the legislation.

[157] However, the classification step cannot simply consider the POGG head of power in the same manner as one would the enumerated classes of subjects under s 91. While peace, order and good government is the first head of power identified in s 91, it is a residuary power. As such,

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[125] "The object of the exercise is to determine whether that "matter" comes within a particular class of subjects for the purpose of determining which order of government can legislate".

POGG is to be exercised only with respect "to all Matters, not coming within the Classes of Subjects, by this Act assigned exclusively to the Legislatures of the Provinces".[126] Hence, Parliament's POGG power only applies where the "matter" does not fall within one of the heads of powers assigned exclusively to the provinces.[127] To put it the way K Lysyk did in "Constitutional Reform and the Introductory Clause of s. 91" (1979) 57:3 Can Bar Rev 531 at 543 [Lysyk], it might better be described as a "not coming within" power.[128]

[158] Where a "matter" does not fall into an enumerated power under either ss 91 or 92, it necessarily falls into the POGG power: ***Attorney-General for Alberta v Attorney-General for Canada***, [1943] AC 356 at 371 (PC). This was the original notion of what has come to be referred to as the "gap" branch of POGG. It includes matters not in existence in 1867, sometimes called "new matters". Given the reality of our living tree approach to constitutional interpretation, courts ought to be cautious, however, before concluding that a matter cannot be linked to an existing head of jurisdiction and therefore qualifies as "new".[129]

[159] We now turn to what "matters" might fall under the third branch of POGG, the "national concern" branch.

X. The National Concern Doctrine

A. Setting the Scene

[160] Parliament's ability to legislate in the "national concern" has its roots in three decisions of the Privy Council, all of which dealt with iterations of the *Canada Temperance Act*. Sir Montague Smith first used the expression a "subject ... of general concern to the Dominion" in ***Russell*** at 841. There, the Privy Council upheld the constitutionality of the *Canada Temperance Act, 1878*

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[126] ***Jones v AG of New Brunswick***, [1975] 2 SCR 182 at 189 ("[t]he opening paragraph of s. 91 of the *British North America Act* ... [confers a] purely residuary character..."); ***Board of Commerce*** at 197; see also Hogg at 17-1 to 17-2: "The power to make laws for the 'peace, order, and good government of Canada' ... is residuary in its relationship to the provincial heads of power, because it is expressly confined to 'matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatives of the Provinces'."

[127] ***Anti-Inflation*** at 442, per Beetz J: "The Parliament of Canada ..., under s. 91 of the Constitution, cannot make laws in relation to matters 'coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces'".

[128] It is true that the emergency branch of POGG applies even if matters do fall within enumerated grounds. But emergencies are in an entirely different category; the Constitution is temporarily suspended during the emergency.

[129] For example, in ***R v Hydro-Québec***, [1997] 3 SCR 213 at para 153 [***Hydro-Québec***], La Forest J (for the majority) referred back to his earlier dissent in ***Crown Zellerbach*** at 455 to point out, with reference to atmospheric pollution, that "[t]he problem is thus not new". Similarly, in ***Anti-Inflation*** at 458, Beetz J said that "[t]he 'containment and reduction of inflation' does not pass muster as a new subject matter."

prohibiting and regulating the sale of intoxicating liquors, not on the basis of Parliament's criminal law power, but rather under its POGG power.[130] Its rationale was that the "matter" of the law was to promote temperance throughout Canada by a uniform law, and the true nature and character of the legislation did not fall within any class of subjects under s 92.

[161] Courts have revisited ***Russell*** more than once to try to reconcile it with later decisions of the Privy Council without, it must be said, much success. ***Russell***'s role in legal history was explained this way in ***Anti-Inflation*** at 454:

> It is perhaps unfortunate that a case with a history as chequered as *Russell* be sometime regarded as the authority which gave birth to the national concern doctrine.

[162] The next Privy Council decision on this subject, ***AG Ontario***, came 14 years after ***Russell***. There the Privy Council upheld a similar law, the *Canada Temperance Act, 1886*, under POGG. While Lord Watson's judgment has been interpreted as an endorsement of the national concern (sometimes called "national dimensions") doctrine, he did not fully explore what matters might be "transformed" into matters of national concern and why. His judgment also urged great caution in applying this doctrine. As Lord Watson said at 361:

> Their Lordships do not doubt that *some matters, in their origin local and provincial*, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But *great caution must be observed in distinguishing between that which is local or provincial*, and therefore within the jurisdiction of the provincial legislatures, *and that which has ceased to be merely local or provincial*, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. [Emphasis added]

[163] For decades thereafter, the Privy Council disputed the legitimacy of the national concern doctrine. Instead, it limited Parliament's powers under POGG to matters that did not exist at the date of Confederation and were accordingly not allocated to either level of government, that is those falling into the "gap".[131] In doing so, the Privy Council rejected the concept of a matter being transformed into a "national concern" on the basis it had ceased to be substantially of local interest and was thus within Parliament's POGG power. It repeatedly declined to expand federal powers

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[130] This history is traced by Beetz J in ***Anti-Inflation*** at 453-456.

[131] As noted, there have also been cases under the emergency branch of POGG but that is a distinct situation since it reaches matters listed under s 92.

on this ground: see ***Attorney General for Canada v Attorney General for Alberta***,[1916] 1 AC 588; ***Re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919***, [1922] 1 AC 191 (PC); ***Toronto Electric Commissioners v Snider***, [1925] AC 396 (PC); ***Reference re Natural Products Marketing Act***, [1936] SCR 398 at 422-426, aff'd [1937] AC 377 at 387; ***Reference re Unemployment Insurance Act***, [1937] AC 355 (PC).[132]

[164] Then came the Privy Council decision in ***Temperance Federation***. While the Privy Council was asked to overrule ***Russell***, it declined to do so. In attempting to explain the rationale for ***Russell***, Viscount Simon said this at 205-206:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

[165] This did not settle the scope of the revived national concern doctrine.

B. Clarifying the Scope of the National Concern Doctrine

[166] The existence and scope of the national concern doctrine came up again in ***Anti-Inflation***. The federal *Anti-Inflation Act* restrained profit margins, prices, dividends and compensation in Canada in an effort to combat high levels of inflation. The federal government had argued that inflation was no longer a matter of local concern but rather one which had attained "national dimensions". It sought to rely on the national concern doctrine.

[167] Four members of the Supreme Court declined to consider whether the *Anti-Inflation Act* could be upheld under this doctrine. Having regard to the legislation's temporary nature, they found it constitutional instead on the basis of Parliament's emergency power under POGG. This power is akin to a constitutional override; Parliament's use of its emergency power effectively suspends the division of powers under the Constitution *temporarily*.

[168] The judgments of Beetz J and Ritchie J (constituting a majority of the Supreme Court on this topic) rejected the notion that simply because an issue was of concern to Canadians generally,

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[132] Indeed, with respect to unemployment insurance, it required a constitutional amendment to add "Unemployment insurance" to the list of specific federal powers: *British North America Act, 1940*, 3-4 Geo. VI. C 36 (UK).

this justified Parliament's intruding into provincial jurisdiction under POGG. To put it the way that Ritchie J did:

> [U]nless such concern is made manifest by circumstances amounting to a national emergency, Parliament is not endowed under the cloak of the "peace order and good government" clause with the authority to legislate in relation to matters reserved to the Provinces under s. 92 of the *British North America Act*.[133]

[169] What is important for this Reference is Beetz J's discussion of the national concern doctrine.[134] Before exploring his reasons, it must be said that since Confederation, there has been considerable confusion, not to mention pointed disagreement, about the existence and scope of the national concern doctrine.

[170] The central underlying premise of the national concern doctrine is that a "matter" originally of "local" concern within a province may be "transformed" into a national one where it has become "the concern of the Dominion as a whole". We accept that this is so. But the real question is what "matters" originally within which provincial heads of power can be transformed? And, in particular, what is meant by matters of "local" concern in this context? In our view, the disagreement about the scope of the doctrine has arisen because of a lack of clarity as to what matters may be "transformed" from a matter of local concern to a matter of concern to the Dominion as a whole.

[171] Section 92(16) grants the provinces the power to make laws in relation to "Generally all Matters of a merely local or private Nature in the Province." This residuary power is the corollary to Parliament's residuary power under the introductory words of s 91: Lysyk at 534-538; Jean LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38:2 UBC L Rev 353 at 354-358 [LeClair]. While the draftsmen included the provinces' residuary powers as part of the list of powers under s 92 and not in a basket clause, that in no way affects its residuary nature. In other words, s 92(16) is an additional listed power; it does not diminish, much less subsume, the provinces' other enumerated powers.

[172] We have concluded that only when the "matter" would originally have fallen within the provinces' residuary power under s 92(16) does the national concern doctrine have any potential application. Thus, we reject the proposition that the national concern doctrine opens the door to the federal government's appropriating every other head of provincial power under s 92, s 92A or under provincial proprietary rights under s 109.

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[133] ***Anti-Inflation*** at 437.

[134] The "national concern" or "national dimensions" has also been called "national interests".

[173] A careful review of Beetz J's decision in ***Anti-Inflation***, with which Ritchie J agreed, resulting in a majority of five judges, makes it clear that the national concern doctrine does not have this reach. While Beetz J was in dissent on the outcome of ***Anti-Inflation***, Le Dain J later approved, and relied on, his reasoning about the scope of the national concern doctrine in ***Crown Zellerbach***. What then did Beetz J say? Several things of importance.

[174] Beetz J traced the history of the national concern doctrine, highlighting the cases calling it into question. He summed up Viscount Simon's judgment in ***Temperance Federation***: "It is to be doubted that Viscount Simon intended to formulate an important constitutional doctrine on the basis of a case as exceptional as *Russell*. But he had to find a form of words that would account for *Russell*."[135] Beetz J referred to two of the three Supreme Court cases that relied only on the national concern doctrine, that is ***Johannesson*** and ***Munro***, and explained them this way:

> In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of *distinct subject matters which do not fall within any of the enumerated heads of s. 92* ***and*** *which, by nature, are of national concern.*[136] [Emphasis added]

[175] The operative words here are "which do not fall within any of the enumerated heads of s 92 **and** which ... are of national concern". In other words, it is a condition precedent to opening the door to the national concern doctrine that the subject matter *not be within any of the enumerated heads of provincial powers*. This was not muddled reasoning by Beetz J. His judgment implicitly draws a line between specific heads of power under s 92 (and now s 92A), on the one hand, and the provinces' residuary power under s 92(16), on the other. Thus, the only "matters" exposed to being "transformed" and potentially falling under the national concern doctrine are those that originally would have fallen only within s 92(16).[137]

[176] The national concern doctrine is not a grand entrance hall into every head of provincial power. That is the very point that Beetz J made in rejecting the theory that a *concern across the country or indeed globally* could be used to justify the federal government's invading *specific enumerated heads* of provincial jurisdiction. Beetz J outlined the far-reaching negative consequences were the courts to accede to this submission:

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[135] ***Anti-Inflation*** at 457.

[136] ***Anti-Inflation*** at 457.

[137] Our colleague, Wakeling JA, questions even this.

> If [this] submission is correct, then it could also be said that the promotion of economic growth or the limits to growth *or the protection of the environment have become global problems and now constitute subject matters of national concern going beyond local provincial concern or interest* and coming within the exclusive legislative authority of Parliament. It could equally be argued that older subjects ... which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever [they] have become national in scope.... It is not difficult to speculate as to where this line of reasoning would lead: *a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.* [138] [Emphasis added]

[177] Beetz J's approach is correct and consistent with our federal state. Many things are of national concern to Canadians generally. Several come to mind immediately: health care which is a matter of life and death for Canadians daily; education which is fundamental to the realization of a child's potential; minimum wages which are vital to those fighting to survive economically; homelessness which affects tens of thousands across this country; support for people with disabilities who often struggle mightily; and the administration of justice which, if inadequately funded, can devastate families and children. But the federal government cannot rely on the national concern branch of POGG to take over any of these "matters" which have consistently been held to lie within exclusive provincial jurisdiction. Nor can it mandate how the provinces exercise their exclusive jurisdiction in relation to these matters, whether by setting minimum standards or otherwise.[139]

[178] Therefore, "matters" within one of the provinces' specific enumerated powers under s 92 cannot be "transformed" into a national concern. What can be transformed is limited, to use the words in ***Crown Zellerbach*** at 432, to those "matters which, although originally matters of a local or private nature in a province, have since ... become matters of national concern".[140] In our view, these are matters that would otherwise have originally fallen only within s 92(16). The textual wording of the Constitution supports this conclusion. The reference to "matters of a local or private nature in a province" tracks virtually word for word the text of the provinces' residuary power

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[138] ***Anti-Inflation*** at 445.

[139] It can influence the approach of the provinces indirectly through use of its spending power, health care being an example of this. But it cannot override the approach of the provinces.

[140] ***Crown Zellerbach*** at 432.

under s 92(16) which, to repeat, covers "Generally all *matters of a merely local or private nature in the province*" (emphasis added).

[179] The concluding words of s 91 also shed some light on what is meant by "matters of a local or private nature within a province" and what matters may therefore be "transformed" into a national concern. The concluding words are these: "And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the *Class of Matters of a local or private Nature* comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" (emphasis added).

[180] The framers linked s 91 and s 92 together through these words to ensure there was no doubt that matters within the 31 classes of subjects assigned to the federal government, some of which might otherwise be considered of a local or private nature, would nevertheless be possessed by Parliament. In other words, matters under specific federal heads of powers are excluded from the *class of matters of a local or private nature*. What is important for our purposes is what is meant by the "class of matters" to which these words relate. This reference is to a *singular* class only; that singular "class of matters of a local or private nature" must necessarily be s 92(16).

[181] Further, if the intention was that Parliament possessed by virtue of POGG some override of specific enumerated heads of power allocated to the provinces other than matters of a "local or private nature" under s 92(16), the framers would have said so. They did not.

[182] Nor is there any suggestion anywhere in the Constitution that the judicially-created national concern doctrine and the transformation theory encompassed therein does, or should, apply to matters falling within provincial heads of powers other than s 92(16). If this were so, then as Beetz J recognized, Canada's federation would come to a quick end.

C. *Crown Zellerbach* and the Test Under the National Concern Doctrine

[183] That takes us to ***Crown Zellerbach*** where the Supreme Court attempted to clarify the scope of the national concern doctrine. Le Dain J summarized the analytical framework for the national concern doctrine, which he considered to be "firmly established", as follows. In doing so, he endorsed Beetz J's reasoning in ***Anti-Inflation***:

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although

> originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;
>
> 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.[141]

[184] Le Dain J did not question the scope of the national concern doctrine as confirmed by Beetz J in ***Anti-Inflation***. That is apparent from Le Dain J's conclusion that the national concern doctrine applies to matters "which, *although originally matters of a local or private nature in a province*, have since, in the absence of a national emergency, become matters of national concern" [emphasis added]. Inferentially, Le Dain J accepted that this second category – which tracks with the wording of s 92(16) – includes only those matters which would originally have fallen within the provinces' residual power under s 92(16) and not under some other subsection of s 92.

D. Conclusion

[185] Accordingly, the federal government cannot use the national concern doctrine to commandeer matters assigned exclusively to the provinces unless a matter otherwise within s 92(16) has gone beyond the "local or private nature in a province" and become a matter of concern generally across this country. Of course, in that latter event, it must also meet the other parts of the test under the national concern doctrine.

[186] For these reasons, this doctrine has no application to matters within the provinces' exclusive jurisdiction under other enumerated heads of power under s 92 or 92A. Nor can the national concern doctrine be invoked to oust the provinces' proprietary powers where the

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[141] ***Crown Zellerbach*** at 431-432.

impugned law invades the provinces' powers as owners of their natural resources. The doctrine operates within the constraints set out in ***Anti-Inflation*** and ***Crown Zellerbach***.[142]

[187] This does not mean that a "matter" that falls within the national concern doctrine, having been "transformed" from a matter of a local or private nature under s 92(16), cannot also "touch on", that is "incidentally affect", one of the provinces' other enumerated heads of power under s 92. But that does not detract from the key point here: the national concern doctrine does not apply to matters falling within the provinces' exclusive jurisdiction under s 92, 92A or 109.

[188] This does not leave Parliament without any room to move to regulate GHG emissions within provincial jurisdiction. As noted, Parliament is able to use its spending power to do indirectly what it is not authorized to do directly under the distribution of powers in the Constitution.[143] This can have a profound influence on the legislative actions and policies of provincial governments. There is no need to inflate the national concern doctrine beyond acceptable constitutional limits for the federal government to accomplish the objectives that it considers important.[144]

[189] In summary, we recognize that the national concern doctrine has been the subject of both judicial and academic criticism through the years.[145] Part of that may have arisen because of the ambiguity around the limits of the doctrine. Regardless, while the national concern doctrine may be of dubious origin and debatable legitimacy, this Court remains bound by it.

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[142] Some intervenors seemed to think the national concern doctrine could be invoked by the federal government to legitimate any federal legislation even if the "matter" were covered by a provincial head of jurisdiction providing the federal enactment did not go so far as to reach the "core" of the provincial head of power. This improperly merges two concepts: interjurisdictional immunity and the national concern doctrine. To endorse this approach would be directly contrary to Parliament's residuary power under POGG. It would erase the word "exclusive" from s 92 and license arrogation of provincial heads of power to the federal government. Foundationally, this is noxious to federalism. We reject it without reservation.

[143] Hogg at 6-16 to 6-22. Parliament possesses other powers discussed below, including its power over the criminal law.

[144] In addition, Parliament has the right to regulate GHG emissions for all federally governed undertakings which includes, for example, aeronautics and railways. It also possesses other legislative spheres of jurisdiction discussed below.

[145] See eg Jean LeClair, "The Elusive Quest for the Quintessential National Interest" (2005) 38:2 UBC L Rev 353 [LeClair].

XI. Characterization of the "Matter" of the *Act*

A. Introduction

[190] Determining the "matter" of the *Act* is critical to assessing whether the federal government may properly rely on the national concern doctrine to uphold its constitutionality. In turn, this permits a court to determine whether the "matter" falls within provincial legislative powers under any of the enumerated heads of s 92 (other than s 92(16)) or under s 92A or the provinces' proprietary rights under s 109 of the Constitution.

B. Characterization of the Matter Prior to this Reference

[191] Canada's position throughout the three References has shifted with respect to the "matter" of the *Act* and the "matter" of national concern. It has taken different positions with respect to each at different points. As we concluded earlier, the "matter" of the *Act* and the "matter" for purposes of the national concern doctrine are one and the same.

[192] Initially, before the Saskatchewan Court of Appeal, Canada argued in its factum that the "matter" for purposes of the national concern doctrine was "GHG emissions". When pressed on the viability of defending the claim to this broad area of jurisdiction – since GHG emissions are produced through every aspect of Canadians' daily lives – Canada shifted its position. It asserted in oral argument that the matter was the "cumulative dimensions of GHG emissions":[146] In its factum before the Ontario Court of Appeal, Canada repeated this argument that the matter of national concern was the "cumulative dimensions of GHG emissions".[147]

[193] In upholding the constitutionality of the *Act*, the majority in the ***Saskatchewan Reference*** declined to find this to be the subject matter, pointing out that regulating cumulative emissions is only possible through regulating individual ones, the former being no more than the simple sum of the latter. It concluded, correctly in our view, that there is no meaningful distinction between cumulative dimensions of GHG emissions and GHG emissions themselves.[148]

[194] Instead, Richards CJS, for the majority, characterized the subject matter of the *Act* and matter of national concern as "the establishment of minimum national standards of price stringency for GHG emissions." By comparison, the four judge majority of the Ontario Court of Appeal did

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[146] ***Saskatchewan Reference*** at para 134.

[147] Factum of the Attorney General of Canada at para 53, submitted February 8, 2019 in the ***Ontario Reference.***

[148] ***Saskatchewan Reference*** at paras 136-138. This very point was also made by Huscroft JA in ***Ontario Reference*** at para 227.

not adopt this characterization. Nor did they agree amongst themselves how to characterize the subject matter.

[195] Strathy CJO characterized both the *Act* and subject matter of national concern as "establishing minimum national standards to reduce GHG emissions." Hoy ACJO characterized the subject matter of both the *Act* and national concern as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."

[196] Canada was evidently not content with any of these narrower formulations. Rather, before this Court, Canada's position morphed again to "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions". At least it did vis à vis the question of the matter of national concern. We note that nowhere in Canada's newest formulation of the matter is there any reference to "pricing stringency" for GHG emissions. Moreover, Canada's introduction of "integral" to the claimed "matter" does not have a narrowing effect; in this context, it enlarges its scope.

C. Courts Cannot Pre-Limit Federal Powers if the *Act* Is Found Constitutional

[197] The purpose in setting out these various positions is to flag a critical point. Up to and including this Reference, counsel and courts have struggled to define the subject matter of the *Act* and national concern said to be addressed by it.

[198] All ten judges in the other References declined to extend the federal government's powers under the national concern doctrine to GHG emissions generally.[149] The majorities in the ***Saskatchewan Reference*** and ***Ontario Reference*** attempted to limit the subject matter in an effort to confine the *Act* to a realm of constitutional acceptability. But that approach is fundamentally flawed. Since the ***Saskatchewan Reference*** and ***Ontario Reference*** upheld the constitutionality of the *Act* in its entirety, it matters not how the majorities sought to limit the subject matter of the *Act*. In other words, conclusions about how the "subject matter" should not apply to GHG emissions generally are meaningless.

[199] Why? Courts have no ability to confine or pre-limit the scope of the *Act* in any way by such pronouncements while at the same time clearing it constitutionally in its entirety. Validating the *Act* means that each and every provision in the *Act* is fully operational. In turn, all exercises of discretion and manners of administration of the *Act* provided for therein are thereby constitutional. Canada would be entitled to claim legitimacy by the Executive – and succeed – for any and all actions taken under the *Act* providing the language of the *Act* so permits.

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[149] The ***Saskatchewan Reference*** majority said that Canada asserted to them that "GHG emissions are a quintessential matter of national concern" (para 127). The majority in the ***Saskatchewan Reference*** rejected this.

[200] Canada was of course free to change its position as it saw fit.[150] However, Canada's elasticity of position may have left the impression that courts can confect their own characterization to fit the national concern doctrine and thereby somehow limit the Executive's powers under the *Act* or Parliament's powers otherwise. But judicially composed variants of "subject matter" cannot accomplish any such limitation. In that sense, they are futile and obscure the key questions as to constitutional legitimacy.

[201] The validity of the *Act* must be decided at present, but inclusive of what the *Act* allows to be done in the future on its existing terms. In other words, this Court must decide the constitutionality of the *Act* based on the totality of the measures it authorizes and not simply the steps currently taken under the *Act*. Courts do not reassess the constitutionality of legislation as each new step authorized under legislation is implemented. Thus, we reject the proposition that the *Act* might be declared valid today and invalid tomorrow.

[202] Further, any new head of power judicially sanctioned under the national concern doctrine permits Parliament to legislate in the future as it sees fit in relation to that head of power.[151] Accordingly, if the constitutional validity of this *Act* were ultimately upheld, the *Act* could be amended tomorrow or indeed replaced entirely with whatever new legislation Parliament chooses in its unilateral discretion providing the new legislation falls within the new head of power allocated to Parliament. Under the principle of Parliamentary sovereignty, no power can lay its "dead hand" on future law making.[152] A present Parliament cannot fetter its future authority to amend the *Act*.[153] Nor can the present expressed intentions of the Executive through their counsel.[154]

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[150] Counsel's submissions cannot however limit the legislative powers of Parliament or the Executive under the *Act* were it ultimately recognized as constitutionally valid. The mobility of Canada's position may well be a modernization of the approach described by Prof Le Dain, as he then was, in "Sir Lyman Duff and the Constitution" (1974), 12 Osgoode Hall LJ 261 where he stated at 293 with respect to matters of national concern that "It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples." See also 452 - 453 of ***Crown Zellerbach*** per La Forest J.

[151] As noted in ***Mikisew Cree First Nation v Canada (Governor General in Council)***, 2018 SCC 40 at para 36, [2018] 2 SCR 765: "Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority."

[152] Hogg at 12-8.

[153] See ***Canada (Attorney General) v Friends of the Canadian Wheat Board***, 2012 FCA 183 at para 82, 352 DLR (4th) 163, leave to appeal to SCC refused, 34973 (17 January 2013).

[154] See ***Resolute FP Canada Inc. v Ontario (Attorney General)***, 2019 SCC 60 at para 116, [2019] SCJ No 60 (QL), per Côté and Brown JJ. (in dissent but not on this point); ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48 at para 53, [2018] 3 SCR 189 [***Second Securities Reference***]: "[T]he executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation...."

[203] All this said, searches for a narrow formulation of subject matter in an attempt to squeeze the *Act* into the national concern doctrine are belied by the *Act* itself.

D. What Is the "Matter" of this *Act*?

1. Introduction

[204] In determining the "matter" of an impugned law, a court must not confuse the means or technique Parliament has chosen to give effect to a law's purpose with its dominant feature: ***Ward v Canada (Attorney General)***, 2002 SCC 17 at para 25, [2002] 1 SCR 569; ***Quebec (AG)*** at para 29; ***Goodwin v British Columbia (Superintendent of Motor Vehicles)***, 2015 SCC 46 at para 24, [2015] 3 SCR 250.[155] Various counsel introduced "means" or aspirations under the *Act* into the "matter" in an attempt to drive the conclusion that the *Act* is narrowly confined. But the *Act* cannot be read that way just in order to try to make it constitutionally viable. In this context, the focus must be on the essential matter of the *Act* (and national concern), not one particular way (carbon pricing) in which the matter has been regulated to date.

[205] It has been suggested that, in applying the national concern doctrine, courts should be slow to characterize the "matter" of impugned federal legislation at too high a general level. The argument is that doing so would thwart efforts to save impugned federal legislation under the national concern doctrine. The reason – too high a level of abstraction such as the "environment" or "inflation" or "climate change" would clearly run afoul of the division of powers. Instead, it has been contended that courts should be more willing to limit the subject matter so that the national concern doctrine might flourish and thereby allow the federal government more room to do what it thinks is best in the national interest.

[206] In this context, the argument translated to this. A restrained approach to characterizing the *Act* would allow provincial and federal legislation to work concurrently or through the double aspect doctrine to reduce GHG emissions. Courts should therefore find that reducing GHG emissions through minimum national standards falls within the national concern doctrine.

[207] This reasoning cannot be sustained. First, as already explained, a restrictive characterization of the *Act* is meaningless. It is the *Act* that dictates the characterization; the characterization does not dictate the scope of the *Act*.

[208] Second, in deciding division of powers disputes, it is not the courts' role to try to find a way to wedge federal legislation into the national concern doctrine. Cooperative federalism is an

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[155] This point was made clearly by Huscroft JA in his dissenting reasons in ***Ontario Reference*** at para 211.

important value in Canadian society. But cooperative federalism has its limits. It cannot override or modify the division of powers: ***Quebec (AG)*** at paras 15-21.

[209] Third, once a subject matter is allocated to the federal government under the national concern doctrine, as noted, that effectively removes that subject matter from provincial jurisdiction including its "intra-provincial" aspects: ***Crown Zellerbach*** at 433. The head of power allocated to the federal government would be permanent, exclusive and plenary (as well as paramount), subject only to constitutional amendment. Further, even if the double aspect doctrine could in theory operate, it would not apply here regardless since both levels of government would be regulating GHG emissions for the same purpose and in the same aspect: ***Reference Re Environmental Management Act (BC)***, 2019 BCCA 181 at para 16, 434 DLR (4th) 213 [***Environmental Management***], aff'd 2020 SCC 1. Nor is there any possibility of federal and provincial governments having "concurrent" jurisdiction over GHG emissions, concurrent jurisdiction being restricted to those subject matters set out in the Constitution.

[210] Fourth, the subject matters determined by the majorities under the ***Saskatchewan Reference*** and ***Ontario Reference*** are inconsistent with the scope of this *Act*. We do not agree with any of the three characterizations by the majority judges in the ***Saskatchewan Reference*** or the ***Ontario Reference*** or with Canada's newest characterization of the "matter" of the *Act* or national concern.[156] Canada adroitly sought to escalate the currently chosen means in the *Act* to the status of "national concern". But Canada's claimed subject matter, "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions", is so abstract, broad and all-inclusive of all aspects of life that, if added to the federal heads of power, it would be unbounded.

[211] We have concluded that the "matter" of this *Act*, its true nature, is, at a minimum, regulation of GHG emissions.[157] That this is so can be seen from assessing, as required, the *Act*'s purpose and its legal and practical effects: ***First Securities Reference*** at paras 63-64; ***Lacombe*** at para 20; ***Kitkatla*** at paras 53-54.

2. Purpose of the *Act*

[212] Canada suggested this Court should conclude that the *Act* was forced by the provinces' failure to adequately engage with the federal government on the climate crisis. Alberta rejected this position as did Saskatchewan. They contended there was an abrupt sidelining of provincial interests. It is not necessary to determine whether the *Act* was unilateral action by the federal

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[156] Canada argued in its factum that the "matter" of the *Act* (its "pith and substance"), as opposed to the "matter" of national concern, is "the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions": Factum of the Attorney General of Canada at page 23.

[157] This was also the view of Huscroft JA in his dissenting opinion in ***Ontario Reference***.

government. A court is not entitled to judicially review the legislative process: see ***Mikisew Cree First Nation v Canada (Governor General in Council)***, 2018 SCC 40 at paras 2, 18, 33-41 50 (Karakatsanis J) and paras 101-143 (Brown J), and paras 152, 160-171 (Rowe J), [2018] 2 SCR 765. This Court must take Parliament's enactment of the *Act* as reflecting Parliament's considered opinion.

[213] Canada asserted that the dominant purpose of the *Act* is "to establish minimum national standards of stringency for GHG emissions to reduce Canada's nationwide GHG emissions." But this leads to an obvious question. To what end? What is the purpose of reducing GHG emissions? The federal government is not seeking to regulate GHG emissions for no reason. Were GHG emissions not a cause of climate change, there would be no purpose in regulating them.

[214] The reason for regulating GHG emissions, the purpose of the *Act*, is to mitigate the effects of climate change. The *Act* is clear on this point: there is no reason not to take Parliament at its word.

[215] The full name of the *Act* speaks for itself: "An Act *to mitigate climate change* through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources..." [Emphasis added]. As stated in the *Act's* Preamble, the chosen means – one of a number of available policy objectives – is to impose "a federal greenhouse gas emissions pricing scheme to ensure that ... greenhouse gas emissions pricing applies broadly in Canada".

[216] The two page long Preamble includes express references to global *climate change*, impacts of *climate change*, minimizing the impact of *climate change* on future generations, reducing the risks and impacts of *climate change*, building resilience to the impacts of *climate change*, identifying *climate change* as a national problem, pricing greenhouse gas emissions as a core element of the *Framework* and actions necessary for *climate change*. In determining the *Act*'s purpose, this Court must take that Preamble, which also confesses changes to come, into account: s 13 of the *Interpretation Act*, RSC 1985, c I-21 [*Interpretation Act*].[158]

[217] The Preamble confirms that the *Act* is aimed at "a national problem that requires immediate action by all governments as well as by industry, non-governmental regulations and individual Canadians". That problem is identified as "climate change". And the identified source of that problem is stated to be GHG emissions. In particular, the first ten paragraphs of the Preamble talk about tackling climate change and why:

> Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to *global climate change*;

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[158] "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."

Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present *an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity*;

Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities;

Whereas Parliament recognizes that it is the responsibility of the present generation to *minimize impacts of climate change on future generations*;

Whereas the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries;

Whereas Canada has ratified the United Nations Framework Convention on Climate Change, done in New York on May 9, 1992, which entered into force in 1994, and the objective of that Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level *that would prevent dangerous anthropogenic interference with the climate system*;

Whereas Canada has also ratified the Paris Agreement, done in Paris on December 12, 2015, which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that *this would significantly reduce the risks and impacts of climate change*;

Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change;

> Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that *climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians*;
>
> Whereas *greenhouse gas emissions pricing* is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change; [.....] [Emphasis added]

[218] These statements then lead to these paragraphs which introduce the overall means chosen to implement the *Act*'s purpose:

> Whereas behavioural change that leads to *increased energy efficiency*, to the use of *cleaner energy*, to the adoption of *cleaner technologies and practices* and to *innovation* is necessary *for effective action against climate change*;
>
> Whereas the pricing of greenhouse gas emissions on a basis *that increases over time is an appropriate and efficient way to create incentives for that behavioural change*;
>
> ...
>
> Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems *could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity*; [Emphasis added]

[219] The means currently chosen, levying charges on certain fossil fuels, are servants of the *Act*'s purpose. If GHG emissions did not have a material impact on climate change at a national level, there would be no basis for a claimed national concern to justify the *Act*. Thus, there can be no doubt that the purpose of the *Act* is to mitigate climate change. But while this is the purpose, we must also consider the effects of the *Act*.

3. Effects of the *Act*

[220] The effects of a law are often a more reliable guide to its constitutional validity: ***Environmental Management*** at para 14. A court must assess the effects of impugned legislation

in its entirety, not simply one feature or aspect of it. While much stress has been placed on the *Act*'s minimum standards of price stringency for regulating GHG emissions, an attentive review of this 235 page *Act* reveals that it goes farther – much farther – than this.

a. Legal Effects of the *Act*

[221] Parliament's and the Executive's authority is derived from the scope of the *Act* itself. The *Act* presently authorizes the imposition of minimum standards for pricing of GHG emissions wherever a province does not have in place a provincial GHG pricing system or one which is not, in the sole view of the Executive, sufficiently stringent. But the *Act* does far more than levy charges on certain emissions under Parts 1 and 2 of the *Act*. The Executive is given large and liberal discretionary powers vis à vis the existing scheme. Not only are there no limits on what can be covered, there are no limits on "price stringency" either, meaning that, under the *Act*, this concept is open-ended and entirely subjective. And since a price can be attached to anything, the Executive is also effectively given broad and pervasive discretion to take *whatever other steps the Executive decides should be taken to mitigate climate change*.

[222] In no way does the *Act* constrain the provincial areas of jurisdiction into which Parliament and the Executive may intrude, quite apart from those it has already entered. Indeed, given the degree of discretion in the *Act*, the Executive can authorize additional and different pricing measures for more and more industries and institutions and also for virtually all aspects of daily life consistent with the Preamble and body of the *Act*. Nor, to repeat, would Parliament be limited to this *Act* if the validity of this *Act* were upheld.

[223] Section 166(2) states that "for purposes of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in General considers appropriate, the Governor General in Council may, by regulation, amend Part I of Schedule 1, including by *adding*, deleting, *varying* or *replacing* any item or table." Hence, there is no effective constraint on what could be added, varied or replaced by the Executive.

[224] Similarly, the Governor General in Council has the unfettered right under s 166(4) *by regulation* to amend Schedule 2 respecting the application of the fuel charge including by *adding*, deleting, *varying* or *replacing* a table. Existing exemptions can also be deleted.

[225] Key parts of s 166 follow:

> 166 (1) The Governor in Council may make regulations
>
> > (a) prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation;

(b) requiring any person to provide any information, including the person's name, address, registration number or any information relating to Part 2 that may be required to comply with this Part, to any class of persons required to make a return containing that information;

(c) requiring any person to provide the Minister with the person's Social Insurance Number;

(d) requiring any class of persons to make returns respecting any class of information required in connection with the administration or enforcement of this Part;

(e) *distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things*; and

(f) generally to carry out the purposes and provisions of this Part.

(2) *For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.*

(3) In making a regulation under subsection (2), *the Governor in Council shall take into account*, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

(4) The Governor in Council may, by regulation, *amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.* [.....] [Emphasis added]

[226] The essentially unrestricted scope of the authority that this *Act* confers on the Governor General in Council can also be seen from s 168(2)(l). It provides that the Governor in Council may make regulations in relation to the fuel charge system "generally to effect the transition to, and implementation of, that system in respect of ***fuel or a substance, material, or thing and in respect of a province or area***" (emphasis added).

[227] Thus, this *Act* is *not limited to carbon pricing on fuels.* To the contrary. Given the absence of restrictions on what might be included, it authorizes coverage and pricing of any substance,

material or thing known to mankind. In summary, the *Act* provides for a standardless sweep of authority in favour of the Executive.[159]

[228] Indeed, it even allows for differences between provinces, there being no requirement anywhere in this *Act* that the charges be uniform across the country. The entire scheme allows the federal government to prefer, or not prefer, provinces as it chooses. Canada argued that there is no requirement for a law to be uniform across Canada. It is true that generally there is no requirement of constitutional uniformity.[160] But that is an argument with more purchase where the federal government is moving to provide a benefit. By comparison, where legislation, as here, is intended to impose new costs on individuals and industries, the risk of majoritarian oppression of minority interests is real.

[229] Nor is there an assurance, given other sections of the *Act*, when the net funds collected under Part 1 will be returned to a listed province. Or equally important, that the net amount will not simply be deducted from other monies or programs funded by the federal government. All of this is possible given the open-ended provisions in the *Act*.

[230] Parts of s 165 follow:

> 165 (1) In this section, ***net amount*** *in respect of a province or area and a period fixed by the Minister* means the charges levied by Her Majesty in right of Canada under this Part in respect of the province or area and that period less any amounts in respect of the charges that are rebated, refunded or remitted under this Part or any other Act of Parliament in that period.
>
> (2) For each province or area that is or was a listed province, *the Minister must distribute the net amount for a period fixed by the Minister, if positive, in respect of the province or area.* The Minister *may* distribute that net amount
>
> (a) *to the province*;
>
> (b) *to persons that are prescribed persons, persons of a prescribed class or persons meeting prescribed conditions*; or
>
> (c) *to a combination of the persons referred to in paragraphs (a) and (b).*

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[159] In ***Saumur v City of Quebec***, [1953] 2 SCR 299 at 333, Rand J cautioned about broad sweeps of authority.

[160] Hogg at 17-13.

> (3) *Despite subsection (2)*, if the Minister is not authorized, by reason of section 150, to take any action described under subsection 150(1) in respect of an amount payable by a person under this Part, *the amount is not to be distributed by the Minister under this section.* [Note: s 150 refers to 'collection restrictions']
>
> (4) The amount of any distribution under subsection (2) *is to be calculated in the manner determined by the Minister* and may, subject to subsection (8), be paid by the Minister *out of the Consolidated Revenue Fund at the times and in the manner that the Minister considers appropriate.* [.....]
>
> (8) The Governor in Council may make regulations
>
> > (a) *prescribing the time and manner of paying any distribution under subsection (2)*; and
> >
> > (b) *generally to carry out the purposes of this section.* [Bold in original; italics added]

[231] Canada emphasizes that under s 165(2), "the Minister must distribute the net amount for a period fixed by the Minister, if positive, in respect of the province or area". The suggestion is that no listed province will be, in effect, subject to direct economic harm from being listed. This language is replicated in s 188 referring to "excess" charges.

[232] The word "must" in s 165(2) and s 188(1) is said to force the federal government to rebate out of the Consolidated Revenue Fund the "net amount" collected back to the province or an "excess". The word "must" is, indeed, imperative. But the *Act* goes on to prescribe that these amounts "may" be distributed to the province or "may" be distributed to persons or prescribed classes of persons or some combination thereof. There is no assurance the net amount will be paid on a regular basis, the timing being left to the Minister. And as to whom the amount is paid, that is also within the Executive's sole discretion, to prefer or not prefer certain individuals in a province, as it determines. On its face, therefore, the Executive is empowered to decide a different sort of winner and loser distribution than straight back to the province.

[233] Nor is the Executive constrained by substantive provisions in Part 1 of the *Act*. Under s 168(4), if there is any conflict between the regulations and the *Act in that the regulation applies despite any provision of Part 1 of the Act*, the regulation prevails to the extent of the conflict. This means that future regulations can supercede the current scope and existing limitations of carbon pricing under Part 1 even if in conflict with the *Act*.

[234] Part 2 dealing with Industrial Greenhouse Gas Emissions is equally elastic and unbounded.

[235] Section 188(1) mandates that the Minister of National Revenue must distribute revenues to the province of origin. But again, the actual distribution portion of the section is expressed in discretionary terms.

[236] Sections 171 and 172 also have a large and flexible scope respecting what would qualify as a "facility" and a "covered facility". Section 185 provides for a tracking system with discretion built in. Section 189 provides:

> 189 (1) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by order, amend Part 2 of Schedule 1 by adding, deleting or amending the name of a province or the description of an area.
>
> (2) In making an order under subsection (1), *the Governor in Council shall take into account, as the primary factor*, the stringency of provincial pricing mechanisms for greenhouse gas emissions. [Emphasis added]

[237] Section 190 goes on to authorize the Executive to change the coverage of the system by "adding a gas to column 1 and its global warming potential to column 2". It is to be noted that the gases listed in Schedule 3, although under a title of "Greenhouse Gases", cover a wide variety of gases, some of which are the product of some industries and not others.

[238] The extent to which this purports to be a one-size-fits-all plan is subject entirely to the Executive's discretion. Further, the Executive can expand the current scheme to a much larger target beyond the GHG emissions now covered. For example, s 197(1)(a) authorizes the Minister "to assess the emission levels in Canada of greenhouse gases *or other gases* that contribute *or could contribute* to climate change" (emphasis added).

[239] Numerous sections encompass references to "related" matters or activities. For example, under s 197(2), the Minister is authorized to order any person described in the order "to gather information on those gases including (i) information on a substance or product, including a fuel, that is *related to* those gases. The Governor in Council may also make regulations respecting the gathering of information on GHGs *or other gases* that contribute to *or could contribute* to *climate change*, on the emission of those gases and *on activities related to those emissions* and the provision of that information to the Minister ...." The phrases "relating to", "related to" or "in connection with" are essentially indeterminate because everything is related to everything else: ***California Div of Labor Standards Enforcement v Dillingham Construction, NA, Inc***, 519 US 316 at 335 (1997); ***Maracich et al v Spears et al***, 570 US 48 at 60 (2012).

[240] In the result, there is almost no limit to the extent to which the Executive can interfere in the day-to-day operations of the various industries falling under Part 2.

[241] We are not suggesting a colourable motive but simply setting out the scope of the Executive's authority and Parliament's jurisdiction were the courts to sanction this *Act* under the national concern doctrine.

[242] It was suggested that the *Act* was a modest step (even if by its own terms intended to become less modest over time). But a modest intrusion by the federal government into provincial powers cannot transform an unconstitutional intrusion into a lawful one.[161] The constitutional dividing line is not moveable. It is fixed. Were this not so, the Canadian federation could not be preserved. Further, this *Act* is anything but a modest step.

[243] Canada's counsel dismissed concerns about the large amount of power given to the Governor in Council under the *Act*. Some counsel seemed to think that a court could read into the language of the *Act* forms of limitation to constrain the Executive. There is no principle of statutory construction to support this idea. Section 12 of the *Interpretation Act* directs a large and liberal reading.[162] Hence, there can be no reasonable expectation that future courts would narrow the language of this *Act*.

[244] Moreover, how future decisions of the Executive could be judicially reviewed, and against what enforceable legal standards, is a mystery suitable for a Delphic Oracle. The open-ended nature of the discretion conferred means that there is no objective foundation for a court in future to decide if the Executive took into account irrelevant considerations or made determinations at odds with the *Act*. Consequently, there is no air of reality to the possibility of judicial review reasonably constraining the broad decision-making discretion that this *Act* confers on the Executive. More doubtful yet is the idea that the Executive would trim it back voluntarily out of respect for provincial authority: "Power granted is seldom neglected."[163]

[245] When counsel was pressed on the unlimited scope of the Executive's powers under the *Act*, it was suggested the federal government would nevertheless be constrained – by the democratic process. That is undoubtedly true. But the federal government alone will decide. And therein lies

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[161] The incidental effects doctrine comes into play when there has been a constitutional exercise of a recognized head of power. But if the impugned law involves an unconstitutional encroachment on provincial power, the law does not become constitutional merely because it is said to be "modest" or incidental in effect. If a federal law otherwise unconstitutional could be sustained because it only had an incidental effect on provincial powers, there would be no need for an incidental effects doctrine to validate the effects of a constitutional law.

[162] "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[163] ***United States v Wunderlich***, 342 US 98 at 101 (1951), per Douglas J dissenting. Courts have long been deferential to administrative decision makers despite these concerns: ***National Corn Growers Assn. v Canada (Import Tribunal)***, [1990] 2 SCR 1324 at 1332-1335, per Wilson J. The most recent re-expression of the scope of judicial review presumes reasonableness as the standard of review: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 16, 23, [2019] SCJ No 65 (QL).

the problem. Especially from the perspective of those provinces whose interests may be of lesser political concern at the relevant time to the federal government.

[246] The unavoidable reality is this. What is authorized under the *Act* indefinitely into the future and in the sole unfettered discretion of the Executive is endlessly expansive. The Executive's authority is also open-ended and largely subjective. Conspicuous for its breadth, the *Act* allows the federal government to intrude further into more and different aspects of lawful daily life, both personal and business. Nor is there anything in the *Act* limiting what the federal government can choose to levy in the future both on people and industry. The minimums of today are not the maximums of tomorrow. This is all quite apart from the fact that once a new head of power is allocated to Parliament, it can quite literally do whatever it chooses with respect to that new head of power.

b. Practical Effects of the *Act*

[247] The parties provided substantial volumes of material as to "social and economic circumstances". Counsel effectively suggested this Court should try the question whether the *Act* will work or whether alternative methods for addressing GHG emissions as proposed by different provinces would work better or at least work as well. Something must be said about the dueling records concerning facts arising from the scheme under the *Act*.

[248] Considerable argument was directed to the imminence and potentially catastrophic implications of climate change. And on the need to effect behaviour modification in Canada's population to reduce GHG emissions. We understand this. But while courts may consider evidence that helps the court in determining the "purpose and effect" of an impugned statute, the courts do not have either the institutional capacity or legitimacy to decide whether the statute is a "good idea".

[249] The Court was also offered evidence concerning the economic effects on Alberta and Saskatchewan (and industries therein) from this scheme as well as insight into the views of Ontario, British Columbia and New Brunswick respecting factual implications. The Alberta and Saskatchewan evidence, in particular, was said to show that the negative effects of the *Act* would be significant. It was offered in response to the weight Canada placed on the evidence of a witness for Alberta. Canada suggested his evidence discounted the degree of economic harm to Alberta from the scheme under the *Act*. Alberta disagreed, asserting that Canada had misunderstood that evidence.

[250] This Court is not a trial court and this record does not permit a definitive decision on the economic consequences of this *Act*. More fundamentally, it is not for this Court to decide the efficacy or wisdom of the challenged legislation. A decision on division of powers must be certain. It is not dependent on how beneficial or hurtful it may be to individual provinces or the federal

government. Nor are decisions on division of powers dependent on snapshots of economic or environmental events at any particular date in history.

[251] All that said, what is evident is that the legal and practical effects of this *Act* directly intrude on provincial powers, including their exclusive jurisdiction to develop and manage their natural resources.

4. The "Matter" of the *Act* Is the Regulation of GHG Emissions

[252] As stressed, the scope of the *Act* is not constrained by what now is but by what is authorized overall.[164] The "matter" of this *Act* is not restricted to any of the formulations advanced to date.

[253] "Establishing minimum national standards of price stringency for GHG emissions"[165] or any variations on this theme does not properly capture the "matter" of the *Act*. Stringency, in this context, means the severity of the pricing of GHG emissions. "Minimum standards", because they are minimum, cover the entire waterfront of regulation of all aspects of GHG emissions. That means the federal government would control GHG emissions from zero content and composition to infinity. And since the *Act* prescribes a minimum price for GHG emissions but no maximum, the federal government would also control GHG emissions from a zero price to infinity. In the result, this would give the federal government control over "the regulation of GHG emissions" in their entirety. Viewed from this perspective, while "minimum national standards for price stringency of GHG emissions" is certainly a more subtle and less obvious way of saying "regulation of GHG emissions", in the end there is no substantive difference between the two characterizations.

[254] Canada has claimed the matter of the *Act* is "the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions".[166] But adding the words "national standards" cannot predetermine the outcome of the legality analysis. The Constitution does not give Parliament power to impose national standards at large or for any public purpose it believes warrants national attention.[167] Hence, the mere fact the

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[164] We agree with Huscroft JA dissenting in ***Ontario Reference*** at paras 225-226 that the subject matter must not confuse ends with means and should be set at the "appropriate level of generality".

[165] As found by the majority in the ***Saskatchewan Reference.***

[166] As noted, its claimed matter of national concern is "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions". As we have explained, contrary to Canada's argument, the matter of national concern and the subject matter of the *Act* are one and the same.

[167] Nor, as noted in ***Wärtsilä*** at para 140, per Wagner CJ and Brown J concurring, does Parliament have the constitutional authority to unilaterally alter the extent of its own constitutional jurisdiction.

Act sets "minimum national standards to reduce GHG emissions"[168] does not make this a "matter of national concern". Canada is seeking to validate a component (national standards) of the means it has chosen (price stringency for GHG emissions) in aid of its objective (to reduce Canada's nationwide GHG emissions and thereby mitigate climate change).

[255] It is also argued that the *Act* is aimed at "behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation ... necessary for effective action against climate change". We do not dispute that this is so. But again to what end; that is the question. The end is reducing GHG emissions to mitigate climate change.

[256] For these reasons, after taking into account both the purpose of the *Act* (to mitigate climate change) and the narrower effects of the *Act*, we have concluded that the subject matter of the *Act* – its "main thrust", "dominant characteristic", "essential character", "pith and substance" – is, at a minimum, the "regulation of GHG emissions". Moreover, whether the "matter" is characterized as being the "regulation of GHG emissions" or the "cumulative effect of GHG emissions" or "establishing minimum national standards of GHG emissions" or "the establishment of minimum national standards of price stringency for GHG emissions" or "the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions" or some variation on this theme, it all reduces to the same thing. The "matter" of the *Act* is *no less* than the "regulation of GHG emissions".

XII. Classification of the Subject Matter of the *Act*

A. Federal Jurisdiction

[257] We agree with the court in the ***Saskatchewan Reference*** that the *Act* does not fall within Parliament's criminal law power (s 91(27))[169] or trade and commerce power (s 91(2)).[170]

[258] Nor does this *Act* fall within Parliament's POGG emergency branch. One intervenor in this Reference, the David Suzuki Foundation, contended it did. Canada did not seek to uphold the *Act* on this basis. Again, we agree with our Saskatchewan colleagues that the evidentiary record here does not meet the requirements for an "emergency" under that POGG branch.[171]

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[168] As found by majority in the ***Ontario Reference***.

[169] See paras 178-199.

[170] See paras 166-173.

[171] ***Saskatchewan Reference*** at para 202.

[259] We also agree with our Saskatchewan colleagues that the federal government cannot justify the *Act* on the basis of its treaty obligations.[172] This does not itself provide Canada with legislative jurisdiction. As the Privy Council recognized long ago in ***Attorney-General for Canada v Attorney-General for Ontario***, [1937] AC 326 at 351, "there is no such thing as treaty legislation". In other words, Canada cannot "merely by making promises to foreign countries, clothe itself with legislative authority": 352. Parliament only has authority to pass a statute which implements a treaty where the subject matter of the treaty itself otherwise falls within federal authority under s 91.

[260] The Supreme Court has confirmed that the "environment" is not a head of power assigned to either the Parliament of Canada or the provincial Legislatures.[173] We agree with Wakeling JA's summary of the law on this point. The key point is that each level of government can legislate in relation to environmental matters providing that it is acting within one of its constitutional powers: ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3 at 65.[174]

[261] This *Act* does not fall within any of Parliament's enumerated heads of power under s 91. Nor did Canada contend that it did. The only basis on which Canada defended the validity of the *Act* is under the national concern doctrine.

B. Provincial Jurisdiction

[262] Subject only to a national emergency, the provinces have exclusive jurisdiction under several heads of provincial power over the subject matter of the *Act*, whether that is expressed as the regulation of GHG emissions or any variation thereof. Again, we are speaking of GHG emissions within provincial jurisdiction. This excludes GHG emissions from, for example, a federal work or undertaking which falls under the federal government's jurisdiction: s 92(10)(a).

[263] That the real "matter" of the *Act* – the regulation of GHG emissions – falls squarely under specific heads of provincial powers is undeniable. Indeed, the very fact the federal "backstop" only comes into effect if the provinces have not implemented carbon pricing, or one to the federal government's satisfaction, is proof of that. In other words, the federal scheme is premised on the provinces' jurisdiction to impose carbon pricing in their own provinces on those subject to their jurisdiction. GHG emissions can be readily identified and thus regulated at source by the applicable

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[172] See paras 174-177.

[173] ***Hydro-Québec*** at para 86; ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3 at 64 [***Oldman River***].

[174] Other heads of power assigned to Parliament including trade and commerce (s 91(2)), navigation and shipping (s 91(10)), sea coast and inland fisheries (s 91(12)), Indian lands (s 91(24)), and agriculture (s 95) give the federal government the power for environmental initiatives.

provincial government. Hence, this is not an area in which it is impossible (as in ***Crown Zellerbach***) to determine the source of the GHG emissions.[175]

[264] Provincial governments can turn to several heads of power to impose on industries or end users of fuel products in their province a scheme to regulate GHG emissions, including carbon pricing.

[265] First and foremost is the *Resource Amendment*, s 92A. Under this section, provinces possess the exclusive power to develop and manage their natural resources. That power includes determining the terms and conditions under which industry will exploit those resources in the province. In turn, that necessarily includes the conditions a province may choose to impose regarding those operations, including regulating the polluting GHG emissions they produce. The *Resource Amendment* extends not only to the provinces' legislative authority over non-Crown-owned natural resources. It also explicitly authorizes the power to exercise the provinces' proprietary rights by legislation under s 92A.[176]

[266] Deciding the terms and conditions for controlling GHG emissions goes directly to a province's power to decide how best to manage, and the conditions under which it will permit, the development of its natural resources. A province's jurisdiction over development and management of its natural resources, and for Alberta, that includes its oil and gas sector, is inextricably linked to what must be a crucial concern of any provincial government, namely its economy.

[267] Development of natural resources cannot be achieved without capital investment. That investment does not just happen, especially where the capital investment is measured in the billions, not millions of dollars. And it particularly does not happen where the investing rules are uncertain, unpredictable, unquantifiable and unreliable. To encourage capital investment while ensuring it occurs in a socially and environmentally prudent manner requires comprehensive policies, oversight and agreements directed to a wide range of issues. These include: design, planning, construction, royalty structures, workforces, operations, emission controls, site reclamation, capture and storage of carbon and more. It also requires, in turn, a constant balancing, and re-balancing, of economic considerations with social and environmental ones. Add to that the need today for provinces to secure the social license for the extraction of fossil fuels and it is easy

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[175] Or the end users of the fuels subject to regulation.

[176] As explained in Moull at 419: "In Alberta ... the proportion of Crown-owned oil and gas producing lands is so high ... that there may be little need for the provincial government to resort to its new legislative powers under s 92A if it can continue to rely on the tremendous scope that the courts traditionally have given to section 109 for both revenue-raising and regulatory purposes... It is noteworthy that, at least partially in recognition of the potency ascribed to provincial Crown proprietary rights, subsection 92A(6) expressly preserves not only all pre-existing legislative powers but also all pre-existing provincial government 'rights' as well."

to understand why development of natural resources compels an integrated, predictable governmental screening and approval structure.

[268] Without a strong economy, a province's ability to respond to the challenges of climate change through innovation, including new clean energy solutions and minimizing GHG emissions from fossil fuel extraction, is diminished. Nor is this a battle governments are likely to win on their own. The creativity of the private sector, including the energy sector, must be harnessed for the challenges ahead. That calls for an alignment in the battle front, again of policies and conditions for developing natural resources.

[269] In the end, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns the resources, not the federal government. And it is the province and its people who lose if those resources cannot be developed, not the federal government. That is why the *Resource Amendment* was intended to ensure that the provinces' proprietary and legislative rights to determine the basis on which they would allow the development of their resources would be subject only to specific heads of federal power.

[270] It is true that, despite their efforts, the provinces did not succeed in altering the federal government's declaratory power when they negotiated the *Resource Amendment* with the federal government. The Supreme Court's decision in ***Ontario Hydro v Ontario (Labour Relations Board)***, [1993] 3 SCR 327 is explained by the continued existence of the declaratory power. In addition, the federal government also has the power under the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*] to punish criminally prohibited conduct.[177] To this sphere of federal powers, we would add the recently enacted federal *Impact Assessment Act*, SC 2019, c 28, s 1 which replaced the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.[178]

[271] Nevertheless, the arduously achieved *Resource Amendment* is not a constitutional nothing. The *Resource Amendment* and the provinces' proprietary rights confer significant powers over the sustainable development of natural resources – *and that necessarily includes regulation of GHG emissions through carbon pricing and otherwise*. In other words, short of the use of the federal declaratory power and the emergency POGG power, the purpose of s 92A, when passed, was to

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[177] Certain provisions in an earlier version of *CEPA* (see *Canadian Environmental Protection Act*, RSC, 1985, c 16 (4th Supp.)) were upheld as constitutional in ***Hydro-Québec*** under Parliament's criminal law power. ***Hydro-Québec*** has been criticized for its negative impact on the constitutional division of powers: see Alexis Bélanger, "Canadian Federalism in the Context of Combating Climate Change" (2011) 20:1 Const. Forum 21 at 23 [Bélanger]; Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21 at 26; David M Beatty, "Polluting the Law to Protect the Environment" (1998) 9:2 Const. Forum 55.

[178] The constitutional validity of the *Impact Assessment Act* is the subject of a separate Reference to this Court pursuant to Order in Council 160/2019.

bar the federal government's intrusion into a province's development and management of its natural resources.[179]

[272] Second, s 92A is not the only power the provinces have with respect to their natural resources and control over GHG emissions in their province. To this must be added the provinces' proprietary rights under s 109 of the Constitution as owners of their natural resources. These rights extend to regulation of resources after recovery from the ground.[180]

[273] This *Act* interferes directly with provincial proprietary rights. The decision to impose a carbon pricing scheme on GHG emissions from natural resources goes directly and deep into provincial jurisdiction over their development and management. The scheme under the *Act* is unlimited in scope and application: it can be used to control every aspect of development from inception to post-production. The courts should not permit the national concern doctrine to be used to render the provinces' potent proprietary rights and powers impotent.

[274] Third, under one of the broadest areas of provincial jurisdiction, s 92(13), property and civil rights, provincial governments have the power to regulate industries and levy charges on consumers. These powers include regulating land use and emissions that could pollute the environment.[181] This power also includes the control and regulation of local trade and commerce generally and commodity pricing in the provincial sectors: ***Anti-Inflation*** at 452-453.

[275] Fourth, the provinces' powers over nuisance and trespass, as a subset of their exclusive jurisdiction over property and civil rights, have long been recognized. As for the theory that the regulation of GHG emissions or environmental pollution is a "new" issue falling within the national concern doctrine, we do not agree. Canada did not advance this argument before this Court. Nevertheless, it has been suggested that today, there is a greater appreciation that environmental pollution can transcend national and international boundaries and therefore is no longer thought of as a purely local concern.[182]

[276] This reasoning trivializes the foundational nature of the constitutional division of legislative powers. "Greater appreciation" provides no substantive content to the meaning of "national concern" and the permanent ouster of express provincial legislative authority. This "greater appreciation" notion also stumbles on the realities of history. Industrial pollution was

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[179] As noted, the federal government today also possesses powers under other legislation, including *CEPA* and the *Impact Assessment Act*.

[180] Hogg at 30-2.

[181] Hogg at 30-23, citing ***R v Lake Ontario Cement***, [1973] 2 OR 247 (HC). See as an example of the reach of such laws: ***Castonguay Blasting Ltd v Ontario (Environment)***, 2013 SCC 52, [2013] 3 SCR 323.

[182] ***Ontario Reference*** at para 80.

known at Confederation. As pointed out by Professor John PS McLaren in "Nuisance Law and the Industrial Revolution – Some Lessons from Social History" (1983) 3:2 Oxford Journal of Legal Studies 155 [McLaren], "noxious vapours" and the effort to suppress them have been around since at least the 18th Century. McLaren at 165 notes colourful descriptions from authors like De Toqueville, who said this in 1835:

> A sort of black smoke covers [Manchester]. The sun seen through it is a disc without rays. Under this half daylight 300,000 human beings are ceaselessly at work.

There was a Select Committee on Noxious Vapours in 1862 *before* there was a Canada.[183] We doubt the Fathers of Confederation missed the topic.

[277] In ***Crown Zellerbach***, La Forest J recognized that environmental pollution is not new.[184] As he explained at 455:

> ... environmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable. *The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale.* [Emphasis added]

[278] Moreover, the laws of trespass and nuisance date well prior to the *Constitution Act, 1867*. At Confederation, the common law of centuries was adopted into Canada and formed part of property and civil rights: ***Campbell v Hall*** (1774) 98 ER 1045. Since Canada inherited laws of nuisance and trespass, the subject of a person's activities prejudicing their neighbors has been

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[183] See the speech of the Earl of Derby regarding forming a Select Committee "to inquire into the Injury resulting from noxious vapours evolved in certain manufacturing Processes, and into the State of the Law relating thereto," dated May 9, 1862 Vol 166 cc 1452-1467: https://api.parliament.uk/historic-hansard/lords/1862/may/09/motion-for-select-committee.

[184] La Forest J was in dissent but as he pointed out in ***Oldman River*** his view in ***Crown Zellerbach*** that the environment was a "diffuse subject" and environmental control, as a subject matter, did not have the requisite distinctiveness to meet the test under the "national concern" was not contested by the majority. Also, in ***Hydro-Québec*** at para 153, La Forest J again referred back to his dissent in ***Crown Zellerbach*** at 455 to point out with respect to atmospheric pollution that "[t]he problem is thus not new". Lamer CJ and Iacobucci J, while in dissent in ***Hydro-Québec***, echoed La Forest J's concerns at para 60: "The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or ... may have an immediate or long-term harmful effect on the environment" .... *One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances*" (emphasis added).

recognized, it is fair to say, for centuries. The regulation of GHG emissions also falls within the provinces' powers over nuisance and trespass.

[279] Fifth, provincial governments' power under s 92(5) of the *Constitution Act, 1867* extends to making laws, and that includes laws relating to pollution, in relation to management of public lands. Where the lands are not owned by the provinces, s 92(13) gives the provinces power to make comparable laws. Again, this power would be rendered meaningless if the federal government could simply impose charges on GHG emissions by those using provincial public lands. The conditions for such use are within the province's exclusive control.

[280] Sixth, the provinces have the power under s 92(2) to tax consumption of products that cause pollution such as gasoline.[185]

C. Conclusions on Classification

[281] Parliament is attempting, under the *Act*, to compel provincial governments to exercise their jurisdiction under ss 92, 92A and 109 in a manner, and in accordance with policy choices and time lines, the federal government prefers. Parliament has the power to do what it wants within its spheres of jurisdiction. But apart from a national emergency, it cannot use powers reserved exclusively to the provinces to regulate GHG emissions subject to provincial jurisdiction. Nor does Parliament have the constitutional right to demand or dictate that the provinces enact laws in accordance with its policy choice – a price on carbon – on persons and industries subject to provincial jurisdiction. As Beetz J noted in ***Anti-Inflation*** at 453, in comments that apply equally to the regulation of GHG emissions:

> Parliament may fight inflation with the powers put at its disposal by the specific heads enumerated in s. 91 or by such powers as are outside of s. 92. But it cannot, apart from a declaration of national emergency or from a constitutional amendment, fight inflation with powers exclusively reserved to the provinces, such as the power to make laws in relation to property and civil rights. This is what Parliament has in fact attempted to do in enacting the *Anti-Inflation Act*.

[282] Nor is it any answer to suggest, as some have done, that because the federal government has only set minimum standards, the provinces somehow retain jurisdiction over the regulation of GHG emissions. They do not. The suggestion that they do so because they could always do more than the federal government mandates is disingenuous. The question is not whether the provinces could do more in regulating GHG emissions but whether they could do less than the federal

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[185] Hogg at 30-24.

government mandates. And more important, whether they can instead choose other policies to reduce GHG emissions or a combination of other policies and carbon pricing. Under the *Act*, they can do none of these.

[283] It comes down to this. The national concern doctrine cannot be used to assign a new head of power to the federal government where the subject matter of that claimed head of power falls within the provinces' exclusive jurisdiction. Constitutionally, the provinces' jurisdiction over the subject matter targeted by this *Act*, namely the regulation of GHG emissions in a province, falls under several heads of provincial powers assigned exclusively to the provinces: provincial *legislative* and *proprietary* powers over natural resources under s 92A and s 109 respectively; provincial powers over property and civil rights (s 92(13)); local works and undertakings (s 92(10)); and direct taxation (s 92(2)). The *Act* and *Regulations* interfere with classes of matters which have invariably been held to come within exclusive provincial jurisdiction.

[284] The provinces' jurisdiction over the regulation of GHG emissions or any variation on this theme does not rest on s 92(16). Thus, there is simply no scope for the national concern doctrine to apply.

XIII. Section 35 of the *Constitution Act, 1982*

[285] We heard arguments about how s 35 might inform the federal government's powers under s 91. The record before this Court does not provide a settled, clear and comprehensive basis to address whether s 35 and the obligations it imposes on the federal Crown with respect to Indigenous Peoples in any way influences or affects the division of powers in our federation. In particular, this Court has not received a sufficient factual record or full argument to allow a proper consideration of the many complex legal questions that this broad issue raises. Thus, as in the ***Saskatchewan Reference***, we find that it is not possible to deal with this submission on the interrelationship between s 35 and the division of powers generally in Canada.[186]

XIV. Why the National Concern Doctrine Does Not Apply to the *Act*

[286] Even if we are incorrect in our view that the national concern doctrine cannot intrude on provincial jurisdiction under enumerated heads of power outside of s 92(16), we have nevertheless concluded that the *Act* cannot be saved under the national concern doctrine. That requires us to consider the test set out in ***Crown Zellerbach***.

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[186] ***Saskatchewan Reference*** at paras 203-204.

A. Why the "Matter" Fails the Singleness, Distinctiveness and Indivisibility Criteria

[287] The "matter" of a new head of federal power under the national concern doctrine cannot be an aggregate of powers but must rather possess a degree of unity that makes it indivisible and distinct from provincial matters: ***Crown Zellerbach*** at 432. In assessing whether the claimed head of power is sufficiently distinct from provincial powers, a court must consider the totality of the legislative means authorized under the impugned legislation. This point was made by LeClair:[187]

> [T]he 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.

[288] The "matter" of this *Act* is an aggregate of powers – virtually all provincial. As explained, the regulation of GHG emissions within a province falls within provincial powers under s 92A, s 109 and a number of heads of power under s 92.

[289] Admittedly, the federal government possesses a broad group of powers over GHG emissions generally, for example legislation that is in pith and substance criminal law, direct or indirect taxation, regulation of interprovincial undertakings or those declared to be for the general advantage of Canada or through the power of the purse, namely the federal spending power. But this does not detract from the several heads of power under which the provinces have exclusive jurisdiction vis à vis industry, businesses, their operations and end users within the particular province. Thus, the regulation of GHG emissions or any variation on this theme is not a subject indivisible or separate from provincial powers.

[290] In identifying these various federal heads of power, we are not endorsing the validity of legislation interfering with the provincial governments' rights inherent in ownership of their natural resources and their exclusive jurisdiction to develop those resources in the manner the provinces see fit. As noted, the intersection between the two is an issue for another day. The point is that federal government powers are already substantial. That too is a reason courts should be

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[187] LeClair at 363-364. LeClair refers to the totality of the legislative means "necessary" for a matter's overall regulation in asking whether it amounts to "an important invasion of provincial spheres of power". We would refine this to include the means "authorized" by the legislation.

very cautious before using the national concern doctrine to judicially expand federal heads of power.

[291] The federal government's effort to co-opt the provinces' jurisdiction in pursuit of the federal government's preferred policy choices is fundamentally inconsistent with the national concern doctrine. This doctrine confers federal power over a single and indivisible subject matter when it does not come within any of the classes of powers assigned to the provincial governments, that is when it is *beyond* the power of the provinces to regulate. That is not this case. The fact that provinces may avoid being "listed" if they have their own carbon pricing schemes in place itself proves that this *Act* does not meet the national concern test. As explained by constitutional scholar Dwight Newman in "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 197:

> ... [l]egislation purportedly grounded in the national concern branch of POGG cannot logically contain opt-out clauses for provinces that regulate the matter at issue. If any matter is to be regulated under the national concern branch .... the matter must be indivisibly regulated by the federal government and is no longer subject to any provincial aspect.

[292] Further, simply because GHG emissions transcend provincial boundaries does not make their regulation an "indivisible" subject matter. In ***Crown Zellerbach***, the Supreme Court made it clear that the mere fact a polluting substance crossed a provincial border would not be sufficient to invoke the national concern doctrine. The problem in ***Crown Zellerbach*** that justified adding "marine pollution" as a federal head of power was the *inability to detect the source of the pollution.* As Le Dain J explained in ***Crown Zellerbach*** at 437:[188]

> Moreover, there is much force, in my opinion, in the appellant's contention that the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions. This, and *not simply the possibility or likelihood of the movement of pollutants* across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances. [Emphasis added]

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[188] This was in the context of "toxic" substances with far more immediacy of effects.

[293] No such problem exists with respect to GHG emissions within a province. The sources of emissions from industry (covered facilities) and regulated producers are readily identifiable.

[294] Nor does the concept of "minimum national standards" constitute a conceptually indivisible or distinct "matter". There is no separate head of federal power relating to minimum national standards of anything. Nor is backstoppism a separate head of federal power. And, for reasons explained earlier, the federal government cannot intrude on provincial powers simply because it would prefer national standards in any particular area. Were this otherwise, the federal government could usurp provincial power every time it decided it preferred its policy objectives more than the ones the provinces had selected in a given area. In ***Anti-Inflation***, a majority of the Supreme Court dismissed the notion that inflation could become a new residual head of power. Beetz J's reasoning at 458 has equal application here:

> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial power nugatory.

[295] Further, viewing this issue through the "minimum national standards" lens implies that the choice is between the federal government doing something to address GHG emissions and the provinces doing nothing. This is a false construct. It is also unfair to provinces that actually took steps to reduce GHG emissions (including through carbon pricing). On this record, Alberta was the first jurisdiction in Canada to require large industrial emitters to measure and report their GHG emissions (in 2004) and the first jurisdiction in Canada to adopt carbon pricing as part of its overall policy approach to address anthropogenic climate change (in 2007).[189] To take another example, in 2005, Ontario banned the use of coal-powered electrical generators, thereby substantially reducing its GHG emissions.[190]

[296] The "regulation of GHG emissions" is no more acceptable as an exclusive head of power for the federal government than the "environment" or, for that matter, "climate change". Nor is there much substantive space between "regulation of GHG emissions" and mitigation of "climate change" since the primary means identified to mitigate climate change is the reduction of GHG emissions. The "regulation of GHG emissions" as a subject matter is so pervasive and all-encompassing that it would be analogous to giving the federal government exclusive jurisdiction over the "environment". Or "climate change". The federal government's attempt to secure the

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[189] Savage Affidavit at paras 27, 33. AR Alberta A6-A7.

[190] Savage Affidavit at para 234. AR Alberta A41 ("... between 2005 and 2017, GHG emissions from Ontario electricity sector decreased from 33.9 Mt to 2.0 Mt").

environment as a head of power was firmly closed in ***Anti-Inflation*** at 445. That is because "environment" as a class of laws consists of many different classes and assigning it to Parliament exclusively would render many enumerated provincial powers meaningless. The same can be said of regulation of GHG emissions.

[297] Thus, the subject matter of this *Act*, the regulation of GHG emissions, and all variations on this theme, do not meet the requirements of the national concern doctrine for singleness, distinctiveness and indivisibility. All the labels counsel and courts can come up with to characterize the "matter", including all the ones already used, cannot take the "matter" with which this *Act* actually deals, the regulation of GHG emissions, outside the scope of provincial jurisdiction.

B. Provincial Inability

[298] That takes us to "provincial inability" under the national concern doctrine.

[299] Canada asserted that "provincial inability" is the test for distinctiveness.[191] We do not agree. Provincial inability and distinctiveness are two separate issues. While provincial inability can be an indicia of distinctiveness, the one is not a proxy for the other. As Le Dain J explained in addressing provincial inability in ***Crown Zellerbach*** at 434:

> In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

[300] The parties did not agree on what "provincial inability" means under the national concern doctrine. Several theories have been advanced. Does it mean "jurisdictional inability" or "the risk a province will fail to act"?[192] Or something else?

[301] Le Dain J noted in ***Crown Zellerbach*** at 432 that the genesis of the "provincial inability" test was a 1976 article by Dale Gibson.[193] The oft-cited quote from Professor Gibson is that "*a matter has a national dimension to the extent only that it is beyond the power of the provinces to*

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[191] Reply Factum of the Attorney General of Canada at para 16.

[192] We note that in the French version of ***Crown Zellerbach***, the word "omission" appears in lieu of "failure".

[193] "Measuring 'National Dimensions'" (1976) 7:1 Man LJ 15 [Gibson].

deal with it" (italics in original; underline added).[194] But Le Dain J then expressed reservations about this statement.

[302] Since ***Crown Zellerbach***, the Supreme Court has addressed what amounts to "provincial inability" in the context of the federal trade and commerce power: ***Second Securities Reference***.[195] There, it set out the test for whether a matter is of a genuinely national scope so as to engage the federal trade and commerce power.

[303] To qualify, it must be "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination": ***Second Securities Reference*** at para 101, citing ***AG (Can) v Can Nat Transportation, Ltd***, [1983] 2 SCR 206 at 267. The Court also confirmed at para 103 that this analysis involved key questions relating to the provinces, relying on ***General Motors of Canada Ltd v City National Leasing***, [1989] 1 SCR 641: "Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?" and "Would a failure to include one or more of the provinces or localities in the scheme jeopardize the successful operation in other parts of the country?"

[304] The first question goes to "jurisdictional" inability, not risk of inaction. And while the second question goes to failure, inaction alone (a province's choice not to be included in the scheme), will not suffice. The question is whether that inaction (not participating in the scheme) goes so far as to "jeopardize" the successful operation of the scheme in other provinces. This test cannot be met by an affirmative answer to the simplistic question: "Is there a risk a province might fail to participate in a national scheme?"

[305] It would be ironic if the content of a "provincial inability" test under the federal government's trade and commerce power (where the federal government is relying on an enumerated power to justify challenged legislation) were more difficult for the federal government to meet than the "provincial inability" test under the national concern doctrine (where the federal government has no enumerated power to rely on). Logically, the test for "provincial inability" under the national concern doctrine should be more onerous than that under the trade and commerce power.

[306] Canada and other intervenors contended that "provincial inability" focuses on interprovincial effects and the consequences of a "failure to act". In Canada's view, "[the] test does not ask whether provinces can constitutionally address GHG emissions, or whether provinces

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[194] Gibson at 33.

[195] While the Supreme Court does not explicitly use the phrase "provincial inability" when discussing s 91(2), Hogg (at 20-19) does so in describing the fourth of five indicia from ***General Motors of Canada Ltd v City National Leasing***, [1989] 1 SCR 641 [***General Motors***].

are taking steps to reduce GHG emissions.... Rather, the test asks what would be the effect on extra-provincial interests of a provincial failure to do so."[196] Thus, the focus must be on the "detrimental interprovincial impacts that would result from a province's failure to act".[197]

[307] In this regard, Canada contended that because every province produces GHG emissions, and some disproportionately higher than others, a failure to act by any province negatively affects other provinces. And since no one province acting alone or group of provinces acting together can establish minimum national standards to reduce GHG emissions,[198] only the federal government is able to legislate nationally. Thus, on Canada's theory, the federal government can satisfy the "provincial inability" test where there is a risk that a province will fail to meet a national standard to reduce GHG emissions. "Failure to act" in this context means failing to implement the federal government's policy choice.

[308] In our view, "provincial inability" *under the national concern doctrine* refers to whether the provinces, acting alone or in concert, have the jurisdictional ability to enact the challenged scheme. If they do and that scheme may still operate successfully in other provinces, even if one province or more does not join in, that test is not met.

[309] If the risk of failure to meet a national standard constituted provincial inability, then Canada could readily satisfy this test merely by enacting a national standard. But the POGG power can only operate in the absence of provincial jurisdiction and here, the provinces have the constitutional and practical ability to act to reduce GHG emissions individually or together. Indeed, Canada admits in its factum (at para 93) that it "agrees with Alberta that provinces can and do address GHG emissions under various provincial heads of power."

[310] Each province can act to reduce GHG emissions – and has. If the provinces continue to do so effectively, they can substantially reduce the GHG emissions that those subject to their jurisdiction produce. Nor is there anything to prevent the provinces working together using their authority, if they choose.[199] Indeed, doing so, provinces have even resolved international environmental issues.[200] The *Act* seeks to reduce GHG emissions by imposing financial costs on

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[196] Factum of the Attorney General of Canada at para 93.

[197] Factum of the Attorney General of Canada at para 98.

[198] ***Ontario Reference*** at para 118.

[199] Despite differences in approach between them, the provinces have made significant strides across the nation in addressing *other* major social problems that are Canada-wide, such as cigarette smoking.

[200] As noted in Bélanger at 23: "The only real limit to environmental action by the provinces, apart from the specific areas under federal jurisdiction, is the relative difficulty in addressing the cross-border aspect of pollution. However, even in this regard, several precedents illustrate how, in certain situations, the provinces and U.S. states are better able to resolve transboundary problems than federal authorities, in particular through the practice of interprovincialism and

consumers and industry to encourage behaviour change. The provinces, acting alone or in concert, are constitutionally capable of enacting a comparable scheme or, for that matter, the exact same scheme. The backstop language is a confession the provinces could do just that.

[311] The provinces have the unchallengeable jurisdiction to reduce GHG emissions. But because the provinces might actually choose to exercise their powers in the way they are constitutionally entitled to do – for example, by not imposing carbon pricing on individual consumers – the federal government claims a right to use the provinces' exercise of their constitutional powers as justification for invoking the national concern doctrine and stripping away those powers. In other words, because the federal government believes a province's failure to act would not ensure the overall efficacy of the federal government's policy choice, the jurisdiction of *all the provinces* should be overridden. This cannot be.

[312] Nor does the fact that some provinces have disproportionately higher GHG emissions per capita than others make that a "national concern" justifying federal intervention under the national concern doctrine.

[313] We must say something about the implicit criticism that Alberta is producing a disproportionate share of industrial GHG emissions. This is undeniable – but hardly unexpected. Alberta, because of its oil and gas sector, has been one of the biggest drivers of the Canadian economy for decades. Were that not so, Alberta would not have been one of the largest financial contributors to the federal coffers throughout that entire time.[201] Thus, it is disingenuous, not to mention unfair, to imply that, because Alberta continues to generate the wealth it does, Alberta cannot be counted on to regulate its own industries and do its part in reducing GHG emissions.

[314] That said, the point is this. The fact one or more provinces produce disproportionately higher GHG emissions, and thus more potential for a negative impact on other provinces on this front, does not permit the federal government to deprive the provinces of their incontrovertible jurisdiction over their natural resources or other provincial powers. Under our federal system, what one province or the federal government does – or does not do – may well adversely affect another province socially, economically or environmentally.

[315] Take for instance certain trade barriers that provinces have been effective in maintaining. To the detriment of other provinces. Or the fact oil is imported into some provinces from countries whose records are not as environmentally progressive as Canada's, enabling and enriching those other countries. To the disadvantage of more responsible oil-producing provinces. Or the fact some

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the implementation of the ensuing multiple agreements. For example, the provinces and states along ... the Great Lakes recently concluded the *Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement.*"

[201] Fraser Institute, *A Friend in Need: Recognizing Alberta's Outsized Contributions to Confederation*, by Steve LaFleur, Ben Eisen & Milagros Palacios (July 2017).

provinces export coal to other countries whose burning of that coal has a disproportionately negative impact on the world's atmosphere. To the detriment of non-coal exporting provinces. Or the fact that if one province does not have sufficiently stringent vaccination provisions in place, that can lead, in our mobile age, to germ breakouts elsewhere. To the detriment of other provinces. Hence, the mere fact something one province does might adversely affect another economically, socially or environmentally is not itself a basis for the federal government's taking over provincial jurisdiction under the national concern doctrine.

[316] The bottom line is this. How the provinces exercise their jurisdiction to regulate GHG emissions is a policy question not a legal one. That policy question includes deciding how to balance environmental priorities with other provincial priorities. No government is in favour of pollution. Citizens of each province and territory elect their provincial or territorial governments knowing the platform on which each has run. If the federal government can successfully invoke the national concern doctrine because a province fails to see a policy issue the same way it does, then the federal government could effectively upend the election in any province or territory.[202]

[317] This would undermine democracy and federalism. As the Supreme Court said in ***Secession Reference*** at para 66: "The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less 'legitimate' than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province."[203]

[318] The federal government's position is also internally contradictory. Its claimed need for national standards rests on the proposition that if a province takes a divergent approach, this "failure" to act compromises the entire scheme. It then relies on the possibility of such "failure" to contend it meets the provincial inability test. In sum, the provinces *cannot be relied on to exercise provincial jurisdiction enough* – that is, do what the federal government tells them to do. So the federal government must act. Its approach is euphemistically described as a "backstop". And even though the *Act* confers broad discretion on the Executive, the federal government claims it *can be*

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[202] As Saskatchewan noted in its Factum of the Attorney General of Saskatchewan at paras 12-13: "Saskatchewan opposes a carbon tax on fuel because of its geography and its economy. Saskatchewan is a rural province with a cold climate. Saskatchewan's economy, like Alberta's, is resource based and export dependent. Saskatchewan's agricultural producers, miners and oil and gas producers have little ability to pass on their costs of production to customers. Therefore, a carbon tax in Saskatchewan will result in increased costs for essential commodities like gasoline and home heating fuel with little to no real reductions in emissions.... Saskatchewan is doing its part to reduce greenhouse gas emissions. Saskatchewan is not looking for a free ride."

[203] The Court went on to add: "At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government *acting within the limits of its jurisdiction.*" [Emphasis added] The key words in this context are the ones in italics.

relied on not to invade provincial jurisdiction too much. In other words: "We can't trust you, but you can trust us." Some might call this constitutional chutzpah.

[319] Accordingly, we agree with Huscroft JA's conclusion in the ***Ontario Reference*** at para 231:

> No doubt, action or inaction by one province could undermine the effectiveness of another province's efforts to establish carbon pricing, but this does not speak to provincial inability to address the GHG problem; it is, instead, a reflection of legitimate political disagreement on a matter of policy, and in particular the suitability of carbon pricing as a means of reducing GHG emissions in a particular province.

[320] If the provincial inability test could be met simply by "the risk a province will not act" in accordance with the federal government's preferred scheme, this would not be an indicia of a new head of federal power. It would be a guarantee of it. Policy differences abound throughout this country.

[321] In this case, the provinces have the jurisdiction to agree on minimum standards of carbon pricing. That is so even if an individual province chooses not to do so. In other words, the test has nothing to do with political will and choice. It is whether the provinces have the constitutional authority individually and collectively to set minimum standards to reduce GHG emissions. They do.

[322] As to whether the scheme can operate successfully in other provinces if a province chooses not to participate, the answer is that it can. A province's decision to opt out would not be destructive of the efforts of the others; the others could readily carry on with their collective scheme.

[323] It was argued that a decision of one or more provinces not to enact precisely the same scheme as imposed by the federal enactment would jeopardize air quality elsewhere because air moves. And that being so, this proved that a failure to act would be detrimental to the interests of others outside a province. But that calls for conjecture on this record as to possible results under different schemes. Canada had the onus to establish that different provinces approaching the problem in a different manner than the *Act* requires would "jeopardize" the scheme's operation in other provinces. While Canada asserted its choice would work best, it did not prove that variation in provincial approaches would actually jeopardize the operation of the *Act* in different parts of the country. There was some evidence Canada itself did not apply its scheme uniformly throughout Canada.

[324] Further, factually, in any event, there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. The scale and proportionality of GHG emissions differ from the immediacy of harm from a toxic chemical. The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries. Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world's GHG emissions. Canada, given its northern climate, vast geography and comparatively small population, generates 1.8%.[204]

[325] For these reasons, the provincial inability test is not met here. Even if we are in error on this point, this aspect of the test would not trump the federal government's failure to satisfy the other parts of the national concern test.

C. Why the Proposed New Head of Power Is Not Reconcilable with the Division of Powers

1. Introduction

[326] For a "matter" to qualify as a matter of national concern, it must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution: ***Crown Zellerbach*** at 432. If not, the national concern doctrine cannot be successfully invoked. When the federal government claims, as here, a broad head of power, this will often be the most significant issue.

2. Impact of the Regulation of GHG Emissions on Division of Powers

[327] We now turn to the reasons why the impact of the subject matter of this *Act* – the regulation of GHG emissions and any variation on this theme – is not reconcilable with the fundamental distribution of legislative power.

[328] First, for reasons already explained, it interferes with the provinces' *exclusive* jurisdiction under the Constitution over the development and management of their natural resources under s 92A and 109 of the Constitution. This intrusion into provincial development and management of natural resources, including the oil and gas sector, effectively deprives the provinces of their right to balance environmental concerns with economic sustainability.

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[204] The breakdown, based on 2014 numbers, is as follows: China (26%); United States (13.9%); European Union (8.9%); India (6.7%): see https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global -greenhouse-gas-emissions.html.

[329] One example only. Imposing a demand side carbon price under Part 1 of the *Act* contradicts Alberta's policy choice to have approximately 28,000 small facilities [Small Facilities], including single well oil production sites, focus their GHG reduction efforts on reducing methane emissions. The *Methane Regulation* exempted Small Facilities from its retail carbon tax until 2023 to assist them while they invested in actions to reduce methane emissions.[205] There has been significant uptake of this program, which has resulted in over 19,000 device conversions since 2016 and an estimated 1.6 Mt of GHG emission reductions in 2019. But Part 1 of the *Act* imposed on January 1, 2020 does not exempt these Small Facilities. Thus, they are now subject to both Part 1 and the *Methane Regulation*. That means that additional costs have now been imposed on these Small Facilities which, according to Alberta, will slow or halt progress on methane emission reduction projects.[206]

[330] Tackling climate change, including reducing GHG emissions, is not an abstract concept nor an exercise in virtue seeking. As with everything in life, meeting the challenges of climate change while sustaining the economy is all about balance. When it comes to achieving the desired balance, it is the provinces, in keeping with the subsidiarity principle, who are best suited to decide the most appropriate combination of policies for their province amongst recognized policy choices – carbon pricing, regulations and subsidies for households, and regulations and subsidies for businesses. When an economy unravels, this has real implications for real people and real jobs, businesses and standards of living. Unemployment contributes to many problems: mental health, substance abuse, loss of homes, family breakdowns and suicides. These too are valid concerns of every provincial government.

[331] In its argument, Canada made much of the need to avoid carbon leakage domestically. But for provinces such as Alberta, the issue is less about carbon leakage domestically and more about carbon leakage internationally. The *Vancouver Declaration* recognized the significance of carbon leakage internationally. The oil and gas sector is largely in Alberta (and Saskatchewan and Newfoundland and Labrador). Carbon leakage internationally leads to business leakage. Business craves certainty. If it cannot find it in one country, it will move to another. The United States has served notice of withdrawal from the *Paris Agreement*.[207] While that is not material to what Canada chooses to do, it is material to Alberta's deciding what is required to sustain Alberta's economy and remain competitive with the oil and gas sector internationally. These are choices Alberta, and other provinces, are entitled to make under our federal structure.

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[205] The exemption encouraged Small Facilities to pursue methane emission reductions such as converting high bleed pneumatic devices to low bleed pneumatic devices, pump electrification, vent gas capture, and instrument gas to instrument air conversion. Savage Affidavit at para 113. AR Alberta A17.

[206] Savage Affidavit at paras 111-116. AR Alberta A17-18.

[207] United Nations Treaty Collection Depository Status of Treaties website. Reference: C.N.575.2019.TREATIES-XXVII.7.D (Depositary Notification), dated November 4, 2019. This will not be effective until November, 2020.

[332] We recognize there may well be those who favour ending further oil and gas development and even shutting down the entire oil and gas industry. Chief amongst them would be Alberta's foreign oil and gas competitors.

[333] Second, the regulation of GHG emissions intrudes deep into the provinces' exclusive jurisdiction over property and civil rights. There would be almost no aspect of the daily lives of the citizens of a province that would not be affected and areas into which the federal government could not intrude. Since a price can be attached to anything, price stringency charges could be imposed on an endless list of GHG producing items and things: the purchase of beef; living in a single family home or one exceeding a certain size; ownership of a second residence for personal use; ownership of a vehicle or one that exceeds a certain age; ownership of more than one vehicle per family; taking a holiday by plane, car, cruise ship or bus; the purchase of consumer goods such as TVs, stereos, alarm systems, computers, phones, etc; and the consumption of electricity, to mention a few only.

[334] Third, the *Act* purports to be neutral but has a disproportionate negative impact on certain provinces and their citizens.[208] In particular, the *Act* does not take into account regional differences in terms of inclemency of weather (meaning more costs to end users to heat their homes), longer travel distances for work and transport of goods (meaning more costs to end users to travel to and from work and more costs for food and other goods that must be transported longer distances) and the sparseness of population (which again leads to incrementally higher costs for transportation). Nor does the *Act* account for lack of economies of scale which would otherwise be available to larger population centres and which facilitate initiatives such as rapid transit. As explained in Bélanger at 26:

> Geographical and environmental characteristics vary immensely in Canada, from one region to another and from one province to another. Canada occupies one of the largest land masses in the world.... Canada has a federal structure capable of managing a vast territory characterized by diversity in its geographical environments. The diversity of ecosystems calls for diversity in environmental responses. Environmental standards must be adapted to the numerous local contexts in order to have their full effect. This is also why one-size-fits-all policies can often prove to be costly and inefficient.

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[208] Nor does Canada's argument that the charges levied will be returned to the province of origin obviate this concern. End users under Part 1 are not reimbursed what they paid. If the backstop applies, the funds are returned to whomever the Executive decides, in their unilateral discretion, will receive such funds. If the backstop does not apply, this is left to the discretion of the provincial government.

[335] Fourth, if minimum national standards for pricing of GHG emissions or any variation on this were permitted, then, on this theory, the federal government could impose minimum national standards on innumerable areas under provincial jurisdiction: roadways, building codes, public transit, home heating and cooling.

[336] Fifth, granting the federal government the new head of power over GHG emissions and any variations on this theme would negatively impact federalism. What the citizens of each province would lose cannot be measured solely in the context of this one piece of legislation, no matter how compelling the forces motivating it are. We have a federation for a purpose. The provinces share the environmental concerns, have been willing to act, and have done so.

[337] Sixth, the final decision of the courts that a newly claimed power of the federal government falls within the national concern doctrine binds everyone in accordance with the Rule of Law. All governments are bound by a judicial decision on division of powers.[209] When the provinces agreed to repatriation of the Constitution, it was on the basis that the constitutional amending formula expressly include the right on the part of an individual province to dissent from an amendment if that amendment derogated from the province's legislative powers or proprietary rights. The final compromise on amendment of Constitution is found in 38 of the *Constitution Act, 1982*. Why is this relevant? Because while a province can dissent from any *constitutional amendment* derogating from its proprietary rights and legislative powers over its natural resources, it cannot dissent from a judicial decision. That decision binds. Thus, courts should be slow to judicially expand federal heads of power under the national concern doctrine since this effectively steps past provinces' rights and protections under s 38(3).

3. Conclusion

[338] No matter how narrowly other courts have sought to characterize the "matter" of this *Act*, the new federal head of power claimed in this Reference fails this part of the national concern test. Whether the "matter" is characterized as the "regulation of GHG emissions" at the one end or "establishment of minimum national GHG emissions pricing standards to reduce GHG emissions" at the other, the result is the same. The scale of impact on provincial jurisdiction is irreconcilable with the fundamental distribution of legislative power under the Constitution. This is quite apart from the fact it is also irreconcilable with the provinces' proprietary powers as owners of their natural resources.

[339] For these reasons, acceding to the federal government's invocation of the national concern doctrine because of the clarion call of today's discourse – something must be done – comes at an unacceptably high cost both to the provinces' exclusive jurisdiction to manage their own affairs and to the citizens of each province. The federal government is attempting to use a valid domestic

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[209] Of course, this is subject to constitutional amendment.

and international concern about climate change to vary the division of powers in Canada, but without a constitutional amendment. However, simply because reducing GHG emissions is a pressing international problem and one of concern to Canadians generally across this country does not justify abrogating the existing division of powers in Canada.

D. Conclusion on National Concern Doctrine

[340] For the reasons given, Canada's argument that this *Act* is constitutional based on the national concern doctrine fails.

[341] The Supreme Court has noted, with respect to s 125 of the *Constitution Act, 1867*, which prevents one level of government taxing the other, that "the power to tax is the power to destroy".[210] But the power to tax is not the only power to destroy. Undermining the provinces' powers through federal legislation which might at first blush appear benign, but which is anything but, is equally destructive. To uphold the *Act* under the national concern doctrine would substantially override the provinces' powers under several heads of power under s 92, as well as s 92A, and their proprietary rights as owners of their natural resources.

XV. Conclusion

[342] For the reasons given, it is our opinion that Parts 1 and 2 of the *Act* are unconstitutional in their entirety.

[343] Since we did not receive any submissions on the constitutionality of Parts 3 and 4, we decline to express any opinion on those Parts.

[344] We would add this. While we have given our opinion on the validity of this *Act*, we cannot participate in the frank conversation across differences that is clearly called for in this country. It is apparent from the way in which this Reference unfolded and the submissions and evidence presented that a substantial disconnect exists between meeting environmental objectives by reducing GHG emissions, on the one hand, and preserving provincial economies and the ability to fund new technologies and clean energy, on the other.

[345] This disconnect involves several linked issues: how to ensure provinces continue to be able to develop their resources; how to ensure oil and gas resources do not become stranded assets and if they do, how to resolve the tangled web of issues that raises; how to mitigate GHG emissions from developing those resources; how to improve the capture and storage of carbon; how to minimize regulatory delays; how to encourage capital investment; how to transition to clean energy

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[210] ***Westbank First Nation v British Columbia Hydro and Power Authority***, [1999] 3 SCR 134 at para 17, citing Marshall CJ in ***McCulloch v Maryland***, 17 US (4 Wheat) 316 at 431 (1819).

sources; how long that will realistically take; how to spur innovation and development of new clean energy sources; how to motivate the societal changes necessary to reduce GHG emissions; how to ensure this country's energy independence and security; and how to reconcile the development of natural resources with environmental concerns. All of this raises an overarching issue – how to resolve social, economic and environmental issues in this country in a way that maintains public trust and confidence in our democratic federal state and the Rule of Law.

Special Hearing heard on December 16, 17 and 18, 2019

Opinion filed at Edmonton, Alberta
this 24th day of February, 2020

Fraser C.J.A.

Watson J.A.

Authorized to sign for Hughes J.A.

Wakeling J.A. (Concurring):

TABLE OF CONTENTS

I. Introduction

[346] We are the third appeal court – the appeal courts for Saskatchewan[211] and Ontario[212] were the first two – asked to opine on the constitutionality of Parliament's *Greenhouse Gas Pollution Pricing Act*.[213]

[347] We are the first to opine that it is unconstitutional.[214]

[348] The *Greenhouse Gas Pollution Pricing Act* is a massive and unprecedented peacetime-nonemergency[215] invasion of Alberta's and other provinces' jurisdiction under the *Constitution Act, 1867*[216] by the use of the federal government's residual lawmaking power. This assault on provincial jurisdiction could only be justified if Parliament validly claimed an environmental emergency that threatened life as we know it on planet earth and required an immediate and comprehensive response to dangerously high levels of greenhouse gas emissions.[217]

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[211] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; [2019] 9 W.W.R. 377.

[212] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; 436 D.L.R. 4th 1.

[213] S.C. 2018, c. 12, s. 186.

[214] That is all we have decided. The wisdom of competing strategies to reduce greenhouse gas emissions was not and could not be before us. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶ 192; 436 D.L.R. 4th 1, 56 per Huscroft, J.A. ("The court is not required to decide anything about the science of climate change in order to provide that advice: all of the governments ... proceed on the basis that climate change is a real and pressing problem that must be addressed. Nor does this case require the court to decide anything about how climate change is best addressed. That is a question for governments and legislatures, not the court which has neither the expertise nor the mandate to express any views on the matter") & *Ontario v. Canada*, [1912] A.C. 571, 583 (P.C.) (Can.) ("It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say"). What is clear is that policymakers have several options from which to choose. Intergovernmental Panel on Climate Change, Climate Change 2014 Synthesis Report Summary for Policymakers 28 (2015). 1 Appeal Record Canada R247 ("Mitigation options are available in every major sector. Mitigation can be more cost-effective if using an integrated approach that combines measures to reduce energy use and the greenhouse gas intensity of end-use sectors, decarbonize energy supply, reduce net emissions and enhance carbon sinks in land-based sectors").

[215] In *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 417 & 425-26 (the Court relied on the economic emergency residual power to uphold Parliament's *Anti-Inflation Act*. Chief Justice Laskin, for the majority, held that Parliament had a "rational basis for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole"). Id. 425.

[216] 30 & 31 Vict., c. 3 (U.K.).

[217] The preamble to the *Greenhouse Gas Pollution Pricing Act* does not allege that Canada confronts an environmental emergency on account of climate change. A court should not consider whether an act of Parliament was a response to an emergency unless counsel for Canada claims that it was. The Attorney General of Canada made no such claim. It is not enough that two intervenors made the claim and counsel for the Attorney General of Canada adopted any arguments intervenors made supporting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. The David

[349] If the *Greenhouse Gas Pollution Pricing Act* is a valid law, the constitutional foundation for provincial governments is badly damaged and their future as an important level of government is in jeopardy.[218] Federalism, as we have known it for over 150 years, is over. Tomorrow Parliament could pass a law prohibiting Albertans from heating their homes above sixteen degrees Celsius, driving gasoline-powered motor vehicles, raising cattle – the source of not only meat and dairy products but methane, a greenhouse gas that is particularly harmful to the environment, and any other activity that the federal government believes contributes to greenhouse gas emissions and global warming.

[350] The federal residual head of power that Canada invokes to justify the *Greenhouse Gas Pollution Pricing Act* is not a portal through which Parliament is entitled to drive a giant oil sands earth mover that could carry Prince Edward Island in its payload. The residual head of power was never intended to sanction federal forays that left little provincial jurisdiction behind after the federal vehicle departed. The framers of the *Constitution Act, 1867* thought they had built a modest roadway that would allow the odd pickup truck to pass to ensure that the *Constitution Act, 1867* would work.

Suzuki Foundation argues that there was a national emergency. Factum, ¶¶ 1 & 2: "Canada and the world are engaged in an existential struggle against climate change. The *Greenhouse Gas Pollution Pricing Act* ... is urgently necessary to address a *national emergency*: Canada is running out of time to mitigate climate change's disastrous health, economic and environmental and social impacts. ... Parliament may legislate or respond to a *national emergency* if there is a rational basis for doing so. The threat of climate change and the need to curtail it is surely as grave as, and most probably graver than, past emergencies for which the Courts have upheld Parliament's legislative response ... [under the national emergency head of power under section 91 of the *Constitution Act, 1867*]" (emphasis added). So did the Athabasca Chipewyan First Nation in paragraph 15 of its factum: "For ACFN, climate change is not an ordinary concern, but an existential *emergency* without comparison in thousands of years. If the scientists at Parks Canada and ... [Environment and Climate Change Canada] are right that AFCN's homeland in the ... [Peace-Athabasca Delta] will become drier and hotter by up to 7.1°C by 2080, it is all too likely that AFCN will lose fish, birds, caribou, muskrats, beaver, moose, medicinal plants and other species that have furnished sustenance and shaped their culture since time immemorial" (emphasis added). The Attorney General of Canada did not take the position before the Court of Appeal for Ontario that the *Greenhouse Gas Pollution Pricing Act* was passed on account of a climate change emergency. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 433, ¶ 217; 436 D.L.R. 4th 1, 62 per Huscroft, J.A.

[218] *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 256 per Lamer, C.J. & Iacobucci, J. ("One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such a total control over the release of these substances. Moreover, the countless spheres of human activity, both collective and individual, which could potentially fall under the ambit of the [federal] Act are apparent") & *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 445 per Beetz, J. ("If the first submission is correct, then it could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject matters of national concern going beyond local provincial concern or interest and coming within the exclusive legislative authority of Parliament. ... It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and Provincial Legislatures would disappear not gradually but rapidly").

[351] Our opinion that the *Greenhouse Gas Pollution Pricing Act* is unconstitutional does not mean that Parliament is without legislative authority to pass laws designed to reduce the risk that Canada's greenhouse gas emissions will exceed internationally acknowledged harmful levels. Parliament has a suite of lawmaking powers the exercise of which can affect the greenhouse gas emissions of enterprises and undertakings primarily subject to its legislative authority – airlines, railroads, atomic energy enterprises, interprovincial truckers and bus lines, telecoms, banks, works declared to be for the general advantage of Canada and federal institutions, for example – and the exercise of others – tax and criminal law, for example – can also affect the conduct of persons, enterprises and undertakings not otherwise subject to federal authority.[219]

[352] In the absence of a valid environmental emergency, the federal and provincial governments must work together[220] to produce and implement strategies that will dramatically reduce Canada's greenhouse gas levels to the degree Canada indicated was achievable in the Paris Agreement.[221] Each level of government has an important role to play and must accept that different lawmakers may have different perspectives and policies.[222]

[353] All provincial governments recognize that greenhouse gas emissions caused by human activity contribute to global warming and are committed to decreasing greenhouse gas emissions.[223]

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[219] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶ 240; 436 D.L.R. 4th 1, 68 per Huscroft, J.A. ("Parliament has significant authority to address pollution and the environment").

[220] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 215; [2019] 9 W.W.R. 377, 460 per Ottenbreit & Caldwell, J.J.A. ("Under Canadian federalism, our federal and provincial governments treat each other as equals or partners (and as adversaries, at times) who together provide good governance by engaging in intergovernmental dialogue that leads to harmonised laws and agreements as to cooperation between or among the federal and provincial levels of governments").

[221] Can T.S. 2016 No. 9 (in force November 4, 2016).

[222] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶ 231; 436 D.L.R. 4th 1, 66 per Huscroft, J.A. ("[there exists in Canada] a legitimate political disagreement on a matter of policy, and in particular the suitability of carbon pricing as a means of reducing GHG emissions in a particular province").

[223] British Columbia, cleanBC our nature. our power. our future. 5 (December 2018). 6 Appeal Record Alberta A2008 ("The full scope of actions envisioned in CleanBC ... will accomplish our 2030 GHG reduction goals"); Alberta, Alberta's 2008 Climate Change Strategy: Responsibility/Leadership/Action 9 (2008). 1 Appeal Record Alberta A312 ("Climate change is real. Our planet is warming and it's doing so at a faster pace than at any other time in our recorded history"); Government of Saskatchewan, Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy 1 (2017). 7 Appeal Record Alberta A2505 ("We wholeheartedly support efforts to reduce greenhouse gases. ... We propose a broad and comprehensive approach, one that connects the very real global problem of climate change to the day-to-day priorities of people"); Manitoba Sustainable Development, A Made-In-Manitoba Climate and Green Plan: Hearing from Manitobans 1 (2017). 6 Appeal Record Alberta A2075 ("Climate change is real and is already impacting us. It is being accelerated by carbon and greenhouse gas emissions from humans. Scientists all over the world agree climate change is happening and poses a growing threat to how we live and work"); Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario

[354] No political party has a monopoly on good judgment. In the end, the voters in every jurisdiction have the final say on the wisdom of their government's climate change policies. A political party that does not commit to a vigorous defence of the local, national and global environment may be unelectable today. I do not know anybody who is not in favor of clean air, land and water and a world that offers their children and grandchildren a healthy and happy future.[224]

Environment Plan 3 (2018). 6 Appeal Record A2138 ("We will continue to do our share to reduce greenhouse gases and we will help communities and families prepare to address climate change. With hard work, innovation and commitment, we will ensure Ontario achieves emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement"); Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 3 (2012). 7 Appeal Record Alberta A2450 ("The reality of climate change is now well established. Average temperatures on the surface of the earth and the oceans have risen, leading to climatic disturbances that are already occurring in almost all regions of the world. ... Global warming is also already a reality in Québec. Average annual temperatures in southern Québec increased by 0.3°C to 1.5°C between 1960 and 2008"); Municipal Affairs and Environment Climate Change Branch, The Way Forward: On Climate Change in Newfoundland and Labrador 4 (2019). 6 Appeal Record Alberta A2220 ("The science is clear. Climate change is happening and is being caused by human activities such as burning fossil fuels and deforestation. The impacts are already being felt – each of the last three decades has been the warmest on record"). New Brunswick, Transitioning to a Low-Carbon Economy: New Brunswick's Climate Change Action Plan 3 (2016). 6 Appeal Record Alberta A2197 ("The science of climate change is clear. The Intergovernmental Panel on Climate Change, the world's foremost authority on climate change, has projected that an increase in global temperatures of more than 2 degrees Celsius will result in irreversible and catastrophic impacts. The current level of greenhouse gas emissions ... is expected to raise global temperatures by 3.5°C before the end of this century"); Nova Scotia Environment, Toward a Greener Future: Nova Scotia's Climate Change Action Plan 1 (January 2009). 6 Appeal Record Alberta A2334 ("Most of the world's governments accept the 2007 report from the United Nations' Intergovernmental Panel on Climate Change. ... Among its key conclusions is that human activity is warming the planet, with severe consequences") & Prince Edward Island, Taking Action: A Climate Change Action Plan for Prince Edward Island 2018-2023, at 4. 7 Appeal Record Alberta A2414 ("The earth's climate is changing and there is overwhelming scientific evidence to support that much of the change is being caused by human activity").

[224] Alberta, Alberta's 2008 Climate Change Strategy: Responsibility/Leadership/Action 4. 1 Appeal Record Alberta A307 ("Albertans place a high value on clean air, clean water and wide open spaces") & Ontario, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 2 (2018) ("The people of Ontario ... recognize the importance of a clean environment to our health, our wellbeing and our economic prosperity for future generations"). 6 Appeal Record Alberta A2137. Oil sands operators are also committed to reducing their greenhouse gas emissions. See Cenovus Energy Inc., "Cenovus sets bold sustainability targets" (January 9, 2020) (at 2) ("Cenovus has demonstrated leadership through per-barrel GHG emissions reductions at its oil sands operations of approximately 30% over the past 15 years. Building on this, the new 2030 GHG emissions targets are among the most ambitious in the world for an upstream exploration and production company. Cenovus is targeting to reduce its per-barrel GHG emissions by 30% by the end of 2030 ... . Cenovus's ambition of reaching net zero emissions by 2050 ... will require ongoing focus on technology solutions beyond those that are commercial and economic today") & Suncor Energy Inc., Climate Risk and Resilience Report 2019, at 2 (2019) ("Suncor is aiming to reduce our emissions intensity through our GHG goal by continuing to drive operational efficiency improvements while accelerating the adoption of new technology. We are measuring our progress by targeting a 30% reduction in the emissions intensity of our products by 2030 relative to a 2014 baseline").

[355] The Supreme Court of Canada is scheduled to hear the appeals against the judgments of the Court of Appeal for Saskatchewan and the Court of Appeal for Ontario on March 24 and 25, 2020 respectively.[225]

II. Questions Presented

[356] Are Parts 1 and 2 of Parliament's *Greenhouse Gas Pollution Pricing Act*[226] constitutional? Is this a law of a class of laws assigned to Parliament under section 91 or another section of the *Constitution Act, 1867*[227] or any other enactment?

[357] In a division-of-powers case a number of questions have to be posed.

A. First Question

[358] Why did Parliament pass the contested law and how does it impact those who are subject to its terms? What actually happens on the ground?

B. Second Question

[359] Taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the contested law display a feature[228] that reasonably justifies its classification as a class of laws assigned to the provincial legislatures under section 92 or another section of the *Constitution Act, 1867* or any other enactment? The answer to this question is usually obvious and not controversial. The essential attributes of most of the heads of power under section 92 have already been identified by precedent.

[360] If the contested law displays no feature that reasonably justifies classifying it as a class of laws assigned to the provinces, the contested law cannot possibly be within the jurisdiction of a province. This means that a provincial legislature may not validly pass the contested law. Only Parliament has the constitutional authority to do so.

[361] If the answer to the second question is yes, the inquiry continues.

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[225] Supreme Court of Canada Scheduled Hearings website.

[226] S.C. 2018, c. 12, s. 186.

[227] 30 & 31 Vict., c. 3 (U.K.).

[228] It is not the facts or circumstances that caused the legislature to enact the challenged law that constitute a feature of the law.

C. Third Question

[362] Taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the challenged law display a feature that reasonably justifies its classification as a class of laws assigned to Parliament under section 91 or another section of the *Constitution Act, 1867*[229] or any other enactment?

[363] If the challenged law displays no feature that reasonably justifies classifying it as a class of laws assigned to Parliament, the contested law cannot possibly be within the Parliament's jurisdiction. This means that Parliament has no constitutional authority to pass the impugned law. Only a provincial legislature may make it.

[364] If the challenged law displays features that reasonably justify its classification only as a class of laws assigned to a province, there is no need to proceed further.

[365] But if the challenged law displays features that reasonably justify its classification as a class of laws assigned to *both* the provinces and Parliament, logically either or both levels of government may enact the contested law. The inquiry must continue to resolve these issues.

D. Fourth Question

[366] Given that the challenged law displays features that reasonably justify its classification as a class of laws assigned to both levels of government under the *Constitution Act, 1867*[230] or any other enactment, does only Parliament or a provincial legislature or both have the constitutional authority to enact the contested law?

[367] To answer this query, several subsidiary questions arise.

[368] Is there a need for a national standard? How great is this need? Are the conditions which prompted legislative intervention present throughout Canada? Is the problem that prompted the contested law best solved the same way across the country?

[369] Is there a need for regional responses? How great is this need? Is a potential diversified response the best solution? Are there differences in the various regions that would justify varied regional solutions?

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[229] 30 & 31 Vict., c. 3.

[230] Id.

[370] If the benefits associated with a national standard and those derived from potentially diverse regional solutions are comparable, both a provincial legislature and Parliament may pass the impugned law.

[371] If the benefits associated with a national standard exceed the benefits Canada would derive from potentially varied regional responses, only Parliament may pass the impugned law.

[372] If the benefits associated with potentially varied regional responses exceed the benefits associated with a single national response, only a provincial legislature may pass the law.

[373] The answer to the fourth question is a judgment call on which jurists may reasonably disagree. The answer is not always obvious.

E. Fifth Question

[374] If the benefits associated with a national standard and potentially diverse regional solutions are comparable and both levels of government have the constitutional competence to enact the contested law, is there conflict between the law under review and a law passed by the other jurisdiction on the same subject matter or are the provincial and federal laws incompatible? If so, the doctrine of dominion paramountcy applies and the federal law applies and the provincial law does not apply.

[375] I have framed these five questions using plain English. In doing so, I am following the lead – 1953 – of Professor Lederman, indisputably one of, if not Canada's premier scholar, on division-of-powers constitutional law,[231] justices who regularly adopted Professor Lederman's original insights – Chief Justice Dickson and Justice La Forest, for example – and scholars whose work gained prominence after Professor Lederman made his major contributions to constitutional law.[232]

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[231] P. Hogg, Constitutional Law of Canada (3d. ed. 1992) ("Professor Lederman's brilliant writing has been the most important single contribution to my understanding of constitutional law"); J. Corry, Foreword in W. Lederman, Continuing Canadian Constitutional Dilemmas v (1981) ("[Professor Lederman] is the leading constitutional lawyer in Canada today. ... More than one senior judge has told me that judges, faced with a difficult constitutional case, always want to know what Lederman has said on the matter") & *Sahaluk v. Alberta*, 2015 ABQB 142, n. 163; 75 M.V.R. 6th 10, n. 163 ("I hold the work of Professor Lederman in high regard").

[232] This is a point Professor Lederman made in his groundbreaking 1953 article "Classification of Laws and the British North America Act" and is generally accepted by the Supreme Court and leading academics. Lederman, "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 203-04 & 207 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 246 & 248-49 (1981) ("The feature of the meaning of the rule deemed of outstanding importance is said to be 'the pith and substance,' 'the essence,' or 'the aspect that matters.' The feature deemed relatively unimportant is dismissed as merely 'incidental.' ... There is ... no special magic in any of these incantations. Plainly, whatever the form of expression adopted there is only one thing to be expressed: judgment on the relative importance of the federal and provincial features respectively of the meaning of the challenged law, for purposes of the distribution of legislative powers. *All the ... verbiage could be dispensed with and the words 'important' and 'unimportant' (or 'more important'*

[376] I have intentionally jettisoned the language nineteenth-century judges found of assistance when exploring the intricacies of division-of-powers case law – pith and substance[233] and double aspect, for example. Regrettably, modern constitutional lawyers and judges frequently employ these old terms, attributing to them meanings that their predecessors never intended. This contributes to confusion and lack of clarity.

III. Brief Answers

[377] Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act*[234] are unconstitutional.

A. First Question

[378] Parliament passed the challenged law to reduce the amount of greenhouse gas emissions produced by Canadians going about their daily lives and the enterprises and undertakings operating in Canada.

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and 'less important') substituted. ... [A] challenged law with features of meaning relevant to both federal and provincial categories of laws has to be classified by that feature of it deemed most important for the purposes of the division of legislative powers in the country") (emphasis removed and added); *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 137 per Dickson, J. ("The constitutional question to be answered is whether the 'dominant or most important characteristic' of the *Heroin Treatment Act* is the medical treatment of drug addiction"); *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 286-87 per La Forest, J. ("Though pith and substance may be described in different ways, the expression 'dominant purpose' or 'true character' ... or 'the dominant or most important characteristic of the challenged law' appropriately convey the meaning to be attached to the term"); *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 62 per La Forest, J. ("While various expressions have been used to describe what is meant by the 'pith and substance' of a legislative provision, in *Whitbread v. Whalley* I expressed a preference for the description 'the dominant or most important characteristic of the challenged law'"); 1 P. Hogg, Constitutional Law of Canada 15-7 (5th ed. supp. looseleaf release 2018-1 ("The general idea of these and similar formulations is that it is necessary to identify the dominant or *most important* characteristic of the challenged law") (emphasis added) & G. Régimbald & D. Newman, The Law of the Canadian Constitution 177-78 (2d ed. 2017) ("In cases where there are potentially numerous subject-matters inherent within the statute, the court will decide which is the *most important* or dominant aspect of the statute and characterize that aspect as being the pith and substance or matter of the law") (emphasis added).

[233] In *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, 587 (P.C.) (B.C.) Lord Watson used the phrase "the whole pith and substance of the [challenged] enactments" *after* he had earlier declared that "the leading feature of the enactments consists in this – ... these [Chinese] aliens ... shall not ... be allowed to work, in underground coal mines within ... British Columbia [a class of laws assigned to Parliament by section 91(25) of the *British North America Act, 1867*]". Lord Watson obviously equated the concepts of "leading feature" and "pith and substance". Given that he employed the "leading feature" phrase first, it is probably the expression he ultimately preferred. To the modern ear, "pith and substance" is archaic. Nonlawyers have probably never encountered this phrase.

[234] S.C. 2018, c. 12, s. 186.

[379] The *Greenhouse Gas Pollution Pricing Act*[235] provides minimum standards that come into force only if the provincial standards fall below the benchmarks incorporated in the contested federal law.

[380] Parliament, in effect, pressures provincial and territorial legislatures to exercise their admitted jurisdiction under the *Constitution Act, 1867*[236] and enact laws that are designed to cause persons and enterprises and undertakings subject to provincial and territorial jurisdiction to reduce the amount of greenhouse gases that their actions cause to be released into the atmosphere.

[381] The champions of the challenged law predict that the combined effect of provincial climate-change enactments approved by the federal cabinet and the minimum standards contained in the impugned law in force in the provinces and territories whose greenhouse gas emission initiatives are not approved by the federal cabinet will be altered behaviour by Canadians and the enterprises and undertakings located in Canada so that their cumulative greenhouse gas emissions will be substantially lower than was the case before the *Greenhouse Gas Pollution Pricing Act* was passed.

[382] They argue that the law will cause Canadians and the enterprises and undertakings they operate to emit smaller quantities of greenhouse gases as they go about their daily lives and operate their enterprises and undertakings. More of them may decide to live in a cooler house, acquire a higher-efficiency furnace, improve the insulation in their homes, purchase electric or more fuel-efficient cars and take public transportation more frequently. Enterprises and undertakings will invest in new technology or alter how they do business to reduce their greenhouse gas consumption.

[383] The contested law also targets large emitters – oil sands and other mines, coal-fired electricity-generating plants, cement producers, steel mills and smelters, for example. Large emitters have to change their ways or pay to continue emitting greenhouse gases.

B. Second Question

[384] The *Greenhouse Gas Pollution Pricing Act*[237] is designed to cause Canadians and businesses and undertakings subject to it, when making everyday decisions that affect their carbon footprint, to select the option that will result in a smaller amount of greenhouse gas emissions. It is also formulated to incentivize large emitters to pollute less. Large emitters usually hold leases for Crown lands.

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[235] Id.

[236] 30 & 31 Vict., c. 3 (U.K.).

[237] S.C. 2018, c. 12, s. 186.

[385] Parliament's contested law displays features that reasonably justify its classification as a management of public lands law[238] – it directly affects the management of public lands belonging to Alberta, a local works and undertakings law,[239] a property and civil rights law[240] – it affects the property and civil rights of those that are subject to its terms, a local matter law[241] and a nonrenewable natural resources law[242] – it directly affects the development, conservation and management of Alberta's nonrenewable natural resources. It applies to local undertakings and affects the civil rights and property of Albertans and the enterprises and undertakings they operate and Alberta's nonrenewable resources.

C. Third Question

[386] Canada argues that the *Greenhouse Gas Pollution Pricing Act*[243] is a law of a class assigned to Parliament under its residual head of power set out in the opening paragraph of section 91 of the *Constitution Act, 1867*[244] – "to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

[387] This argument is without merit.

[388] The Attorney General of Canada proposes a new head of power or class of laws – "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions."[245]

[389] This is not a head of power or class of laws that qualifies for inclusion under the federal residual head of power. Assigning a class of laws of this nature to Parliament would completely undermine the balance that must exist between the heads of power allotted to Parliament and the provincial legislatures in the federal Canadian state. Almost every act of Canadians and enterprises and undertakings they operate would be subject to federal regulation if Parliament has the new head of power or class of laws for which Canada seeks judicial approbation. Parliament could use this new head of power as the constitutional foundation for federal laws that prohibit the use in Alberta of gas-powered motor vehicles, lawnmowers and stoves and order enterprises and

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[238] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(5).

[239] Id. s. 92(10).

[240] Id. s. 92(13).

[241] Id. s. 92(16).

[242] Id. s. 92A.

[243] S.C. 2018, c. 12, s. 186.

[244] 30 & 31 Vict., c. 3 (U.K.).

[245] Factum of the Attorney General of Canada, ¶ 74.

undertakings primarily subject to provincial regulation to use fuels that emit less greenhouse gases or adopt technologies that capture greenhouse gases.

[390] The proposed head of power is an amalgamation of a number of heads of power enumerated in the *Constitution Act, 1867* – trade and commerce,[246] raising of money by any mode or system of taxation,[247] navigation and shipping,[248] sea coast and inland fisheries,[249] Indians and lands reserved for the Indians,[250] criminal law,[251] interconnecting works and undertakings,[252] works declared to be for the general advantage of Canada,[253] education[254] and agriculture.[255] It does not have the requisite "singleness, distinctiveness and indivisibility"[256] a new head of power must display.

[391] Nor is the proposed head of power or class of laws one that Parliament obviously should have. Canada is better served if both levels of government have authority to make laws designed to reduce greenhouse gas emissions.

[392] There is no practical reason to concentrate so much lawmaking power in Parliament. Provincial legislatures have the lawmaking tools needed to substantially reduce the amount of greenhouse gases those subject to their jurisdiction produce. For example, Ontario eliminated its coal-fired electricity-generating plants and almost overnight reduced greenhouse gas emission by roughly twenty-two percent.[257] Alberta acted aggressively in 2007 and forced large emitters to alter

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[246] 30 & 31 Vict., c. 3, s. 91(2) (U.K.).

[247] Id. s. 91(3).

[248] Id. s. 91(10).

[249] Id. s. 91(12).

[250] Id. s. 91(24).

[251] Id. s. 91(27).

[252] Id. ss. 91(29) & (92)(10)(a) & (b).

[253] Id. ss. 91(29) & 92(10)(c).

[254] Id. s. 93.

[255] Id. s. 95.

[256] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[257] Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 7 (2018). 6 Appeal Record Alberta A2142.

their ways.[258] Manitoba[259] and Québec[260] electricity-generating stations emit hardly any greenhouse gases.

[393] Some of the intervenors argued that the *Greenhouse Gas Pollution Pricing Act* could be classified as a trade and commerce, criminal law or emergency law.

[394] The challenged law displays no feature that justifies its classification as a class of laws within a class of laws assigned to Parliament by the *Constitution Act, 1867* or any other enactment.

[395] The inquiry is over. There is no need to ask the fourth question – is there a marked disparity in the importance of the provincial and federal features of the law?

[396] Parts 1 and 2 of the challenged law are unconstitutional and have no legal force.

IV. Statement of Facts

A. Global Warming Data

[397] The World Meteorological Organization, a specialized agency of the United Nations, reported in 2018 that atmospheric concentrations of carbon dioxide are at a level not seen for at least three to five million years when the "global mean surface temperature was 2-3°C warmer than today".[261]

[398] The United Nations Framework Convention on Climate Change secretariat provides this explanation:[262]

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[258] Alberta, Alberta's 2008 Climate Change Strategy: Responsibility/Leadership/Action 23 (January 2018). 1 Appeal Record Alberta A326.

[259] Manitoba Sustainable Development, A Made-In-Manitoba Climate and Green Plan: Hearing from Manitobans 10 (2017). 6 Appeal Record Alberta A2084.

[260] Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 7 (2012). 7 Appeal Record Alberta A2454.

[261] WMO Statement on the State of the Global Climate in 2017, at 8 (2018). 1 Appeal Record Canada R78.

[262] Climate Change Impacts, Vulnerabilities and Adaptation in Developing Countries 8 (2007). 1 Appeal Record Canada R160. See also Intergovernmental Panel on Climate Change, Climate Change 2014 Synthesis Report Summary for Policymakers 5 (2015) ("It is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together. ... Anthropogenic forcings have *likely* made a substantial contribution to surface temperature increases since the mid-20th century over every continental region except Antarctica. Anthropogenic influences have *likely* affected the global water cycle since 1960 and contributed to the retreat of glaciers since the 1960s and the increased surface melting of the Greenland ice sheet since 1993") (emphasis in original). 1 Appeal Record Canada R224; Intergovernmental Panel on Climate Change, Global Warming of 1.5°C, Summary for Policymakers 4 (2018) ("Human activities are estimated to have caused approximately 1.0°C of global

> Rising fossil fuel burning and land use changes have emitted, and are continuing to emit, increasing quantities of greenhouse gases into the Earth's atmosphere. ... [A] a rise in these [greenhouse] gases has caused a rise in the amount of heat from the sun withheld in the Earth's atmosphere, heat that would normally be radiated back into space. This increase in heat has led to the greenhouse effect, resulting in climate change. The main characteristics of climate change are increases in average global temperature ...; changes in cloud cover and precipitation particularly over land; melting of ice caps and glaciers and reduced snow cover; and increases in ocean temperatures and ocean acidity – due to seawater absorbing heat and carbon dioxide from the atmosphere.

[399] Elevated levels of atmospheric greenhouse gas concentrations contribute to global warming.[263] The World Meteorological Organization notes that "[t]he average global temperature for 2013-2017 is close to 1°C above that for 1850-1900 and is also the highest five-year average on record".[264]

[400] This is the scientific backdrop that accounts for the United Nations' interest in greenhouse gas emissions.

B. United Nations Climate-Change Initiatives

1. United Nations Framework Convention on Climate Change

[401] Canada ratified the United Nations Framework Convention on Climate Change on December 4, 1992.[265] It came into force on March 21, 1994.[266]

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warming above pre-industrial levels, with a *likely* range of 0.8°C to 1.2°C. Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate"). 1 Appeal Record Canada R256 & United States Environmental Protection Agency, Overview of Greenhouse Gases: Carbon Dioxide Emissions ("Carbon dioxide is naturally present in the atmosphere as part of the Earth's carbon cycle (the natural circulation of carbon among the atmosphere, oceans, soil, plants, and animals). Human activities are altering the carbon cycle – both by adding more CO_2 to the atmosphere, by influencing the ability of natural sinks, like forests, to remove CO_2 from the atmosphere, and by influencing the ability of soils to store carbon. While CO_2 emissions come from a variety of natural sources, human-related emissions are responsible for the increase that has occurred in the atmosphere since the industrial revolution") <https://www.epa.gov/ghgemissions/overview-greenhouse-gases#carbon-dioxide>.

[263] WMO Statement on the State of the Global Climate in 2017, at 7 (2018). 1 Appeal Record Canada R77.

[264] Id. 4. 1 Appeal Record Canada R74.

[265] United Nations Treaty Collection Depositary Notification website. Prime Minister Brian Mulroney was the leader of the Progressive Conservative government in 1992.

[266] United Nations Treaty Collection Depositary Notification website & United Nations Framework Convention on Climate Change, Art. 23(1). 1771 U.N.T.S. 107.

[402] The Convention's preamble states that its signatories are

> concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.

[403] The Convention's ultimate objective, as set out in Article 2, is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".

[404] By Articles 4.2(a) and (b)[267] the parties "commit" to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouses gases ... with the *aim* of returning individually or jointly to their 1990 [greenhouse gas emissions] levels".[268]

[405] The parties also undertook to report to the secretariat of the United Nations Framework Convention on Climate Change "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases ... using comparable methodologies to be agreed upon by the Conference of the Parties."[269]

[406] Article 7 established a "Conference of the Parties" that meets annually and makes the decisions necessary to promote the effective implementation of the Convention.

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[267] The United Nations Framework Convention on Climate Change is a treaty under the Vienna Convention on the Law of Treaties. But there are divergent opinions as to whether Articles 4.2(a) and (b) contain legal obligations or are nonbinding aspirational goals. Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary", 18 Yale J. Int'l L. 451, 516-17 (1993) ("These ambiguous formulations allow states to put their own spin on the requirements imposed by Article 4(2). Indeed, within days after the Convention was adopted, various countries advanced divergent interpretations. For example, President Bush's domestic policy advisor stated, 'there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time.' In contrast, the chief British negotiator characterized the provisions as 'indistinguishable' from an absolute guarantee. These widely divergent interpretations illustrate the limitations of the quasi-target and quasi-timetable contained in Article 4(2)") & Bodansky, "The Legal Character of the Paris Agreement", 25 Rev. Eur. Comm. & Int'l Envirtl. L. 142, 144 (2016) ("Article 4.2 was formulated as a non-binding aim rather than as a legal obligation").

[268] Emphasis added. In 1990 Canada's emission were 602 Mt CO_2e. In 2017 Canada's emissions were 716 Mt CO_2e. Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 12 (2019).

[269] United Nation's Framework Convention on Climate Change, Arts. 4(1) & 12. 1771 U.N.T.S. 107.

2. Kyoto Protocol

[407] Kyoto, Japan hosted the third conference of the parties. The conference adopted the Kyoto Protocol[270] on December 11, 1997.[271] It came into force on February 16, 2005, ninety days after "not less than 55 Parties to the Convention ... have deposited their instruments of ratification, acceptance, approval or accession".[272]

[408] Canada ratified the Kyoto Protocol on December 17, 2002.[273]

[409] Canada promised to reduce its greenhouse gas emissions by six percent below 1990 levels in the period 2008 to 2012.[274] The European Community promised eight percent, as did the United Kingdom of Great Britain and Northern Ireland.[275]

[410] Canada withdrew from the Kyoto Protocol effective December 15, 2012.[276]

[411] Canada did not meet its Kyoto Protocol target.

3. Copenhagen Accord

[412] In 2009 the fifteenth annual conference of the parties convened in Copenhagen. The resulting Copenhagen Accord[277] acknowledged "the scientific view that the increase in global temperature should be below 2 degrees Celsius".[278] Canada, on January 29, 2010, committed to

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[270] The Kyoto Protocol is a treaty as defined in the Vienna Convention on the Law of Treaties. Parties to it made legally binding promises. Bodansky, "The Legal Character of the Paris Agreement", 25 Rev. Eur. Comm. & Int'l Envtl. L. 142, 144 (2016).

[271] United Nations Treaty Collection Depositary Notification website.

[272] Id. & Kyoto Protocol, Art. 25(1).

[273] United Nations Treaty Collection Depositary Notification website (Government of Canada January 29, 2010 letter to the Executive Secretary United Nations Framework Convention on Climate Change) & *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30, s. 2.

[274] Kyoto Protocol, Annex. B.

[275] Id.

[276] United Nations Treaty Collection Depositary Notification website. Canada did not meet its targets. Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶ 42. 1 Appeal Record Canada R16.

[277] The Copenhagen Accord is not a treaty. Bodansky, "The Copenhagen Climate Change Conference: A Postmortem", 104 Am. J. Int'l L. 230, 235 (2010) ("The Copenhagen Accord is a political rather than a legal document"). Pledges parties made are not legal binding. Bodansky, "The Legal Character of the Paris Agreement", 25 Rev. Eur. Comm. & Int'l Envtl. L. 142, 144 & 149 (2016).

[278] Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, UNFCC, 15th Sess. UN Doc CP 2009/11/Add. 1 (2010).

reduce its greenhouse gas emissions by "17%, to be aligned with the final economy-wide emissions target of the United States in enacted legislation" from its 2005 levels by 2020.[279]

[413] As of 2017, Canada had reduced its greenhouse gas emission level by two percent.[280]

4. Paris Agreement

[414] Paris hosted the twenty-first annual conference – 2015 – of the parties. Canada and 194 other countries committed to strengthen the global response to the threat of climate change through the implementation of the Paris Agreement.[281]

[415] Articles 2 and 4 of the Paris Agreement, parts of which are set out below, record the targets the parties adopted:[282]

> Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.
>
> ...
>
> Article 4
>
> 1. In order to achieve the long-term temperature goal set out in Article 2, Parties *aim* to reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter in accordance with best available science,

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[279] United Nations Treaty Collection Depositary Notification website (Government of Canada January 29, 2010 letter to the Executive Secretary United Nations Framework Convention on Climate Change).

[280] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework on Climate Change) Part 1, at 12 (2019).

[281] Can. T.S. 2016 No. 9. The Paris Agreement is a treaty under international law. Bodansky, "The Legal Character of the Paris Agreement", 25 Rev. Eur. Comm. & Int'l Envtl. L. 142, 142 (2016).

[282] Emphasis added.

> so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases *in the second half of this century* ... .

[416] Article 4 requires each party to prepare "nationally determined contributions that it intends to achieve"[283] and file it with the United Nations.

[417] Professor Bodansky reports that

> [t]he issue that received the most attention in the Paris negotiations concerned the legal character of parties' nationally determined contributions (NDCs): would the Paris Agreement make NDSc legal by binding or not? ...
>
> With respect to the NDCs, the European Union ... sought a formulation that would allow them to characterize NDCs as legally binding. The option of requiring parties to 'achieve' their NDCs was not possible, since this would have given NDCs the same legal status as the Kyoto Protocol's emissions targets, which many countries had already rejected – not only the United States, but also big developing countries such as China and India. So the European Union instead sought to include a requirement that countries 'implement' their NDCs, which differs from an obligation to 'achieve' because it constitutes an obligation of conduct rather than result. The United States did not view an obligation to implement as sufficiently different from an obligation to achieve to make it acceptable, but agreed ... in supporting strong procedural obligations relating to NDCs, including obligations to communicate successive NDCs every five years and to regularly report on progress in implementing and achieving NDCs.[284]

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[283] Article 4(11) allows "[a] Party ... at any time [to] adjust its existing nationally determined contribution with a view to enhancing its level of ambition ...". Article 4(9) states that "[e]ach Party shall communicate a nationally determined contribution every five years".

[284] "The Legal Character of the Paris Agreement", 25 Rev. Eur. Comm. & Int'l Envtl. L. 142, 146 (2016). See also Clémençon, "The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?", 25 J. Env. & Dev. 3, 4 (2016) ("The Paris Agreement is built entirely around voluntary country pledges – as different as the countries they are coming from – which are still far from adding up to achieving the objectives the agreement defines").

[418] Canada ratified the Paris Agreement on October 5, 2016.[285] Its nationally determined contribution was an economy-wide target to reduce by 2030 greenhouse gas emissions by thirty percent below 2005 levels.[286]

[419] The Paris Agreement came into force on November 4, 2016.[287]

[420] Canada must report regularly and account for the progress it has made in reducing greenhouse gas emissions.[288]

[421] On November 4, 2019 the United States notified the Secretary-General of the United Nations that it was exercising its right under article 28 of the Paris Agreement and withdrew from the Paris Agreement effective November 4, 2020.[289]

5. Intergovernmental Panel on Climate Change Reports

[422] The United Nations Environment Program and the World Meteorological Organization created the Intergovernmental Panel on Climate Change in 1988.[290] Its mandate is to scientifically assess climate-change data.[291]

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[285] United Nations Treaty Collection Depositary Notification website. Prime Minister Justin Trudeau led a Liberal Party government at the time. According to Mr. Moffet, a senior Canadian civil servant, Canada ratified the Paris Agreement "after extensive consultations with the provinces". Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶ 50. 1 Appeal Record Canada R18. Mr. Savage, a senior Alberta civil servant, disagrees: "Provinces were informed of the negotiations after the fact, but not engaged on the content of the Paris Agreement before it was agreed to". Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 256. 1 Appeal Record Alberta A48.

[286] Canada's 2030 target under the Paris Agreement is currently 511 Mt CO_2e. Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶ 72. 1 Appeal Record Canada R26. Canada's emissions were 730 Mt CO_2e in 2005, 726 Mt CO_2e in 2013 and predicted to rise to 815 Mt CO_2e in 2030. Id. ¶ 70. 1 Appeal Record Canada R25. The difference between the projected 815 Mt CO_2e in 2030 and the Paris Agreement target of 511 Mt CO_2e is 304 Mt CO_2e. In 2005 Alberta's greenhouse gas emissions were 231 Mt CO_2e. Id. ¶ 89. 1 Appeal Record Canada R33. This translated into a 2030 target of 161.7 Mt CO_2e. Id. Alberta's greenhouse gas emissions in 2017 were 273 Mt CO_2e. Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 12 (2019).

[287] United Nations Treaty Collection Depositary Notification website. Paris Agreement, Art. 21(1) & Can. T.S. 2016 No. 9.

[288] Paris Agreement, Art. 13(7).

[289] United Nations Treaty Collection Depositary Notification website. C.N. 575.2019.TREATIES.XXVII.7.d (Depositary Notification).

[290] Affidavit of John Moffet sworn September 30, 2019 and filed October 8, 2019, ¶ 14. 1 Appeal Record Canada R7.

[291] Id.

[423] On October 8, 2018 the Intergovernmental Panel on Climate Change issued its Special Report on Global Warming of 1.5°C.[292] It opined that to limit global warming to 1.5°C above pre-industrial levels net human-caused global emissions of carbon dioxide would need to fall by about forty-five percent from 2010 levels by 2030 and reach net zero[293] around 2050.[294]

C. Canada's Response to the United Nations Climate-Change Initiatives

[424] Canada is responsible for roughly 1.6 percent of the world's greenhouse gas emissions.[295]

[425] Alberta is responsible for approximately one-third of Canada's emissions.[296]

[426] The oil sands generate a quarter of Alberta's emissions.[297]

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[292] Id. ¶ 16. 1 Appeal Record Canada R7 & R8.

[293] Net zero takes into account the activities or processes that lead to the emissions of greenhouse gases and the capture of greenhouse gases. Intergovernmental Panel on Climate Change, Global Warming of 1.5°C: Summary for Policymakers 32 (2018). 1 Appeal Record Canada R284.

[294] Intergovernmental Panel on Climate Change, Global Warming of 1.5°C Summary for Policymakers 15 (2018). 1 Appeal Record Canada R267.

[295] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 5 (2019). ("Canada represented approximately 1.6% of global GHG emissions in 2015"). World Resources Institute, CAIT – Historical Emissions Data (2017) & Canada, Global greenhouse gas emissions. <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global-greenhouse-gas-emissions.html>.

[296] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 12 (2019); Government of Alberta, Alberta's 2008 Climate Change Strategy 9 (January 2008). 1 Appeal Record Alberta A312 ("As a leading energy producer for Canada and the world Alberta is responsible for producing about a third of Canada's total greenhouse gas emissions – the leading cause of climate change"). Alberta's population as of April 1, 2019 was 4.36 million or 11.66% of Canada's population. Government of Alberta, Quarterly Population Report for the First Quarter of 2019 (June 19, 2019). 2 Appeal Record Alberta A617-A628. Canada's population as of April 1, 2019 was 37.4 million. Id.

[297] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 88. 1 Appeal Record Alberta A14.

1. Vancouver Declaration on Clean Growth and Climate Change

[427] On March 3, 2016 Prime Minister Trudeau and all provincial[298] and territorial premiers met in Vancouver and adopted the Vancouver Declaration on Clean Growth and Climate Change.[299] Canada's first ministers committed to cooperative action to meet or exceed Canada's obligations under the Paris Agreement – "to [i]mplement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives".[300]

[428] The Vancouver Declaration displayed a cooperative and collaborative spirit:[301]

> We will build on the leadership shown and actions taken by the *provinces* and territories, as exemplified by the 2015 Quebec Declaration and Canadian Energy Strategy, by working together and including federal action. We will build on the momentum of the Paris Agreement by developing a concrete plan to achieve Canada's international commitments through a pan-Canadian framework for clean growth and climate change. Together, we will leverage technology and innovation to seize the opportunity for Canada to contribute global solutions and become a leader in the global clean growth economy.

[429] The first ministers established four working groups to identify options in four distinct areas – (1) clean technology, innovation and jobs, (2) carbon pricing mechanisms, (3) specific mitigation opportunities and (4) adaptation and climate resilience[302] – and agreed to meet in "fall 2016 to

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[298] Premier Clark (British Columbia Liberal), Premier Notley (Alberta New Democrat), Premier Wall (Saskatchewan Saskatchewan Party), Premier Selinger (Manitoba New Democrat), Premier Wynne (Ontario Liberal), Premier Couillard (Québec Liberal), Premier Gallant (New Brunswick Liberal), Premier McNeil (Nova Scotia Liberal), Premier MacLauchlan (Prince Edward Island Liberal) and Premier Ball (Newfoundland Liberal) were the provincial premiers as of March 3, 2016. The 2017 British Columbia election resulted in a change of government. Premier Horgan became the premier on July 18, 2017. The United Conservative Party won Alberta's 2019 election. Premier Kenny was sworn in on April 30, 2019. Premier Sellinger stayed in power until May 3, 2016 when Premier Pallister replaced him. Premier Ford's government replaced Premier Wyme and her Liberal government on June 29, 2018. After the October 1, 2018 Québec election, Francois Legault of the Coalition Avenir Québec became the premier of Québec. A Progressive Conservative government under Premier Higgs assumed power in New Brunswick on November 9, 2018. A Progressive Conservative government replaced Prince Edward Island's Liberal government on May 9, 2019. The Saskatchewan Party, the Nova Scotia Liberal Party and the Newfoundland and Labrador Liberal Party are still the governors of Saskatchewan, Nova Scotia and Newfoundland and Labrador respectively.

[299] Vancouver Declaration on Clean Growth and Climate Change 1 (March 3, 2016). 7 Appeal Record Alberta A2598.

[300] Id.

[301] Id.

[302] Id. A2603.

finalize the pan-Canadian framework on clean growth and climate change, and review progress on the Canadian Energy Strategy".[303]

[430] The working group on carbon pricing mechanisms reported to the federal, provincial and territorial finance ministers and the Canadian Council of Ministers of the Environment before October 3, 2016.[304] John Moffet, a senior member of the Canadian civil service and a member of the working group, states that the group's final report "was prepared on a consensus basis" and "supported by all provinces and territories".[305]

[431] The working group's Final Report outlined the options that were open to Canadians:[306]

> There are three main mechanisms that can be used to explicitly apply a broad-based price to carbon: carbon taxes, cap-and-trade as well as performance standards systems. Cap-and-trade systems and performance standard systems can both be considered emissions trading systems. In all systems, carbon is priced such that economic agents are incentivized to reduce emissions whenever the costs of doing so are less than the carbon price. ... Each carbon pricing system has advantages and disadvantages, strengths and weaknesses.

[432] The working group did not recommend a single solution. Instead, it identified eight principles that "should be key considerations moving forward, recognizing that there is a trade-off to be made between economic efficiency for Canada as a whole, reducing GHG emissions, and maintaining successful systems already in place in respect to roles and responsibilities of the federal, provincial and territorial governments".[307]

[433] Neither the Vancouver Declaration nor the working group on carbon pricing's Final Report mentioned any federal minimum national standard that would be in force in any province or territory that introduced less onerous milestones than were in the federal minimum standard.

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[303] Id. A2605.

[304] Working Group on Carbon Pricing Mechanisms, Final Report (2016). 7 Appeal Record Alberta A2620. The Final Report does not state when it was submitted to the federal, provincial and territorial environmental ministers. Mr. Savage claims that the working groups submitted their final reports before October 3, 2016. Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 250. 1 Appeal Record Alberta A47.

[305] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶¶ 64 & 67. Appeal Record Canada R23 & R24.

[306] Working Group on Carbon Pricing Mechanisms, Final Report 8 (2016). 7 Appeal Record Alberta A2620.

[307] Id. A2662.

2. Pan-Canadian Approach to Pricing Carbon Pollution

[434] On October 3, 2016, two days before Canada ratified the Paris Agreement, Prime Minister Trudeau announced in Parliament the Pan-Canadian Approach to Pricing Carbon Pollution,[308] in which Canada proposed for the first time a national benchmark for carbon pricing. This proposal included federally legislated minimum standards for carbon pricing, applicable across all jurisdictions, to be enforced through a backstop which would impose a federal carbon pricing system in jurisdictions that did not already meet the federal standards.

[435] The Prime Minister's announcement of a federal minimum standard for carbon pricing appeared to take some of the premiers by surprise. Premier Wall of Saskatchewan accused the Prime Minister of reneging on his promise to collaborate with the provinces:[309]

> I cannot believe that while the country's environment ministers were meeting on a so-called collaborative climate change plan, the Prime Minister stood in the House of Commons and announced a carbon tax unilaterally.
>
> ...
>
> The level of disrespect shown by the Prime Minister and his government today is stunning. This is a betrayal of the statements made by the Prime Minister in Vancouver this March. ...
>
> ...
>
> As I have said many times before, we are having the wrong conversation in Canada. The national focus on carbon pricing holds the lowest potential for reducing emissions, while potentially doing the greatest harm to the Canadian economy. We produce less than two percent of global ... [greenhouse gas] emissions. Whatever impact the federal carbon tax will have on Canada's emissions, global ... [greenhouse gas] emissions will continue to rise because of the developing world's reliance on coal-fired electricity.

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[308] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, exhibit U.3 Appeal Record Canada R746-R748.

[309] Government of Saskatchewan, Statement from Premier Brad Wall Regarding the Prime Minister's Announcement this Morning to Impose a Carbon Tax (October 3, 2016). 8 Appeal Record Alberta A2902-A2903. See also Government of Alberta, Proposed federal carbon pricing: Premier Notley statement (October 3, 2016). 8 Appeal Record Alberta A2899-A2900 ("With regard to the federal government's proposals today, Alberta will not be supporting this proposal absent serious concurrent progress on energy infrastructure, to ensure that we have the economic means to fund these policies") & The Canadian Press, Nova Scotia will not be implementing a carbon tax, premier says (October 4, 2016). 8 Appeal Record A2905-A2907 ("In St. John's Tuesday, Newfoundland and Labrador Premier Dwight Ball said many people were surprised by Trudeau's announcement. ... McNeil [the Nova Scotia premier] said his province has led the country in the reduction of greenhouse gas emissions and has already met Canada's target of a 30 percent reduction in emissions from 2005 to 2030").

[436] Some of the key features of the federal government's Pan-Canadian Approach to Pricing Carbon Pollution are reproduced below:[310]

> 2. Common scope. Pricing will be based on GHG emissions and applied to a common and broad set of sources to ensure effectiveness and minimize interprovincial competitiveness impacts. At a minimum, carbon pricing should apply to substantively the same sources as British Columbia's carbon tax.
>
> 3. Two systems. Jurisdictions can implement (i) an explicit price-based system (a carbon tax like British Columbia's or a carbon levy and performance-based emissions system like in Alberta) or (ii) a cap-and-trade system e.g. (Ontario and Quebec).
>
> 4. Legislated increases in stringency, based on modelling, to contribute to our national target and provide market certainty.
>
> - For jurisdictions with an explicit price-based system, the carbon price should start at a minimum of $10 per tonne[311] in 2018 and rise by $10 per year to $50 per tonne in 2022.
>
> - Provinces with cap-and-trade need (i) a 2030 emissions-reduction target equal to or greater than Canada's 30 percent reduction target: (ii) declining (more stringent) annual caps to at least 2022 that correspond, at a minimum, to the projected emissions reductions resulting from the carbon price that year in price-based systems.
>
> 5. Revenues remain in the jurisdiction of origin. Each jurisdiction can use carbon-pricing revenues according to their needs .... .
>
> 6. Federal backstop. The federal government will introduce an explicit price-based carbon pricing system that will apply in jurisdictions that do not meet the benchmark. The federal system will be consistent with the principles and will return revenues to the jurisdiction of origin.

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[310] 3 Appeal Record Canada R747.

[311] A metric tonne of carbon dioxide is contained in a cube twenty-seven feet, by twenty-seven feet, by twenty-seven feet. The average person in the United States is responsible for the emission of one metric tonne every two weeks. United Nations Press Conference, Press Conference on 'CO_2 Cubes – Visualize a Tonne of Change' (December 1, 2009). <https://www.un.org/press/en/2009/091201_Cubes.doc.htm>.

[437] On December 9, 2016[312] Canada, British Columbia, Alberta, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut adopted the Pan-Canadian Framework on Clean Growth and Climate Change.[313]

[438] Manitoba adopted the Pan-Canadian Framework on February 23, 2018.[314]

[439] Saskatchewan never adopted the Pan-Canadian Framework.[315]

[440] Although Ontario, Alberta and Manitoba subsequently altered their provincial carbon pricing regimes or proposals, and in some cases expressed public opposition to the federal Pan-Canadian Framework, specifically the federal backstop, it would appear that none of these provinces formally withdrew from the Pan-Canadian Framework on Clean Growth and Climate Change.[316]

[441] Mr. Moffet, an important participant in the development of Canada's response to the Paris Agreement, describes the Pan-Canadian Framework this way:[317]

> The *Pan-Canadian Framework* is Canada's first climate change plan to include commitments by federal, provincial, and territorial governments, and is the country's overarching framework to reduce GHG emissions across all sectors of the economy, stimulate clean economic growth, and build resilience to the impacts of climate change.
>
> The *Pan-Canadian Framework* is designed to achieve the *behavioural and structural changes* needed to transition to a low-carbon economy, and was developed collaboratively by Canada's federal, provincial, and territorial governments, with input from Indigenous Peoples as well as from businesses, non-governmental organizations, and Canadians across the country. The *Pan-Canadian*

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[312] There was no change of provincial governments in the period between March 3 and December 9, 2016.

[313] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, exhibit JJJJ. 8 Appeal Record Alberta A2909-A2994.

[314] Id. ¶ 262. Appeal Record Alberta A49.

[315] Id.

[316] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶¶ 99-101. 1 Appeal Record Canada R36.

[317] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶¶ 91 & 92. 1 Appeal Record Canada R33-R34 (emphasis added).

> *Framework* builds on the diverse array of policies and measures already in place across Canada to reduce GHG emissions in all sectors of the economy.

[442] In the last half of 2017 Canada published its Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark[318] and the Supplemental Benchmark Guidance.[319] Both of these documents confirm Canada's belief that "[p]ricing of carbon pollution is central to the Pan-Canadian Framework on Clean Growth and Climate Change".[320] Mr. Moffet, the "lead official responsible for ... [these] documents",[321] states that these documents, along with the Pan-Canadian Approach to Pricing Carbon Pollution published on October 3, 2016, "attempt to provide jurisdictions with the flexibility to design their own system, while setting out some common national standards of stringency for GHG emissions pricing systems throughout Canada to reduce GHG emissions".[322]

[443] On January 15, 2018 Canada published a draft *Greenhouse Gas Pollution Pricing Act* and a document entitled Carbon pricing: regulatory framework for the output based pricing system.[323] The latter, according to Mr. Moffet[324]

> explains that the aim of the ... [output-based pricing system] is to minimize competitiveness impacts and carbon leakage for emissions-intensive and trade-exposed industrial facilities, while retaining the carbon price signal and incentive to reduce GHG emissions.

[444] Part of the carbon-pricing document contained this information:[325]

> In most cases, output-based standards will be set as a percentage of the production-weighted national average of emission intensity. In some cases it may be necessary to use alternate metrics that better characterize the sector.
>
> The proposed starting percentage for all output-based standards will be 70% of the production-weighted national average of emission intensity (i.e., the output-based

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[318] Id. exhibit X. 3 Appeal Record Canada R778-R783.

[319] Id. exhibit Y. 3 Appeal Record Canada R785-R786.

[320] Id. 3 Appeal Record Canada R778 & R785.

[321] Id. ¶¶ 104 & 105. 1 Appeal Record Canada R37 & R38.

[322] Id. ¶ 106. 1 Appeal Record Canada R39.

[323] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, exhibit Z. 3 Appeal Record Canada R788-R794.

[324] Id. ¶ 109. 1 Appeal Record Canada R40.

[325] Id. exhibit Z. 3 Appeal Record Canada R791.

standard will be set 30% below the production-weighted national average of emission intensity). That percentage may be adjusted based on various considerations, such as the emissions intensity of the best-in-class performer (the facility with the lowest emissions intensity); the distribution of emissions intensities among facilities in the sector; and potential impacts on competitiveness.

3. *Greenhouse Gas Pollution Pricing Act*

[445] On March 27, 2018 the Minister of Finance introduced the *Greenhouse Gas Pollution Pricing Act*[326] in the House of Commons and it became law on June 21, 2018.

[446] The *Act* contains four parts.

[447] Parts 1 and 2 are important in this reference.

[448] Part 1 implements minimum fuel charges on fuel distributed to consumers.[327] It applies to fuels that emit greenhouse gases – e.g., gasoline, diesel, natural gas, methane and coke oven gas.[328] The charge rate for each fuel represents $20 per tonne of CO_2e emitted from each fuel in 2019, rising by $10 each year to $50 per tonne in 2022.[329] The charge for gasoline at $20 per tonne is 4.42 cents per liter;[330] at $30 per tonne the charge is 6.63 cents per liter.

[449] Part 2[331] applies to large industrial emitters – oil sands, cement, chemical and pulp and paper producers, for example – whose emissions exceed a stipulated amount.[332] This part contains the rules for implementing the output-based pricing system component. Part 2 introduces financial incentives to encourage large industrial emitters to reduce their greenhouse gas emissions. Emitters must pay a price on the level of emissions that exceed the emission limits recorded in the output-based pricing system.[333] Emitters that emit less than their annual limit receive surplus credits from Canada that they can bank for future use if they exceed their annual limit or sell to other regulated facilities.[334] A payor emitter pays a charge set at the same amount a fuel charge is calculated under

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[326] S.C. 2018, c. 12, s. 186.

[327] Id. ss. 3-168. For a more complete account of the operation of Part I see Justice Feehan's opinion.

[328] Id. sch. 2.

[329] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶ 119. 1 Appeal Record Canada R43.

[330] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, sch. 2.

[331] Id. ss. 169-261.

[332] Id. s. 169.

[333] Id. s. 174.

[334] Id. s. 175 & Sch. 4.

Part 1 of the *Act* – $10 per tonne of CO_2e in 2019 up to $50 per tonne in 2022. The federal government has stated that it will return any Part 2 proceeds to the jurisdiction from which they were collected.[335]

[450] Enterprises subject to Part 2 are not subject to Part 1 fuel charges.

[451] Parts 1 and 2 operate in provinces or territories that are listed in Schedule 1 to the *Act*.[336] The Governor in Council decides which provinces or territories will be listed in Schedule 1. A province or territory may ask to be listed in Schedule 1. A province or territory may be on the list without its permission. Sections 166 and 189 state that the Governor in Council makes decisions "[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" and must "take into account as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions".

[452] Most of the funds collected from provinces or territories listed in Schedule 1 Part 1 of the *Greenhouse Gas Pollution Pricing Act* will be returned by the Minster of National Revenue to the residents of the province as a climate action incentive payment.[337] The payment for a single adult in Alberta is $444 and for a family of four is $888. The climate action incentive payment is not taxable income. It appears on an income tax return.[338]

4. British Columbia's Climate Change Strategy

[453] British Columbia is, and has been for some time, committed to substantially reducing its greenhouse gas emissions.[339]

[454] The *Climate Change Accountability Act*[340]declares aggressive greenhouse gas emissions target levels:

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[335] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶¶ 86 & 118. 1 Appeal Record Canada R32.

[336] When enacted Schedule 1 Part 1 listed Ontario, New Brunswick, Manitoba and Saskatchewan as subject to Part 1. Schedule 1 Part 2 listed Ontario, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, Yukon and Nunavut as subject to Part 2.

[337] See Department of Finance Canada, Climate Action Incentive Payments for 2020.

[338] Canada, Alberta and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/alberta.html>.

[339] British Columbia, cleanBC our nature. our power. our future. 5 (December 2018). 6 Appeal Record Alberta A2008 ("The full scope of actions envisioned in CleanBC … will accomplish our 2030 GHG reduction goals").

[340] S.B.C. 2007, c. 42.

> 2(1) The following targets are established for the purpose of reducing BC greenhouse gas emissions:
>
> ...
>
> (a.1) by 2030 and for each subsequent calendar year, BC greenhouse gas emissions will be at least 40% less than the level of those emissions in 2007;
>
> (a.2) by 2040 and for each subsequent calendar year, BC greenhouse gas emissions will be at least 60% less than the level of those emissions in 2007;
>
> (b) by 2050 and for each subsequent calendar year, BC greenhouse gas emissions will be at least 80% less than the level of those emissions in 2007.

[455] The current New Democratic government in British Columbia is also committed to economic growth:[341]

> Doing our part to address climate change means finding cleaner, more efficient solutions that will help us build and broaden our economy. We are well positioned to seize the opportunities emerging as people look for new solutions to the challenges of climate change, which in turn will provide good jobs for the people of B.C. The global market for clean energy, technologies, products and services is valued in the trillions of dollars and we have a head start on meeting that demand.

[456] In 2008 British Columbia's Liberal government introduced "North America's first comprehensive price on carbon along with a wide-ranging climate action plan supported by legislated GHG reduction targets ... [in] the province."[342]

[457] BC Hydro now generates ninety-eight percent of its electricity from clean or renewable resources.[343]

[458] Since November 5, 2011 British Columbia's Clean Energy Vehicle Program has provided consumer rebates for the purchase of clean-energy vehicles. The current rebate is up to $3,000 for a new-battery electric vehicle and up to $1,500 for a plug-in hybrid-electric vehicle.[344]

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[341] British Columbia, cleanBC our nature. our power. our future. 13 (December 2018). 6 Appeal Record Alberta A2016.

[342] Id. 12. 6 Appeal Record Alberta A2015.

[343] Id. See *Clean Energy Act*, S.B.C. 2010, c. 22, s. 2(c) ("The following comprise British Columbia's energy objectives: ... (c) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity").

[344] New Car Dealers Association of British Columbia & British Columbia, Clean Energy Vehicle Program. www.cevforbc.ca.

[459] In 2018 British Columbia increased its price on carbon. The carbon price will be $50 a tonne in 2021.[345]

5. Alberta's Climate Change Strategy

[460] Alberta, according to Robert Savage, who has worked primarily in the climate change field for Alberta since 2004 and is now Alberta's assistant deputy minister of the Climate Change Division of Alberta Environmental and Parks, "has long accepted the scientific consensus that human activity, in particular the production of ... [greenhouse gases is] ... a significant contributory factor to climate change, and that if action is not taken to reduce global ... [greenhouse gas] emissions, the potential impacts of climate change will be more severe".[346]

[461] Mr. Savage, with justification, asserts that "Alberta has been a pioneer in Canada and North America with respect to climate change initiatives, with a long history of innovative policies, regulatory schemes, and investments in technology targeted at reducing GHGs".[347]

[462] He also claims that Alberta was one of the first Canadian jurisdictions to adopt "a comprehensive action plan to reduce GHG emissions".[348]

[463] The 2002 Albertans & Climate Change: Taking Action plan dealt with better emissions management, enhanced technology to control industrial emissions, enhanced energy efficiency and the development of renewable energy sources.[349]

[464] The 2002 climate change plan contained ambitious components. It targeted a fifty percent reduction of 2002 emissions by 2020 per unit of gross domestic product. It directed large emitters to measure and report to government emissions data. It emphasized the need to manage carbon dioxide emissions and develop biological sinks. It encouraged Albertans to consume less energy.

[465] Consistent with the goals of the 2002 climate change plan Alberta invested in a heavy oil research partnership with industry to improve conventional oil and gas recovery processes.

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[345] British Columbia, cleanBC our nature. our power. our future. 12 (December 2018). 6 Appeal Record Alberta A2015.

[346] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 15. 1 Appeal Record Alberta A4. See also Alberta, Alberta's 2008 Climate Change Strategy 9 (2008). 1 Appeal Record Alberta A312 ("Climate change is real. Our planet is warming and it's doing so at a faster pace than at any other time in our recorded history").

[347] Id. ¶ 18. 1 Appeal Record Alberta A5.

[348] Id.

[349] Id. ¶ 24. 1 Appeal Record A5.

According to Mr. Savage, "[w]ithin two years of the plan's introduction, emissions intensity already dropped 16% below 1990 levels".[350]

[466] In 2004 parts of the *Climate Change and Emissions Management Act* came into force.[351] Section 3(1) declared "[t]he specified gas emission target for Alberta is a reduction by December 31, 2020 of specified gas emissions relative to Gross Domestic Product to an amount that is equal to or less than 50% of the 1990 levels".[352] Section 4 contemplated agreements between Alberta and representatives of different sectors of the economy respecting the "establishment of maximum levels of emissions of specified gases per unit of energy input or output or per unit of material input or product output for operations and undertakings within sectors of the Alberta economy". Section 10(3) established the Climate Change and Emissions Management Fund to "be used only for purposes related to reducing emissions of specified gases or improving Alberta's ability to adapt to climate change".

[467] In 2004 and 2007, Alberta, exercising its authority under the *Climate Change and Emissions Management Act*, enacted two important regulations.

[468] The 2004 regulation, the *Specified Gas Reporting Regulation,*[353] ordered all industrial emitters in Alberta that emitted in excess of 100,000 tonnes of CO_2e annually to report their emissions to government. Mr. Savage reports that the *Specified Gas Reporting Regulation* was "Canada's first specified gas reporting program"[354] and explains why this was an important development:[355]

> [F]or the first time, large emitters were required to know what their emissions profile was, track their emissions year over year, and disclose that data to the government through annual reporting. The data from these reports enabled Alberta to develop and impose emission reduction requirements on those emitters.
>
> This has been Alberta's approach to ... [greenhouse gas] emissions from the beginning: gather data, understand it, design a policy response specific to that

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[350] Id. ¶ 26. 1 Appeal Record Alberta A6.

[351] S.A. 2003, c. C-16.7. Parts came into force on November 1, 2004. 100 Alberta Gazette 3182 (2004). The *Act* was renamed, effective January 1, 2020, the *Emissions Management and Climate Resilience Act*. S.A. 2003, c. E-7.8. *Technology Innovation and Emissions Reduction Implementation Act, 2019*, S.A. 2019, c. 16, s. 2.

[352] Section 3 came into force on April 20, 2007.

[353] Alta. Reg. 251/2004.

[354] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2010, ¶ 30. 1 Appeal Record Alberta A6.

[355] Id. ¶¶ 31 & 32. 1 Appeal Record Alberta A6-A7.

understanding, and then implement a policy with compliance mechanisms that challenge Alberta's industries without breaking them.

[469] The 2007 regulation, the *Specified Gas Emitters Regulation*,[356] created a regime that incentivized large emitters[357] to reduce their greenhouse gas emissions.[358] Emitters that bested their targets earned emission reduction performance credits that they could sell or bank for future use. Emitters that failed to meet their targets had to purchase credits or pay into the Climate Change and Emissions Management Fund[359] at a stipulated amount – initially $15 per tonne of CO_2e. The price was increased to $20 per tonne in 2016[360] and $30 per tonne in 2017.[361]

[470] After the 2007 regulation came into force and in a period ending ten years later, according to Mr. Savage, the 2007 regulation "resulted in 29.8 Mt of avoided GHG emissions at regulated facilities".[362]

[471] Alberta created its emission offset registry in 2007.[363] It allows emitters not covered by the *Specified Gas Emitters Regulation* to earn emission offset credits by reducing their greenhouse gas emissions or sequestering them. Holders of reported offset credits can sell them to large emitters subject to the *Specified Gas Emitters Regulation.*

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[356] Alta. Reg. 139/2007.

[357] The emission intensity limits applied to "a facility that had direct emissions totalling 100 000 tonnes or more in a year of commercial operation in any of the years 2003, 2004, 2005 and 2006". *Specified Gas Emitters Regulation*, Alta. Reg. 139/2007, s. 3(1). The goal was to reduce emissions by twelve percent of a large emitter's baseline emission intensity. Id. s. 3(2).

[358] Mr. Savage states that this regulation "applied to approximately 70% of Alberta's industrial GHG emissions". Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 33. 1 Appeal Record Alberta A7.

[359] Mr. Savage reports that the "revenue from the ... [Specified Gas Emitters Regulation 1], which was paid into the ... [Climate Change and Emissions Management Fund], has been reinvested into other programs and technologies designed to help Alberta's industries further reduce their ... [greenhouse gas] emissions ...". Id. ¶ 37. 1 Appeal Record Alberta A7.

[360] Ministerial Order 13/2015, appendix.

[361] Id.

[362] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 38. 1 Appeal Record Alberta A7. See also Government of Alberta, Specified Gas Emitters Regulation Results (August 27, 2018). 1 Appeal Record Alberta A101-A102.

[363] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 39. 1 Appeal Record Alberta A7.

[472] Mr. Savage reports that "[a]s of July 29, 2019, a total of 52.6 Mt of Co_2e ... emission offsets have been generated, verified and listed on the Offset Registry [managed by the Canadian Standards Association]".[364]

[473] In 2008 Alberta revisited its 2002 climate plan. The result was Alberta's 2008 Climate Change Strategy. Its overall goals are set out below:[365]

> By 2010, implementing the 2002 plan will have resulted in emissions reductions. A major factor in achieving these reductions will be the requirement for large industrial emitters to reduce their emissions intensity by 12 per cent starting in July 2007.
>
> ... By 2020, the essential steps will be in place and new technologies will be tested and implemented. The result is that, while we may not see substantial reductions in the early stages of this strategy, we are planting the seeds today to see substantial reductions over the longer term. By 2020, we will stabilize emissions and begin to see substantial reductions in greenhouse gas emissions.
>
> ... By 2050, substantial reductions in emissions can and will be achieved. Alberta's target of a 200 megatonne reduction is the largest identified and published by any provincial jurisdiction in Canada bringing Alberta's emissions to 14 per cent below 2005 levels.

[474] The 2008 document also committed to other climate-friendly initiatives such as the implementation of "energy efficiency standards in building codes for homes and commercial buildings".[366]

[475] Alberta has also invested in carbon capture utilization and storage initiatives.[367] For example, Alberta contributed $745 million to Shell Canada's Scotford upgrader Quest carbon capture and storage project.[368] In a May 23, 2019 announcement Shell Canada reported that

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[364] Id. ¶ 45. 1 Appeal Record Alberta A8. See also <https://www.csaregistries.ca/alberta carbonregistries/eor_listing.cfm>.

[365] Alberta, Alberta's 2008 Climate Change Strategy 23 (January 2008). 1 Appeal Record Alberta A326. See also id. at 24. 1 Appeal Record Alberta A327 ("a reduction of 50 megatonnes is equivalent to taking over 10 million cars off the road a year. A reduction of 200 megatonnes is equivalent to removing over 40 million cars – this is equivalent to 2.5 times as many cars in all Canada").

[366] Government of Alberta, Alberta's 2008 Climate Change Strategy 16 (January 2008). 1 Appeal Record Alberta A319.

[367] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 55. 1 Appeal Record Alberta A10.

[368] Id. Canada also contributed $120 million. Id. As a result, "the designs, certain intellectual property and data from Quest are publicly available". Shell Canada, "Quest CCS Facility Reaches Major Milestone: Captures and Stores Four

> [i]n less than four years, the Quest carbon capture and storage ... facility has captured and safely stored four million tonnes of CO_2, ahead of schedule and at a lower cost than anticipated. Four million tonnes of CO_2 is equal to the annual emissions from about one million cars. Quest has now stored underground the most CO_2 of any onshore ... [carbon capture and storage] facility in the world with dedicated geological storage.[369]

[476] In 2010 Alberta enacted the *Renewable Fuels Standard Regulation.*[370] The standard requires that gasoline "place[d] in the Alberta market" be blended with an annual average of at least five percent renewable content[371] and that diesel be blended with an annual average of at least two percent renewable content.[372] Mr. Savage reports that "[i]t is estimated that the ... [renewable fuel standard] resulted in the reduction of more than 1.6 Mt of .... [greenhouse gas] emissions from Alberta's transportation sector from 2011 to 2017".[373]

[477] The New Democratic Party under Premier Notley's leadership formed the government from May 24, 2015 to April 30, 2019.

[478] There were five main components of the New Democrat's climate policy.[374] The first was an economy-wide carbon tax. The second was the elimination by 2030 of coal-fired electricity. The third was a thirty percent target by 2030 of electricity from renewable resources. The fourth was a cap on oil sands emissions. The fifth was a reduction of methane emission from upstream oil and gas.

[479] The government moved promptly on its climate-policy initiatives.

[480] On November 24, 2016 Alberta entered into off-coal agreements with three corporations that operated six coal-fired electricity-generating units in Alberta.[375] The companies agreed to eliminate greenhouse gas emissions from their coal-fired units by 2030. In turn, Alberta promised

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Million Tonnes of CO_2" (May 23, 2019) <htpps://www.shell.ca/en_ca/media/news-and-media-releases/news-releases-2019/quest-ccs-facility-reaches-major-milestone.html>. 1 Appeal Record Alberta A344.

[369] Id. 1 Appeal Record Alberta A343.

[370] Alta. Reg. 29/2010.

[371] Id. s. 2(1).

[372] Id. s. 2(2).

[373] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 75. 1 Appeal Record Alberta A13

[374] Id. ¶ 82. 1 Appeal Record Alberta A13.

[375] Id. ¶ 85. 1 Appeal Record Alberta A14.

annual transition payments of $97 million from 2017 to 2030, the present value of which is $1.1 billion.[376] Mr. Savage provided the impact of these off-coal agreements:[377]

> Alberta Energy estimates that, relative to 2011 to 2015 average operating levels, phasing out coal-fired power by 2030 will result in the avoidance of up to 287 Mt of GHG emissions from coal-fired power plants ... from those same plants between 2030 and 2061, when the normal end of life for Alberta's coal-fired power plants was expected.

[481] In 2016, with the passage of the *Oil Sands Emission Limit Act*,[378] Alberta implemented a "greenhouse gas emissions limit for all oil sand sites combined [at] ... 100 megatonnes in any year". The preamble to the *Act* declared that "the Government of Alberta is committed to taking action to enhance Alberta's role as a global leader in addressing climate change and as one of the world's most progressive energy-producing jurisdictions".

[482] Effective January 1, 2017, as a result of the passage in 2016 of the *Climate Leadership Implementation Act*[379] and the *Climate Leadership Act*,[380] Alberta introduced "a carbon levy on consumers of fuel to be effected ... throughout the fuel supply chain".[381] It applied to all fuels that emitted greenhouse gases when combusted. The charge was $20 per tonne in 2017 and $30 per tonne in 2018.[382]

[483] Another leg of the New Democrats' climate structure was also added in 2016. The *Renewable Electricity Act*,[383] passed in 2016 and in force as of March 31, 2017, authorized the promotion of large-scale renewable electricity generation in Alberta. There are now renewable energy contracts in Alberta that will produce 1,360 megawatts of renewable energy and "reduce Alberta's annual ... [greenhouse gas] emissions by approximately 2.3 Mt".[384]

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[376] Id.

[377] Id. ¶ 84.

[378] S.A. 2016, c. O-7.5, s. 2(1). Suncor Energy Inc., Climate Risk and Resilience Report 2019, at 24 (2019) ("*The Oil Sands Emissions Limit Act* includes a precedent-setting 100 Mt emissions limit by 2030 on oil sands development. As a limit on emissions, rather than production, it allows production to grow as long as the total emissions of the sector remain under the limit").

[379] S.A. 2016, c. 16.

[380] S.A. 2016, c. C-16.9.

[381] Id. s. 3(1).

[382] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 89. 1 Appeal Record Alberta A14.

[383] S.A. 2016, c. R-16.5, s. 3(1).

[384] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 97. 1 Appeal Record Alberta A15.

[484] The enactment in 2015 of the *Methane Emissions Reduction Regulation*[385] set in place the legislative framework for initiatives designed to reduce methane emissions from the upstream oil and gas industry by forty-five percent from 2014 levels by 2025.[386]

[485] The United Conservative Party won the April 16, 2019 election. Jason Kenney became the new premier on April 30, 2019.

[486] The new government, as it promised in the campaign, immediately repealed the carbon tax in the *Climate Leadership Act*, effective May 30, 2019.[387] A May 22, 2019 Alberta press release announced that "[t]he Government of Alberta remains committed to tackling climate change, which is why the levy on large industrial emitters will remain in place under the Technology Innovation and Emissions Reduction regime. This will manage emissions from Alberta's large industries while reinvesting revenues in technologies that will further reduce emissions."[388]

[487] The *Technology Innovation and Emissions Reduction Regulation*,[389] most of which came into force on January 1, 2020, applies to large emitters – those facilities that have "direct emissions of 100,000 CO_2e tonnes or more in 2016 or a subsequent year."[390] It requires large emitters to reduce their emissions by ten percent compared to the average emissions intensity between 2016 and 2018.[391] There are various compliance routes. A large emitter may reduce emissions to the benchmark, purchase credits held by other industrial emitters or emission offsets from the Offset Registry or pay stipulated sums to the Technology Innovation and Emissions Regulation fund.[392]

[488] The Government of Canada has determined that the *Technology Innovation and Emissions Reduction Regulation* meets the minimum standard set out in Part 2 of the *Greenhouse Gas Pollution Pricing Act*.[393] This means that the Part 2 minimum standard does not apply in Alberta.[394]

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[385] Alta. Reg. 244/2018. This regulation came into force on January 1, 2020. Id. s. 11.

[386] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, ¶ 107. 1 Appeal Record Alberta A17.

[387] *An Act to Repeal the Carbon Tax*, S.A. 2019, c. 1, s. 1.

[388] Government of Alberta, Carbon tax repeal helps Albertans get back to work (May 22, 2019).

[389] Alta. Reg. 133/2019.

[390] Id. s. 1(1)(cc).

[391] Government of Alberta, TIER Regulation Fact Sheet (December 2019). alberta.ca/technology-innovation-and-emissions-reduction-system.aspx.

[392] Id.

[393] S.C. 2018, c. 12, s. 186.

[394] Government of Canada, Alberta and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/alberta.html>.

[489] But the fuel charge under Part 1 of the *Greenhouse Gas Pollution Pricing Act* is in effect in Alberta as of January 1, 2020.[395]

[490] Reducing greenhouse gas emissions is an extremely challenging task. In spite of Alberta's commitment to the reduction of greenhouse gas emissions, Alberta's greenhouse gas emissions rose from 231 Mt CO_2e in 2005 to 273 Mt CO_2e in 2017.[396]

6. Saskatchewan's Climate Change Strategy

[491] Saskatchewan has not adopted the Pan-Canadian Framework.

[492] This position is not attributable to a belief that climate change is not a problem. The Government of Saskatchewan, in a December 4, 2017 strategy document, Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy, describes climate change as a "very real global problem".[397]

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[395] Id.

[396] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 12 (2019).

Table ES-4: greenhouse gas emissions by provinces/territories, selected years (Mt CO2 eq)

Province/territory	1990	2005	2012	2013	2014	2015	2016	2017	Change (%) 2005 to 2017
Total (Canada)	**602**	**730**	**711**	**722**	**723**	**722**	**708**	**714**	**-2.0%**
NL	9.4	9.9	9.4	9.4	10	11	11	10	6.9%
PE	1.9	2.0	2.1	1.7	1.7	1.7	1.8	1.8	-10%
NS	20	23	19	18	16	17	16	16	-33%
NB	16	20	17	15	14	14	15	14	-28%
QC	86	86	80	80	78	78	78	78	-9.8%
ON	180	204	169	168	166	165	162	159	-22%
MB	18	20	20	21	21	21	21	22	7.7%
SK	44	68	71	73	76	79	76	78	14%
AB	173	231	261	271	276	275	264	273	18%
BC	52	63	60	61	60	59	61	62	-1.5%
YT	0.5	0.5	0.6	0.6	0.5	0.5	0.5	0.5	-1.3%
NT	n/a	1.6	1.5	1.3	1.5	1.7	1.6	1.2	-19%
NU	n/a	0.4	0.5	0.7	0.7	0.6	0.6	0.6	33%

[397] Government of Saskatchewan, Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy 1 (2017). 7 Appeal Record Alberta A2505.

[493] Nor is its opposition of the Pan-Canadian Framework a function of an unwillingness to reduce greenhouse gas emissions. Saskatchewan's goal is to "achieve a total emissions intensity reduction of 10 percent by 2030".[398]

[494] But Saskatchewan fundamentally disagrees with a central component of the Pan-Canadian Framework:[399]

> Saskatchewan did not sign the subsequent Pan-Canadian Framework on Clean Growth and Climate Change, in large part because the Framework promotes a carbon tax as the central approach to reducing emissions. A carbon tax would not significantly reduce emissions in our province where our economy and geography don't allow for easy alternatives. In fact, a carbon tax would make it more difficult for our province to respond effectively to climate change because a simple tax will not result in the innovations required to actually reduce emissions. ...
>
> The conversation about climate change must be broader than carbon pricing. It must encompass how we as Canadians prepare, mitigate and adapt.

[495] On December 4, 2017 Saskatchewan outlined its future plans to reduce greenhouse gas emissions and its successful historical reduction measures in Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy.[400] Some of Saskatchewan's environment enhancement programs are recorded below:[401]

> In agriculture, the province is a global leader in low-emissions practices. Our soils are an important carbon sink, sequestering carbon dioxide from the atmosphere. Since the 1980s, our growers have been developing, refining and implementing zero- and low-tillage practices, increasing the ability of our soils to sequester carbon. ...
>
> Current tillage practices sequester about 9 Mt of CO_2e in our soils annually. Saskatchewan's commercial forests store an estimated 3.5 Mt of CO_2e every year. Increased innovation, stimulated by an offset system, could drive carbon sequestration even further.

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[398] Government of Saskatchewan, Prairie Resilience: Output-Based Performance Standards 1 (2019). Appeal Record Saskatchewan 16.

[399] Government of Saskatchewan, Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy 2 (2017). 7 Appeal Record Alberta A2506.

[400] Id.

[401] Id. 3-4. 7 Appeal Record Alberta A2507-A2508.

[496] Saskatchewan has recently introduced an output-based pricing system on large emitters under *The Management and Reduction of Greenhouse Gases Act*[402] and imposed greenhouse gas emissions limits in the oil and gas industry.[403]

[497] The output-based performance standards apply to more than forty industrial facilities that emit more than 25,000 tonnes of CO_2e annually and are predicted to reduce emissions by a total of ten percent by 2030.[404] The large industrial emitters[405] – pulp mills, ethanol producers, iron and steel mills, mining, canola crushing, fertilizer manufacturers, refineries, upgraders and upstream oil and gas – account for eleven percent of Saskatchewan's total emissions.[406] The goal is a ten percent reduction of greenhouse gas emissions by 2030.[407]

[498] Saskatchewan's Methane Action Plan is expected to reduce methane emissions from venting and flaring activities in the upstream oil and gas industry by 4.5 Mt CO_2e annually by 2025.[408]

[499] Part 2 of the *Greenhouse Gas Pollution Pricing Act* applies to Saskatchewan's electricity generation and natural gas transmission pipelines as of January 1, 2019. Facilities within those sectors that annually emit 50,000 tonnes of CO_2e or more are subject to the federal standards.[409]

[500] Part 1 of the *Greenhouse Gas Pollution Pricing Act* applies to all registered distributors in Saskatchewan as of April 1, 2019.[410]

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[402] S.S. 2010, c. M-2.01.

[403] *The Management and Reduction of Greenhouse Gases (Standards and Compliance) Regulation*, R.R.S., c. M-2.01, Reg. 3 & *The Oil and Gas Emissions Management Regulation*, R.R.S., c. O-2, Reg. 7.

[404] Government of Saskatchewan, Prairie Resilience: Output Based Performance Standards 1 (2019). Appeal Record Saskatchewan 16.

[405] Id.

[406] In 2015 Saskatchewan emitted 75 Mt CO_2e. The oil and gas sector accounted for thirty-two percent, the agriculture sector twenty-four percent and the electricity sector nineteen percent. Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy 2 (2017). 7 Appeal Record Alberta A2506.

[407] Id.

[408] Saskatchewan, Methane Action Plan 1 (2019). Appeal Record Saskatchewan 27.

[409] Government of Canada, Saskatchewan and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/saskatchewan.html>.

[410] Id.

7. Manitoba's Climate Change Strategy

[501] Manitoba accepts that "[c]limate change is real and is already impacting us. It is being accelerated by carbon and greenhouse gas emissions from humans. Scientist all over the world argue climate change is happening and poses a growing threat to how we live and work."[411]

[502] Manitoba's Progressive Conservative government[412] reminds Canadians that Manitoba's hydroelectricity capacity gives the province "one of the cleanest electricity grids in Canada and the world with over 99 percent of ... [its] electricity generated from clean, renewable sources."[413] Had Manitoba not "invested billions of dollars in building ... [its] clean energy system" its annual greenhouse gas emissions would be 42 Mt CO_2e instead of 21 Mt CO_2e.[414]

[503] The current government adopted a $25 per tonne carbon price for the 2018 to 2022 period and an output-based pricing system for the few large emitters in Manitoba.[415] It prefers its carbon-price regime to that of the federal government:[416]

> The federal $50/tonne carbon pricing plan would actually result in 80,000 tonnes fewer emissions reduced by 2022, compared to the Made-in-Manitoba carbon pricing plan.
>
> Our plan is better for Manitoba. Keep the carbon price lower by recognizing these early Hydro investments and use targeted actions to get even more emissions reductions from specific sectors.

8. Ontario's Climate Change Strategy

[504] Ontario announced in its 2018 Preserving and Protecting Our Environment for Future Generations: A Made-in-Ontario Environment Plan that it would "ensure Ontario achieves

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[411] Manitoba Sustainable Development, A Made-in-Manitoba Climate and Green Plan: Hearing from Manitobans 1 (2017). 6 Appeal Record A2075. See also id. 4. 6 Appeal Record A2078 ("A projected temperature outlook produced at the University of Winnipeg indicates that Canadian prairies annual temperature could increase by five to 10 degrees Celsius by 2090").

[412] A Progressive Conservative government under the leadership of Premier Pallister came into office on May 3, 2016. The New Democrats had governed from October 5, 1999 to May 3, 2016.

[413] Manitoba Sustainable Development, A Made-in-Manitoba Climate and Green Plan: Hearing from Manitobans 10 (2017). 6 Appeal Record A2084.

[414] Id. In 2015 Manitoba's annual greenhouse gas emissions from electricity generation was 0.1 Mt CO_2e. Alberta's 2015 greenhouse gas emissions from electricity generation was 46.1 Mt CO_2e. Id. 10 & 14. 6 Appeal Record Alberta A2084 & A2088.

[415] Id. 16. 6 Appeal Record Alberta A2090.

[416] Id.

emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement".[417]

[505] Ontario, as of 2014, had no coal-fired electricity-generation plants.[418] Premier Harris' Progressive Conservative government closed the first coal-fired unit in 2001.[419] By 2017, "approximately 96% of the electricity generated in Ontario was emissions-free."[420] This contributes to Ontario's twenty-two percent reduction of its greenhouse gas emissions from their 2005 levels to 2017.[421]

[506] According to the 2019 National Inventory Report, the Ontario electricity sector reduced its greenhouse gas emissions from 33.9 Mt CO_2e in 2005 to 2.0 Mt CO_2e in 2017.[422] This roughly 31 Mt CO^2e decline is "equivalent to taking up to seven million vehicles off ... [Ontario's] roads."[423]

[507] On June 29, 2018, in Ontario, a Progressive Conservative government replaced the Liberal government Premier Wynne led.

[508] Ontario, with the passage of the *Cap and Trade Cancellation Act, 2018*,[424] repealed the Liberal government's *Climate Change Mitigation and Low-carbon Economy Act, 2016*[425] and all supporting regulations.[426] The old cap-and-trade program was gone.

[509] In 2019 Ontario enacted the *Greenhouse Gas Emissions Performance Standards*.[427] This regulation created annual emissions performance standards for facilities that emitted 50,000 tonnes

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[417] Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 3 (2018). 6 Appeal Record Alberta A2138.

[418] Id. 17. 6 Appeal Record Alberta A2152.

[419] Id.

[420] Id. 7. 6 Appeal Record Alberta A2142.

[421] Id.

[422] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 3, at 49.

[423] Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 7 (2018). 6 Appeal Record Alberta A2142.

[424] S.O. 2018, c. 13, s. 16.

[425] S.O. 2016, c. 7.

[426] *Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits*, Ont. Reg. 386/18; *Administrative Penalties*, Ont. Reg. 540/17; *Ontario Offset Credits*, Ont. Reg. 539/17 & *Service of Documents*, Ont. Reg. 451/17.

[427] Ont. Reg. 241/19.

or more of CO_2e emissions in one or more reporting years after 2014.[428] Emitters that exceed these limits must pay a charge – $20 per tonne of CO_2e in 2020 increasing by $10 per tonne per year up to $50 per tonne in 2023.[429] Costs for CO_2e emissions are imposed only if an emitter exceeds its stipulated allowable maximum. Emitters who emit less greenhouse gases than the applicable limits receive tradeable credits.[430]

9. Québec's Climate Change Strategy

[510] In 2012 Premier Charest announced his government's "ambitious GHG emission reduction target of 20% below the 1990 level".[431] As of 2017, Québec had reduced its greenhouse gas emissions by approximately ten percent.[432]

[511] Québec, relying on its abundant hydroelectric power, emits very little greenhouse gases from its electricity-generating units.[433]

[512] Québec's 2013-2020 Climate Change Action Plan noted that the transportation sector accounted for 43.5 percent of Québec's 2009 greenhouse gas emissions.[434] Three quarters of this originates from road transport.[435]

[513] The province's previous climate change action plan emphasized increased use of public transportation and measures designed to enhance fuel efficiency.[436] This initial "shift ... from solo car use to public transit and alternative transportation" remained a central component of the 2013-2020 climate change action plan.[437]

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[428] Id. s. 2(2).

[429] Id. s. 11(9).

[430] Id. s. 16.

[431] Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan i (2012). 7 Appeal Record Alberta A2446.

[432] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 12 (2019).

[433] Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 7 (2012). 7 Appeal Record Alberta A2454.

[434] Id.

[435] Id.

[436] Id. 23. 7 Appeal Record A2470.

[437] Id.

[514] Québec also adopted a cap-and-trade system for large emitters – annual CO_2e emissions in excess of 25,000 tonnes – effective January 1, 2013.[438] This scheme incentivizes enterprises to reduce greenhouse gas emissions, with concomitant "gains in efficiency, profitability and competitiveness. For Québec society overall, this means a more robust economy and reduced dependence on fossil energy."[439]

10. Eastern Provinces' Climate Change Strategies

[515] The governments of the maritime provinces[440] and Newfoundland and Labrador[441] have committed themselves to reducing greenhouse gas emissions. This is not a recent development. In 2001 the premiers of the Eastern Canadian provinces and the New England governors agreed as a region to reduce their 1990 levels of greenhouse gas emissions by ten percent by 2020.[442]

D. References Asking Provincial Appeal Courts To Opine on the Constitutionality of the *Greenhouse Gas Pollution Pricing Act*

1. Saskatchewan Reference

[516] The Lieutenant Governor in Council,[443] exercising authority granted in *The Constitutional Questions Act, 2012*, [444] asked the Court of Appeal for Saskatchewan to opine on the constitutionality of the *Greenhouse Gas Pollution Pricing Act*.[445]

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[438] Id. 21. 7 Appeal Record Alberta A2468.

[439] Id. 22. 7 Appeal Record Alberta A2469.

[440] New Brunswick, Transitioning to a Low-Carbon Economy: New Brunswick's Climate Change Action Plan 4 (2016). 6 Appeal Record Alberta A2198 ("Reducing GHG emission is vital to limiting future global temperature increases and related climate change. ... This action plan signals New Brunswick's intention to play its part in achieving regional GHG emission reduction targets by adopting targets that reflect total outputs of 10.7 Mt by 2030 [thirty-five percent below 1990 emissions] and 5 Mt by 2050 [equivalent to eighty percent below 2001 emissions], recognizing the unique challenges of New Brunswick's economy. The provincial government confirms its previous target of 14.8 Mt for 2020 [equivalent to ten percent below 1990 emissions]"); Nova Scotia Department of Environment, Toward a Greener Future: Nova Scotia's Climate Change Action Plan 1 (January 2009). 6 Appeal Record Alberta A2334 (Nova Scotia aimed to reduce its annual greenhouse gas emissions by 2020 to 5 Mt) & Prince Edward Island, Taking Action: A Climate Change Action Plan for Prince Edward Island 2018-2023, at 13 (2019). 7 Appeal Record Alberta A2423 ("Government, together with residents, businesses and industries, will reduce provincial greenhouse gas emissions by 30 per cent below 2005 levels by 2030").

[441] Municipal Affairs and Environment Climate Change Branch, The Way Forward: On Climate Change in Newfoundland and Labrador (2019). 6 Appeal Record Alberta A2217.

[442] Id. 7. 6 Appeal Record Alberta A2223.

[443] Order in Council 194/2018.

[444] S.S. 2012, c. C-29.01.

[445] S.C. 2018, c. 12, s. 186.

[517] Chief Justice Richards, in an opinion concurred in by Justices Jackson and Schwann,[446] upheld the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. He concluded that the national concern dimension of the peace, order and good government power served as the constitutional base for the *Act*:[447]

> Parliament...[has] authority over a narrower ... [Peace, Order and good Government] subject matter – the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area. The *Act* is constitutionally valid because its essential character falls within the scope of this POGG authority.

[518] Chief Justice Richards rejected the arguments of the intervenors that the *Greenhouse Gas Pollution Pricing Act* could be characterized as a law relating to trade and commerce, criminal law, national emergencies and the implementation of treaties.[448]

[519] Justices Ottenbreit and Caldwell dissented. In their view, the national concern branch of the peace, order and good government head of power did not provide the necessary constitutional foundation. The dissenters regarded the *Act* as an improper attack on the division of legislative powers. Justices Ottenbreit and Caldwell characterized Part I of the *Act* as a tax and a tax that did not originate in the House of Commons,[449] as required by section 53 of the *Constitution Act, 1867*.[450] In their opinion, the Governor in Council exercised the originating role section 53 insisted the House of Commons play.

2. Ontario Reference

[520] The Lieutenant Governor in Council referred to the Court of Appeal for Ontario the constitutionality of the *Greenhouse Gas Pollution Pricing Act*.

[521] Four justices – Chief Justice Strathy, Associate Chief Justice Hoy and Justices MacPherson and Sharpe – held that it was a valid exercise of the national concern branch of Parliament's power

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[446] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; [2019] 9 W.W.R. 377.

[447] Id. at ¶ 11; [2019] 9 W.W.R. at 403.

[448] Id. at ¶ 12; [2019] 9 W.W.R. at 403.

[449] Id. at ¶ 213; [2019] 9 W.W.R. at 459.

[450] 30 & 31 Vict., c. 3.

to enact laws for the "Peace Order and Good Government" of Canada.[451] Part of Chief Justice Strathy's opinion follows:[452]

> The application of the "provincial inability" test leaves no doubt that establishing minimum national standards to reduce GHG emissions is a single, distinct and indivisible matter. While a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces – emissions that cause climate change across all provinces and territories. However stringent a province's GHG emissions reduction measures, they cannot, on their own, reduce Canada's net emissions. To use the example mentioned earlier in these reasons, the territories and the Atlantic provinces can do nothing practically or legislatively, to address the approximately 93.2 percent of national GHG emissions that are produced by the rest of Canada.

[522] Justice Huscroft saw things differently.

[523] He recognized the magnitude of the impugned law's impact on provincial heads of power[453]:

> Plainly, the *Act* imposes charges on manufacturing, farming, mining, agriculture, and other intraprovincial economic endeavours too numerous to mention, in addition to imposing costs on consumers, both directly and indirectly, as businesses can be expected to pass on increased costs, to a greater or lesser extent – all matters that would be classified as falling under provincial lawmaking authority over property and civil rights (s. 92(13)) or matters of a local or private nature (s. 92(16)).
>
> ...
>
> ... Given that GHG's are generated by virtually every activity regulated by provincial legislation, including manufacturing, farming, mining, as well as personal daily activities, including home heating and cooling, hot water heating, driving, and so on, federal authority over GHG emissions would constitute a massive shift in lawmaking authority from provincial legislatures to the Parliament of Canada.

[524] Justice Huscroft concluded that Parliament could not invoke the national concern branch of the peace, order and good government head of power.[454]

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[451] 2019 ONCA 544; 436 D.L.R. 4th 1.

[452] Id. at ¶ 117; 436 D.L.R. 4th at 61.

[453] Id. at ¶ 215; 436 D.L.R. 4th at 61.

[454] Id. at ¶ 238; 436 D.L.R. 4th at 68.

3. Alberta Reference

[525] Section 26 of the *Judicature Act*[455] authorizes the Lieutenant Governor in Council to "refer to the Court of Appeal for hearing or consideration any matter the Lieutenant Governor in Council thinks fit to refer, and the Court of Appeal shall hear or consider the matter that is referred".

[526] The Lieutenant Governor in Council, by order in council,[456] asked the Court of Appeal to answer this question: "Is the Greenhouse Gas Pollution Pricing Act (Canada) unconstitutional in whole or in part?"

V. Important Provisions of the *Constitution Act, 1867* and the *Greenhouse Gas Pollution Pricing Act*

A. *Constitution Act, 1867*

[527] The key provisions of the *Constitution Act, 1867*[457] are set out below:

> 91. Legislative Authority of Parliament of Canada – It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, –
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> ...
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> 2. The regulation of Trade and Commerce.
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> ...
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> 3. The raising of Money by any Mode or System of Taxation.
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> ...
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> 27. The Criminal Law ... .
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> ...

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[455] R.S.A. 2000, c. J-2.

[456] O.C. 112/2019.

[457] 30 & 31 Vict., c. 3 (U.K.).

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

...

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. Subjects of exclusive Provincial Legislation – In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, –

...

5. The Management ... of the Public Lands belonging to the Province and of the Timber and Wood thereon.

...

10. Local Works and Undertakings other than such as are of the following Classes:

    (a) Lines of Steam ... and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

    ...

    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

...

13. Property and Civil Rights

...

16. Generally all Matters of a merely local or private Nature in the Province.

92A(1) Laws respecting non-renewable natural resources, forestry resources and electrical energy. – In each province, the legislature may exclusively make laws in relation to

...

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

...

(6) Existing powers or rights. – Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

...

93. Legislation respecting Education. – In and for each Province the Legislature may exclusively make Laws in relation to Education ... .

...

95. Concurrent Powers of Legislation respecting Agriculture, etc. – In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces ... .

B. *Greenhouse Gas Pollution Pricing Act*

[528] The most important part of the *Greenhouse Gas Pollution Pricing Act*[458] for the purposes of my division-of-powers analysis is the preamble, some segments of which follow:

Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change;

Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity;

Whereas impacts of climate change ... are already being felt throughout Canada and are impacting Canadians ...;

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[458] S.C. 2018, c. 12, s. 186 (emphasis added).

Whereas Parliament recognizes that it is the responsibility of the present generation to minimize impacts of climate change on future generations;

Whereas the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries;

Whereas Canada has ratified the United Nations Framework Convention on Climate Change ... which entered into force in 1994, and the objective of that Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system;

Whereas Canada has also ratified the Paris Agreement ... which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change;

Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians;

Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;

Whereas *behavioural change* that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;

Whereas the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that *behavioural change*;

...

Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems

could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;

And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada.

VI. Analysis

A. Canada Is a Federal State

[529] Canada is a federal state.[459]

[530] There are two levels of government.[460]

[531] In practice, each level of government is supreme within its sphere.[461]

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[459] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, 250 ("It is undisputed that Canada is a federal state"). What is a federal state? See K. Wheare, Federal Government 1 & 2 (4th ed. 1963) ("An inquiry into the working of federal government begins of necessity with some discussion about the meaning of the term. ... The answer seems to be that the Constitution of the United States establishes an association of states so organized that powers are divided between a general government which in certain matters – for example, the making of treaties and the coining of money – is independent of the governments of the associated states, and, on the other hand, state governments which in certain matters are, in their turn, independent of the general government. This involves, as a necessary consequence, that general and regional governments both operate *directly* upon the people; each citizen is subject to two governments. ... [O]nce granted that a government is acting within its allotted sphere, that government is not subordinate to any other government in the United States") (emphasis in original).

[460] *Liquidators of the Maritime Bank of Canada v. New Brunswick*, [1892] A.C. 437, 441-42 (P.C.) (Can.) ("the object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers ... as were necessary for the due performance of its constitutional functions, and that the remainder should be retained, by the provinces for the purposes of provincial government"); *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 101; 75 M.V.R. 6th 10, 76 ("A federal state's constitution is more complicated than that of a unitary state because it must allocate law-making responsibility, law-administering and dispute-resolution processes between central and regional governments") & W. McConnell, Commentary on the British North America Act 137 (1977) ("Any coherent federal constitution requires an allocation of legislative powers to the federal and local units, and perhaps a list of concurrent powers exercisable by both. There must also be provision for a general or 'residuary' power whereby subjects not specifically entrusted to any legislature (e.g., 'aeronautics', which was not a subject of legislation in 1789 or 1867) will go either to the central government or local units").

[461] *Reference re Securities Act*, 2011 SCC 66, ¶ 71; [2011] 3 S.C.R. 837, 870 ("The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other"); *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, 251 ("The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective

[532] The laws made by the central government have force throughout the dominion.[462] The federation founders must have concluded that uniform laws on the classes of laws assigned to the central government were essential attributes of the new dominion and in the best interests of Canadians.[463]

[533] The laws made by the provincial governments have force only in the jurisdictions that enacted them.[464] The original understanding of the founders must have been that diverse laws on

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spheres of jurisdiction"); *Re The Initiative and Referendum Act*, [1919] A.C. 935, 942 (P.C.) (Man.) ("The scheme of ... [*The British North America Act, 1867*] was thus not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy"); *Liquidators of the Maritime Bank v. New Brunswick*, [1892] A.C. 437, 442 (P.C.) (Can.) ("in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation for each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the ... [*Constitution Act, 1867*]") & *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 111; 75 M.V.R. 6th 10, 78 ("The *Constitution Act, 1867* established a federation in which two levels of government of equal importance were assigned responsibility for enacting laws required for its inhabitants to have happy and prosperous lives"). See K. Wheare, Federal Government 2 (4th ed. 1963) ("The principle of organization upon which the American association is based is that of the division of powers between distinct and co-ordinate governments") & Haldane, "The Work for the Empire of the Judicial Committee of the Privy Council", 1 Cambridge L.J. 143, 150 (1922) ("At one time, ... the conception took hold of the Canadian Courts that what was intended was to make the Dominion the centre of government in Canada, so that its statutes and its position should be superior to the statutes and position of the Provincial Legislatures. [Lord Watson adopted a different view]. ... The Provinces were recognized as of equal authority co-ordinate with the Dominion").

[462] Trudeau, "Federalism, Nationalism, and Reason" in The Future of Canadian Federalism 24 (P.-A. Crepeau & C. MacPherson eds. 1965) ("Coercive authority over the entire territory remains a monopoly of the (central) state, but this authority is limited to certain subjects of jurisdiction").

[463] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 22; [2007] 2 S.C.R. 3, 25 per Binnie & LeBel, JJ. ("Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the county as a whole") & *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 102; 75 M.V.R. 6th 10, 76 ("Who is in the best position to make specific decisions for the general good of the members of the state? Is it a legislature consisting of representatives from all regions of the country? Or is it a legislature whose members come only from one of the regions? Which issues are best resolved by the regional governors? Which decisions should central lawmakers have the jurisdiction to make?"). See Ontario Advisory Committee on Confederation, The Confederation of Tomorrow Conference: Theme Papers 3 (1968) ("The crux of any federal system is the balance which is achieved between the opposing pulls of centralization and decentralization. In any federal system ... the practical heart of the issue is: what is the necessary authority which must be granted to the central government if a viable federal state is to be preserved?") & E. Cameron, The Canadian Constitution 52-53 (1915) ("the provinces of Canada, Nova Scotia and New Brunswick ... [agreed] to surrender to a federal legislature ... those functions which were common to all, and which it was conceived might be best exercised by a central authority, while there should be retained to each province the control of such matters as were of a local or private character").

[464] *Interprovincial Co-Operatives Ltd. v. Manitoba*, [1976] 1 S.C.R. 477, 521 per Ritchie, J. ("under the *British North America Act* each province of Canada enjoys sovereign authority within the spheres enumerated in s. 92 of that Act and that this authority is limited by the territorial boundaries of the provinces respectively").

the same subject throughout the dominion would either be a positive or tolerable feature of the federation.[465]

[534] The laws made by both the central and provincial governments "operate *directly* upon the people".[466]

[535] Federal states assign lawmaking power to the central and regional governments in a variety of ways.[467] Some powers always appear, such as "postal service."[468] But some are unique. Australia grants the central government the power to make laws relating to the "influx of criminals."[469] *The Constitution of India* allots to the central government the power to pass laws relating to "[l]otteries organised by the Government of India or the Government of a State".[470]

[536] Of course, constitution makers may describe classes of laws in any manner they consider helpful. There are over 200 classes of laws recorded in *The Constitution of India*.[471]

[537] As one would expect, some heads of power are abstract. For example, the *Constitution of the United States* declares that Congress may make laws for the "general welfare of the United States".[472] Section 92(13) of the *Constitution Act, 1867* authorizes provincial legislatures to make "Property and Civil Rights" laws for a province".[473]

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[465] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 22; [2007] 2 S.C.R. 3, 25 ("federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. ... The fundamental objectives of federalism were, and still are, to reconcile unity with diversity") & *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 104; 75 M.V.R. 6th 10, 76 ("Are there some problems that can be usefully resolved by a number of different approaches? Is diversity a laudable goal in some circumstances? If so, when?").

[466] K. Wheare, Federal Government 2 (4th ed. 1963) (emphasis in original).

[467] *U.S. Const.* amend. X; *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(1) (U.K.); *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, s. 107 (U.K.) & *The Constitution of India*, art. 246 & Seventh Schedule, Lists 1, 2 & 3.

[468] *U.S. Const.*, art. 1, ʃ 8, cl. 7; *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(5) (U.K.); *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, s. 51(v) (U.K.) & *The Constitution of India*, art. 246 & Seventh Schedule, List 1, s. 31.

[469] *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, s. 51(xxviii) (U.K.).

[470] *The Constitution of India*, art. 246 & Seventh Schedule, List 1, s. 40.

[471] Id. Seventh Schedule, Lists 1, 2 & 3.

[472] *U.S. Const.* art. I, ʃ 8, cl. 1.

[473] 30 & 31 Vict., c. 3 (U.K.).

[538] Some heads of power are very precise. India's central government may make laws regarding "[c]arriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels".[474] Canada's Parliament has the constitutional authority to pass "Bills of Exchange and Promissory Notes" laws.[475]

[539] There is no uniform methodology for the assignment of the residual power. Canada[476] and India[477] allot the residual power to the central government. The United States[478] and Australia[479] grant it to the regional governments or the people.

[540] The *Constitution Act, 1867*[480] grants the Parliament of Canada the authority to enact laws in relation to over thirty classes of laws described in sections 91, 92(10), 92A(3), 93(4), 94, 94A, 95, 101, 132 and other parts[481] of the *Constitution Act, 1867*. Other enactments also grant Parliament lawmaking authority.[482]

[541] The 1867 enactment assigns to the provincial legislatures the authority to make over twenty classes of laws as described in sections 92, 92A, 93, 94A, 95 and other sections[483] of the *Act*. Other enactments are also the source of provincial lawmaking authority.[484]

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[474] *The Constitution of India*, art. 246 & Seventh Schedule, List 1, s. 30.

[475] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(18) (U.K.).

[476] Id. s. 91. See *Ontario v. Canada*, [1912] A.C. 571, 581 (P.C.) (Can.) ("In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada").

[477] *The Constitution of India*, art. 246 & Seventh Schedule, List 1, s. 97.

[478] *U.S. Const.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[479] *Commonwealth of Australia Constitution Act 1*, 63 & 64 Vict., c. 12, s. 107 (U.K.) ("Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, as at the admission or establishment of the State, as the case may be").

[480] 30 & 31 Vict., c. 3 (U.K.).

[481] For example, section 41 of the *Constitution Act, 1867* authorizes Parliament to pass laws relating to the qualifications of voters in federal general elections.

[482] *Constitution Act, 1871*, 34 & 35 Vict., c. 28, ss. 2, 3 & 4 & *Statute of Westminster, 1931*, 22 & 23 Geo., 4, c. 4, s. 3 (U.K.).

[483] For example, section 84 of the *Constitution Act, 1867* authorizes the Québec and Ontario legislatures to pass laws relating to the qualifications of voters in provincial general elections.

[484] E.g., *Constitution Act, 1930*, 20 & 21 Geo. V, c. 26 (U.K.) (this *Act* gave Manitoba, Saskatchewan, Alberta and British Columbia the same rights accorded to Québec, Ontario, New Brunswick and Nova Scotia under s. 109 of the *Constitution Act, 1867* – property in lands, mines, minerals and royalties); *Saskatchewan Act*, S.C. 1905, c. 42, s. 13

[542] Some of these heads of power relate to specific types of enterprises or undertakings – postal service, military, banks, penitentiaries, hospitals, municipal institutions, local works and undertakings and works declared by Parliament to be for the general advantage of Canada, for example. And some relate to specific subjects – trade and commerce, taxation, bills of exchange, interest, and property and civil rights, for example – that may affect persons, enterprises and undertakings without regard to which level of authority has primary legislative responsibility for them.

[543] Laws that are justified by the type of enterprise or undertaking to which they apply only regulate the acts of the enterprises or undertakings subject to them. For example, Parliament can regulate how banks as employers interact with their employees. Provincial regulators, on the other hand, can pass laws that determine how enterprises or undertakings subject to their jurisdiction – mines, manufacturers or grocery stores, for example – in their capacity as employers interact with their employees.

[544] But laws that are constitutional because they regulate specific types of activities legal actors engage in – such as patents or copyrights – apply to enterprises and undertakings without regard to whether they are primarily subject to federal or provincial regulation.

[545] This review of the method utilized by the *Constitution Act, 1867* to assign lawmaking authority to the central and regional government supports three basic propositions.

[546] First, the *Constitution Act, 1867* accords to both the central and regional governments important lawmaking responsibilities.

[547] Second, some of the heads of powers or classes of laws through which these assignments are made are abstract. For example, Parliament has the authority to pass "trade and commerce" laws and the provincial legislatures are entitled to pass "property and civil rights" laws.

[548] Third, judicial interpretation must not be used as a device to distort the balance between the lawmaking jurisdiction of Parliament and the provincial legislatures on which the framers settled.

[549] Adjudicators in a federal state must appreciate that an expansive interpretation of one level of government's lawmaking authority has an immediate and direct impact on the scope of the other

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("Until the ... Legislature otherwise provides, the Legislative Assembly shall be composed of twenty-five members") & *Alberta Act*, S.C. 1905, c. 3, s. 14 ("Until the ... Legislature otherwise determines, all the provisions of the law with regard to the constitution of the Legislative Assembly of the Northwest Territories and the election of members thereof shall apply, *mutatis mutandis*, to the Legislative Assembly of the ... province and the elections of members thereof respectively").

level of government's competing lawmaking authority. As a rule, a broad view of one level of government's lawmaking authority results in a corresponding diminution of the other level of government's lawmaking grant.[485]

[550] The Supreme Court of Canada has emphasized the fundamental importance of the balanced interpretation of federal and provincial lawmaking powers:[486] "[I]t is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government".

B. Neither Parliament Nor the Provincial Legislatures Have Unlimited Legislative Authority

[551] A law enacted by the Parliament of Canada or any of the provincial legislatures is valid only if the maker had the power to pass it. In other words, the authority of lawmakers in Canada has limits.

[552] Neither Parliament nor a provincial legislature can give legal effect to its policy choices just because the actor is dissatisfied with the results of the other's lawful exercise of its jurisdiction.

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[485] Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in The Future of Canadian Federalism 98 (P.-A. Crepeau & C. MacPherson eds. 1965) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 271 (1981) ("it is clear that such generalized concepts must be used with care if we would preserve the balance of our federal constitution – preserve, that is, a proper equilibrium between significant provincial autonomy and adequate central power"); Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 610 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 296 (1981) ("If ... [environmental pollution] were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial power"); *Reference re Securities Act*, 2011 SCC 66, ¶ 85; [2011] 3 S.C.R. 837, 876 ("In the end, the *General Motors* test is aimed at preserving the balance that lies at the heart of the principle of federalism, which demands that a federal head of power not be given such scope that it would eviscerate a provincial legislative competence"); *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 256 per Lamer, C.J. & Iacobucci, J. ("One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances") & *United Transportation Union v. Central Western Railway*, [1990] 3 S.C.R. 1112, 1146-47 ("To hold otherwise would be to undermine completely the division of powers for, absent a requirement of functional integration, virtually any activity could be said to 'touch' a federally regulated interprovincial undertaking").

[486] *Reference re Firearms Act*, 2000 SCC 31, ¶ 48; [2000] 1 S.C.R. 783, 812. See also *Reference re Securities Act*, 2011 SCC 66, ¶ 62; [2011] 3 S.C.R. 837, 867-68 ("The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state") & *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) per Roberts C.J. ("Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time").

C. The Courts Determine the Limits of the Jurisdiction of Parliament and the Provincial Legislatures

[553] The courts resolve disputes on the limits of Parliament's and the provincial legislatures' jurisdiction.[487] But the courts are not the source of the lawmaking authority assigned to the central and regional governments – the *Constitution Act, 1867*[488] and other constitutional enactments are.

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[487] *Reference re Securities Act*, 2011 SCC 66, ¶ 55; [2011] 3 S.C.R. 837, 865 ("Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers ... . That impartial arbiter is the judiciary"); *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 24; [2007] 2 S.C.R. 3, 26 ("[the courts are] the final arbiters of the division of powers"); *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, 250 ("In interpreting our Constitution, the courts have always been concerned with the federalism principle"); *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, 741 ("It is inherent in a federal system ... that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments"); *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 405 ("this Court ... [is] the guardian of constitutional integrity"); *Ontario v. Canada*, [1896] A.C. 348, 366 (P.C.) (Can.) ("if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country") & *Ottawa Valley Power Co. v. Ontario*, [1936] 4 D.L.R. 594, 603 per Masten, J.A.(Ont. C.A.) ("the Legislature cannot destroy, usurp, or derogate from substantive rights over which it has by the Canadian Constitution no jurisdiction and then protect its action in that regard by enacting that no action can be brought in the Courts of the Province to inquire into the validity of its legislation, thus indirectly destroying the division of powers set forth in the B.N.A. Act. ... [I]t is of the essence of the 'Canadian Constitution that the determination of the legislative powers of the Dominion and of provinces respectively ought not be withdrawn from the judiciary'"). See Lederman, "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 183 (J. Corry, F. Cronkite & E. A. Whitmore 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 229 (1981) ("If our federal constitution is to endure and to work tolerably, this task of interpretation is plainly an exclusive judicial function and requires the services of independent tribunals of the first rank"); Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in The Future of Canadian Federalism 109 (P.-A. Crepeau & C. MacPherson eds. 1965) ("The need for final judicial review of the federal distribution of legislative powers has roots in the necessities of a federal system. Neither the federal Parliament nor the provincial legislatures could be permitted to act as judges of the extent of their own respective grants of power under the BNA Act") & Lederman, Book Review of B.L. Strayer, Judicial Review of Legislation in Canada, 16 McGill L.J. 723, 727-28 (1970) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 193 (1981) ("The overriding power of judicial review for competence was already established in 1931 by history, custom, precedent and the needs of federalism in a British Constitutional context"). This is also the role of the judicial branch of government in the United States and Australia. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[*Marbury v. Madison* (1803)] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"); Freund, "A Supreme Court in a Federation: Some Lessons from Legal History", 53 Colum. L. Rev. 597, 598 (1953) ("In all the federations save the Swiss the supreme court may declare invalid laws of the central as well as the state governments") & K. Wheare, Federal Government 58 (4th ed. 1963) ("In Australia ... disputes 'as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states' can be decided finally by the High Court of Australia").

[488] 30 & 31 Vict., c. 3.

[554] Professor Lederman emphasized the importance of the role courts play in the constitutional process:[489]

> Unique flexibility for Canada comes from having *many* power-conferring phrases in competition with one another, and the equilibrium points established between them portray the critical detail of Canadian federalism. The power-conferring phrases themselves are given by the British North America Act, but the equilibrium points are not to be found there. They have necessarily been worked out painstakingly by judicial interpretation and precedent over many years. Furthermore, particular equilibrium points are not fixed for all time. As conditions in the country genuinely change and truly new statutory schemes are enacted, judicial interpretation can adjust and refine the equilibrium of the division of legislative powers to meet the new needs. So the high importance of sophisticated judicial interpretation as an ongoing process is obvious.

D. The Correct Analytical Approach to a Division-of-Powers Problem

[555] A court confronted with a division-of-powers dispute, like almost any problem,[490] is more likely to arrive at the most defensible answer if it asks the right questions in the correct order.[491]

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[489] "Unity and Diversity in Canadian Federalism: Ideals and Method of Moderation", 53 Can. B. Rev. 597, 604 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 291 (emphasis in original). See also *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 23; [2007] 2 S.C.R. 3, 25 ("the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society") & B. Strayer, Judicial Review of Legislation in Canada 209 (1968) ("It is axiomatic that the Constitution ... must adjust to changing conditions. Change by formal amendment being a practical impossibility, change by judicial redefinition becomes a necessity").

[490] *Estate of Roger v. Halvering*, 320 U.S. 410, 413 per Frankfurter, J. ("In law also the right answer usually depends on putting the right question").

[491] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 162; [2017] 7 W.W.R. 343, 394 ("the motions court failed to ask the right questions in the correct order. The failure to adopt this strategy unnecessarily increases the risk that the decision maker will overlook an important consideration and arrive at an unsound conclusion"); *Alberta Union of Provincial Employees v. Alberta*, 2019 ABCA 411, ¶ 105 per Wakeling, J.A. ("The likelihood that an adjudicator will select the best solution to a legal problem increases significantly if the adjudicator poses the right questions in the correct order"); *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 117; 75 M.V.R. 6th 10, 81 ("The likelihood that a court will wisely and rationally resolve a division-of-powers constitutional problem increases significantly if it asks the right questions in the correct order") & Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in The Future of Canadian Federalism 100 & 107 (P.-A. Crepeau & C. MacPherson eds. 1965) ("The process or system is by no means automatic or productive of just one set of 'right' answers. It is largely a matter of framing the right questions in the right order. ... If you can frame the right questions and put them in the right order, you are half way to the answer. In other words, by proper questions and analysis, the issues requiring value decisions are rendered specific and brought into focus one by one in particular terms, so that ordinary mortals of limited wisdom and moral insight can cope with them").

[556] This part of my judgment lists the right questions in the order in which they must be asked and answered in a division-of-powers case.

1. The First Question

[557] Why did Parliament or a provincial legislature pass the contested law and how does it impact those who are subject to its terms?[492] What actually happens on the ground? Whose interests are affected? How has the law changed the behaviour of those who are affected by it? And how are their interests affected? Sometimes this inquiry leads to the conclusion that there is a divergence between the claimed purpose of the law and its actual effects.[493]

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[492] *Reference re Securities Act*, 2011 SCC 66, ¶ 63; [2011] 3 S.C.R. 837, 868 ("The [division-of-powers] analysis looks at the purpose and effects of the law to identify its 'main thrust' as a first step in determining whether a law falls within a particular head of power"); *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 27; [2007] 2 S.C.R. 3, 27 (the Court acknowledged the need to examine "the purpose of the enacting body and the legal effect of the law"); *The Queen v. Morgentaler*, [1993] 3 S.C.R. 463, 485-86 ("the legal effect of ... legislation is always relevant. Barring material amendments, it does not change over time. ... Practical effect consists of the actual or predicted results of the legislation's operation and administration"); *Munro v. National Capital Commission*, [1966] S.C.R. 663 & 668-69 ("It is first necessary to consider what is the matter in relation to which the *National Capital Act* was passed and this requires an examination of its terms. ... [I]t is clear, from a reading of the Act as a whole, that the matter in relation to which it is enacted is the establishment of a region consisting of the seat of the Government of Canada and the defined surrounding area which are formed into a unit to be known as the National Capital Region which is to be developed, conserved and improved 'in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance'"); *Alberta v. Canada*, [1939] A.C. 117, 130 (P.C. 1938) (Can.) ("The next step in a case of difficulty will be to examine the effect of the legislation") & *Sahaluk v. Alberta*, 2015 ABQB 142, ¶ 118; 75 M.V.R. 6th 10, 81 ("what impact does the challenged law have on the community when it is applied in accordance with accepted principles of statutory interpretation?").

[493] 1 P. Hogg, Constitutional Law of Canada 15-19 (5th ed. supp. looseleaf release 2018-1) ("The courts are ... concerned with the substance of the legislation to be characterized and not merely its form"). E.g., *Texada Mines Ltd v. British Columbia*, [1960] S.C.R. 713, 724-25 ("The very high rate of the tax authorized, which would in ten years' time impose in the aggregate an amount of tax equal to the assessed value of the minerals, indicates, in my opinion, that the true nature and purpose of the legislation is something other than the raising of revenue for provincial purposes under head 2 of s. 92. ... [T]he impugned legislation ... seeks to ... indirectly by the imposition of such a high rate of taxation upon iron ore in place as to, under the conditions prevailing in 1958, either impede or render impossible from a business standpoint the export of the ore or concentrates produced from the only iron mines in the province"); *Saskatchewan v. Canada*, [1949] A.C. 110, 124 (P.C. 1948) (Can.) (reducing the amount of the principal due by the amount of interest due did not alter the fact that this was a law in relation to interest, a federal subject matter); *Alberta v. Canada*, [1939] A.C. 117, 131-33 (P.C. 1938) (Can.) ("It does not seem to be necessary to set out ... the particulars of this gigantic increase in the taxation of banks within the Province. ... [T]he facts are sufficient ... 'to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta Legislature to be prohibitive'. In coming to this conclusion it seems to their Lordships that the learned judges were justified in considering that the magnitude of the tax proposed for Alberta was such that, if it were applied by each of the other Provinces, it would have the effect of preventing banks from carrying on their businesses. ... This examination of the ... Social Credit Act leaves little doubt that the Act was an attempt to regulate and control banks and banking in the Province") & *Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.) (Ont.) (Parliament could not use the criminal law power to regulate a local business, such as insurance).

[558] A court must acquire a sound working knowledge of why the legislature passed the challenged law and how the challenged law will impact actors in the community who are affected by it directly and indirectly.[494] Professor Lederman explains why:[495]

> A rule of law expresses what should be human action or conduct in a given factual situation. We assume enforcement and observance of the rule and hence judge its meaning in terms of the consequences of the action called for. It is the effects of observance of the rule that constitute at least in part its intent, object or purpose. Certainly the total meaning of the rule cannot be assessed apart from these effects. We must seek the full meaning of the challenged law because the classes of laws in sections 91 and 92 depend on criteria which touch on all possible phases of the meaning of a law.

[559] This is a fundamental proposition.[496]

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[494] E.g., *Reference re the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, 86-87 (Justice Locke catalogued all the local benefits associated with the growth of crops used in the production of margarine and its manufacture in the course of considering the merits of a federal ban on the sale of margarine in Canada); *Reference re Securities Act*, 2011 SCC 66, ¶ 98; [2011] 3 S.C.R. 837, 880 ("We must look not only at the direct effects of the legislation, but also the follow-through effects the legislation may be expected to produce"); *Reference re Firearms Act*, 2000 SCC 31, ¶ 18; [2000] 1 S.C.R. 783, 797 ("Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians"); *Québec v. Canadian Owners and Pilots Ass'n*, 2010 SCC 39, ¶ 20; [2010] 2 S.C.R. 536, 548 ("[the] main impact [of the challenged provincial law prohibiting nonagricultural use of agricultural land] is to preserve agricultural lots and regulate land use within agricultural regions"); *Husky Oil Operations Ltd v. Workers' Compensation Board*, [1995] 3 S.C.R. 453, 492 (the Court carefully examined the effect of the challenged sections of Saskatchewan's *Workers' Compensation Act*: "This device secures the claim of the Board. When s. 133(1) operates in tandem with s. 133(3), the principal becomes nothing more than a conduit for transferring to the Board monies which are otherwise owed to the contractor. In other words, the principal essentially transfers an asset of the contractor (i.e., monies owing from the principal to the contractor) to the Board") & *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, 75 & 76 (1978) ("This Court cannot ignore the circumstances under which the Potash Conservation Regulations came into being, nor the market to which they were applied and in which they had their substantial operation. ... It is nothing new for this Court ... to go behind the words used by a Legislature and to see what it is that it is doing").

[495] "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 196 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 239-40 (1981). See also Id. 193 reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 237 (1981) ("classification of that law cannot begin ... until its true meaning is established") & *The Queen v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 331 per Dickson, J. ("In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation").

[496] *Reference re Securities Act*, 2011 SCC 66, ¶ 65; [2011] 3 S.C.R. 837, 868 ("After analyzing the legislation's purpose and its effects to determine its main thrust, the inquiry turns to whether the legislation so characterized falls under the head of power said to support it – the classification stage").

[560] Most of the time, it is irrelevant for a division-of-powers analysis whether the consequences of the contested law are desirable or undesirable. An enactment does not lose its status as a valid law just because a court concludes it is an unwise exercise of the maker's legislative authority.[497]

2. The Second Question

[561] Taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the challenged law display a feature that reasonably justifies its classification[498] as a class of laws section 92 or other sections of the *Constitution Act, 1867*[499] or

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[497] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, ¶ 45; [2010] 3 S.C.R. 457, 489 per McLachlin, C.J. ("the language of justification has no place in ...[a division-of-powers] analysis"); *Ward v. Canada*, 2002 SCC 17, ¶ 18; [2002] 1 S.C.R. 569, 579 ("In conducting ... [a division-of-powers analysis], the Court should not be concerned with the efficacy of the law or whether it achieves the legislature's goals"); *Reference re Firearms Act*, 2000 SCC 31, ¶ 2; [2000] 1 S.C.R. 783, 791 ("The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law"); *The Queen v. Morgentaler*, [1993] 3 S.C.R. 463, 488 ("The court is not concerned with the wisdom of a statute [in a division-of-powers case]"); *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576, 590 (1976) ("Courts will not question the wisdom of enactments [in division-of-power cases]"); *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 425 ("it is not for the Court to say ... that because the means adopted to realize a desirable end ... may not be effectual, those means are beyond the legislative power of Parliament"); *Alberta v. Canada*, [1939] A.C. 117, 132 (P.C. 1938) (Can.) ("the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked"); *Bédard v. Dawson*, [1923] S.C.R. 681, 684 per Idington, J. ("Sometimes we may doubt the wisdom of what is done [by an enactment] ... . What we are concerned with ... is merely the question of the power of the legislature [to pass the law]"); *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, 585 (P.C.) (B.C.) ("It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not") & *Bank of Toronto v. Lambe*, 12 A.C. 575, 585 (P.C. 1887) (Que.) ("Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the province it is for the Legislature and not for Courts of Law to judge of its expediency").

[498] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 450 per Beetz, J. ("To characterize a law is but to give it a name to its content or subject matter in order to classify it into one or the other of the classes of matters mentioned in s. 91 or s. 92 of the *Constitution*").

[499] 30 & 31 Vict., c. 3 (U.K.).

any other statute assigns to provincial legislatures?[500] The enumerated heads of power in sections 91 and 92 of the *Constitution Act, 1867* are classes of laws – not facts.[501]

[562] This question must be asked first because section 91 of the *Constitution Act, 1867*[502] declares that Parliament may make classes of laws "*not* coming within the Classes ... [of laws] ... by this Act assigned exclusively to the Legislatures of the Provinces". If a challenged enactment is not a law of a class assigned to the provincial legislatures, it must be a law Parliament, by default, has the authority to enact.[503] The Privy Council, in *Union Colliery Co. of British Columbia v. Bryden*,[504] opined that the *Constitution Act, 1867*, "distribute[s] all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces".

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[500] *Munro v. National Capital Commission*, [1966] S.C.R. 663, 669 ("The [second] ... question is whether this subject matter comes within any of the classes of subjects which, by s. 92 ... are assigned exclusively to the Legislatures of the Provinces"); *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, 406 (P.C.) (Ont.) ("When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92"); *Bank of Toronto v. Lambe*, 12 A.C. 575, 581 (P.C. 1887) (Que.) ("First, does ... [the challenged law] fall within ... sect. 92 of the Federation Act"); *Dobie v. Presbyterian Church of Canada*, 7 A.C. 136, 149 (P.C. 1882) (Que.) ("the first step to be taken, with a view to test the validity of an Act of the provincial Legislature is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in sect. 92. If it does not then the Act is of no validity"); *The Queen v. Russell*, 7 A.C. 829, 836 (P.C. 1882) (N.B.) ("the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in sect. 92") & *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96, 109 (P.C. 1881) (Can.) ("The first question to be decided is, whether the [provincial] Act impeached in the present appeal falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise"). See Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in Future of Canadian Federalism 93 (P.-A. Crepeau & C. MacPherson eds. 1965) ("It would have been a better and simpler description of the true position if the BNA Act had spoken only of power 'to make laws coming within the classes of laws hereafter enumerated'").

[501] The *Constitution Act, 1867* and other constitutional acts bestow jurisdiction on Parliament and the provincial legislatures to enact classes of laws. The enumerated heads of power in sections 91 and 92 and other sections are classes of law. They are not classes of fact. Lederman, "Classification of Laws and the *British North America Act*" in Legal Essays in Honour of Arthur Moxon 191 (1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 236 (1981) ("sections 91 and 92 ... contain respectively enumerations of federal and provincial law-making powers. It is important to realize that these enumerated 'subjects' or 'matters' are classes of laws, not classes of fact").

[502] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91 (U.K.) (emphasis added).

[503] *Re The Initiative and Referendum Act*, [1919] A.C. 935, 943 (P.C.) (Man.) ("The residuary power of legislation, beyond those powers that are specifically distributed by the two sections, is conferred on the Dominion [unlike the constitution of the United States and Australia]"); *Bank of Toronto v. Lambe*, 12 A.C. 575, 588 (P.C. 1887) (Que.) ("the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament") & *The Queen v. Russell*, 7 A.C. 829, 836 (P.C. 1882) (N.B.) ("But if the Act does not fall within any of the classes of subjects in sect. 92, no further questions will remain, for it cannot be contended ... that, if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not ... full legislative authority to pass it").

[504] [1899] A.C. 580, 585 (P.C.) (B.C.).

[563] Most laws will have an obvious provincial feature.[505] Section 92(13) authorizes a province to make property and civil rights laws. This is a class of laws with great scope.[506]

[564] Suppose a provincial law requires owners of handguns, rifles and shotguns to register and license them just as it requires car owners to register their cars and have operators' licenses.[507] This law displays features that reasonably justify its characterization as a law in relation to property and civil rights – a class of laws under section 92(13) – and a law in relation to matters of a merely local nature in the province – a class of laws under section 92(16). It directs owners of handguns to do certain things that they might not choose to do of their own accord.

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[505] E.g., *Reference re Securities Act*, 2011 SCC 66, ¶ 4; [2011] 3 S.C.R. 837, 845 ("Canada does not challenge the proposition that certain aspects of securities regulations fall within provincial authority in relation to property and civil rights in the province"); *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 442 per Beetz, J. ("The *Anti-Inflation Act* ... and the Guidelines directly and ostensibly interfere with classes of matters which have invariably been held to come within exclusive provincial jurisdiction, more particularly property and civil rights and the law of contract. They do not interfere with provincial jurisdiction in an incidental or ancillary way, but in a frontal way and on a large scale"); *Munro v. National Capital Commission*, [1966] S.C.R. 663, 671 ("There is no doubt that the exercise of the [expropriation] powers conferred upon the Commission by the *National Capital Act* will affect the civil rights of the residents in those parts of the two provinces which make up the National Capital Region"); *Canada v. Ontario*, [1937] A.C. 355, 365 (P.C.) (Can.) ("There can be no doubt that, prima facie, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislatures") & *Cushing v. Dupuy*, 5 A.C. 409, 415 (P.C. 1880) (Que.) ("It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization and distribution of the estate, and the settlement of the liabilities of the insolvent. ... [I]t is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the province, so far as a general law relating to those subjects might affect them").

[506] *An Act for making more effectual Provision for the Government of the Province of Québec in North America*, 14 Geo. III, c. 83, s. 8 (U.K.) ("That all his Majesty's Canadian subjects within the Province of Québec ... may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large, ample and beneficial Manner ...; and that in all Matters of Controversy, relative to Property and Civil Rights, resort shall be had to the Laws of Canada, as the Rule for the Decision of the same"). See Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 601 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 288 (1981) ("[T]he Quebec Act of 1774 of the Imperial Parliament ... provided that French law and customs were to obtain respecting property and civil rights in the royal colony of Quebec. This covered all the law except English criminal law, and except the English public law that came to Quebec as necessary context for English colonial government institutions").

[507] See *Canadian National Firearms Ass'n v. Québec*, 2019 QCCA 755 (the Court upheld the constitutionality of Québec's *Firearms Registration Act*) & 1 P. Hogg, Constitutional Law of Canada 18-31 (5th ed. supp. looseleaf release 2018-1 ("Quebec whose police forces have been making use of the long-gun registry, announced that it would establish a provincial registry for the long guns, which the province would undoubtedly have the power to do under its power over property and civil rights in the province").

[565] Or suppose a province[508] passed a law that forfeited to the Crown any property that a criminal used in the commission of an offence under the *Criminal Code*[509] or the *Controlled Drugs and Substances Act*.[510] A convicted drug trafficker whose Chrysler 300 had been forfeited to the Crown challenges the law's constitutionality on the ground that it is a law in relation to criminal law and may only be passed by Parliament. This law clearly displays a feature that reasonably allows it to be characterized as a law in relation to property and civil rights. It transfers the criminal's property rights in his Chrysler 300 to the Crown.[511]

[566] If the challenged law displays a feature that reasonably may be classified as a law assigned to a provincial legislature, the inquiry must continue. The contested law may well have features that reasonably bring classes of law assigned to the federal government into play.[512]

3. The Third Question

[567] Taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the challenged law display a feature that reasonably justifies its classification as a class of laws assigned to Parliament under section 91 or another section of the *Constitution Act, 1867*[513] or any other statute?[514]

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[508] E.g., *Victims Restitution and Compensation Payment Act*, S.A. 2001, c. V-3.5.

[509] R.S.C. 1985, c. C-46.

[510] S.C. 1996, c. 19.

[511] *Chatterjee v. Ontario*, 2009 SCC 19, ¶ 18; [2009] 1 S.C.R. 624, 640 ("Forfeiture is the transfer of property from the owner to the Crown. Forfeiture does not result in the conviction of anybody for any offence. On its face, ... the ... [*Civil Remedies Act, 2001*] targets property rights") & *Ward v. Canada*, 2002 SCC 17, ¶ 19; [2002] 1 S.C.R. 569, 580 ("Section 27 of the *Regulation*, read alone, is simply a prohibition of sale, trade or barter [in the coats of some seals], suggesting it might fall within the provincial rather than the federal domain. However, we cannot stop at this point. We must go further").

[512] *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, 587 (P.C.) (B.C.) ("The provisions ... are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by s. 92 of the British North America Act, 1867, whilst according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91, sub. s. 25") & G. Régimbald & D. Newman, The Law of the Canadian Constitution 191 (2d ed. 2017) ("Conceptually, the doctrine of double aspect recognizes that some laws, by nature, are impossible to categorize under a single head of power as they contain both federal and provincial subject-matter").

[513] 30 & 31 Vict., c. 3 (U.K.).

[514] *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, 406 (P.C.) (Ont.) ("the first questions must ... be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under enumerated head in s. 91"); *Bank of Toronto v. Lambe*, 12 A.C. 575, 581 (P.C. 1887) (Que.) ("Secondly, if it does [engage sect. 92], are we compelled by anything in sect. 91 or in the other parts of the Act so to cut down the full meaning of the words of sect. 92"); *Dobie v. Presbyterian Church of Canada*, 7 A.C. 136, 149 (P.C. 1882) (Que.) ("If ... [the Act falls within a section 92 class of laws] then these further questions may arise viz., ' ... [does it] fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial Legislature is or is not

[568] If a disputed law displays no features that reasonably justifies its classification as a law assigned to Parliament under the *Constitution Act, 1867*, Parliament may not pass it – only a provincial legislature may make it.[515] The inquiry is over. There is no need to answer the remaining questions.

[569] Suppose Saskatchewan amends *The Election Act, 1996*[516] to lower the voting age in a provincial election to sixteen years of age. No class of laws assigned to federal jurisdiction is engaged. This is a law in relation to the election of members of a provincial legislature, a class of laws assigned to the provincial legislature.[517] It has no federal features whatsoever. It is a valid provincial law.

[570] But if a disputed law displays a feature that reasonably justifies its classification as a class of laws assigned to Parliament, the inquiry proceeds and the fourth question must be answered.

[571] This is what happened in *Canadian Western Bank v. Alberta.*[518] Alberta amended its *Insurance Act*[519] to make its provisions relating to promoters and vendors of insurance products applicable to banks that are in the insurance business.[520] The challenged provisions had features that engaged both a provincial head of lawmaking power – property and civil rights – and a federal head of power – banking.

[572] The municipal law banning Rogers Communications Inc. from building a telecommunications tower on a described lot under consideration in *Rogers Communications Inc.*

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thereby overborne'"); *The Queen v. Russell*, 7 A.C. 829, 836 (P.C. 1882) (N.B.) ("If [the challenged Act does have a provincial feature], then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and so does not still belong to the Dominion Parliament") & *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96, 109 (P.C. 1881) (Can.) ("It is only when an Act of the provincial legislature primâ facie falls within one of these classes of subjects [in section 92] that the further questions arise, viz., whether, notwithstanding that this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne").

[515] E.g., *Siemens v. Manitoba*, 2003 SCC 3, ¶ 36; [2003] 1 S.C.R. 6, 27 (the Court upheld the validity of a Manitoba enactment that allowed for a local prohibition of video lottery terminals: "I conclude that the *VLT Act* in its entirety, and s. 16 in particular, are *intra vires* the provincial legislature. The Act's purposes are to regulate gaming in the province and to allow for local input on the issue of VLTs, both of which fall under the powers enumerated in s. 92 of the *Constitution Act, 1867*. It is not an attempt to legislate criminal law, as it has neither penal consequences nor a criminal law purpose").

[516] S.S. 1996, c. E-6.0.1.

[517] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 146 & *Saskatchewan Act*, S.C. 1905, c. 42, s. 14.

[518] 2007 SCC 22; [2007] 2 S.C.R. 3.

[519] R.S.A. 2000, c. I-3.

[520] 2007 SCC 22, ¶ 10; [2007] 2 S.C.R. 3, 20.

v. City of Châteauguay[521] also displayed provincial and federal features. A law prohibiting development – a landowner cannot sell its property to a purchaser – obviously is a property and civil rights law, a class of laws assigned to the province under section 92(13) of the *Constitution Act, 1867*. A law prohibiting a telecom from building a necessary part of its infrastructure on a designated lot is also obviously a law of a class assigned to Parliament.

[573] Or suppose a municipal bylaw prohibits the placement of federal election signs on residential properties.[522] The bylaw regulates the civil rights of property owners and the conduct of participants in the federal general election.[523]

[574] It is not unusual for a challenged law to display features that reasonably allow it to be classified as a law in relation to classes of laws assigned to both provincial legislatures and Parliament. In fact, it would be unusual in a modern and complex society if the opposite was the case.[524] Professor Lederman documents this point and explains why it frequently arises:[525]

> These federal and provincial categories of power are expressed, and indeed have to be expressed, in quite general terms. This permits considerable flexibility in constitutional interpretation, but also it brings much overlapping and potential conflict between the various definitions of powers and responsibilities. To put the same point in another way, our community life – social, economic, political and

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[521] 2016 SCC 23; [2016] 1 S.C.R. 467.

[522] See *The Queen v. McKay*, [1965] S.C.R. 798 (Etobicoke prohibited residential property owners from erecting any signs on their property except stipulated categories of signs – house sale signs, for example).

[523] A law that regulates federal elections triggers sections 41 and 91 of the *Constitution Act, 1867*.

[524] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58; ¶ 83 per Gascon, Côté & Rowe JJ. ("overlaps are an inevitable – and legitimate – feature of the Canadian federal system"); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R.161, 180 ("The constitutional difficulty arises ... when a statute may be characterized, as often happens, as coming within a federal as well as a provincial head of power") & *Reference re the Board of Commerce Act and the Combines and Fair Prices Act of 1919*, 60 S.C.R. 456, 495 (1920) per Duff, J. ("there must still be considerable overlapping of the domain ascribed to the Dominion and the Provinces respectively"). See also 1 Report of the Royal Commission on Dominion-Provincial Relations 31 (1940) ("No amount of care in phrasing the division of powers in a federal scheme will prevent difficulty when the division comes to be applied to the variety and complexity of social relationships. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mechanical application of the division of powers. There is nothing in human affairs which corresponds to the neat logical divisions found in the constitution").

[525] "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 185 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 250 (1981). See also *Multiple Access Ltd v. McCutcheon*, [1982] 2 S.C.R. 161, 180-81 per Dickson, J. (the majority cited Professor Lederman with approval) & Mallory, "The Five Faces of Federalism" in The Future of Canadian Federalism 5 (P.-A. Crepeau & C. MacPherson eds. 1965) ("no constitution can express, in precise detail, a distribution of authority so exact that no doubts can arise about which of the two legislative structures, central and regional, is within its powers in a particular regulatory statute").

cultural – is very complex and will not fit neatly into any scheme of categories or classes without considerable overlap and ambiguity occurring.

4. The Fourth Question

[575] As noted above, if an impugned law has no features that reasonably justify its classification as a class of laws assigned to Parliament, the inquiry ends and questions 4 and 5 are not engaged. Only a provincial legislature may pass the law.

[576] The fourth question – does only Parliament or a provincial legislature or do both have the constitutional authority to enact the contested law – must be asked if the challenged law displays features that reasonably justify its classification as a class of laws assigned to *both* levels of government under the *Constitution Act, 1867*.[526]

[577] Professor Lederman discusses the dilemma that federal states encounter when both levels of government have a rational jurisdictional foundation:[527]

> [T]he categories of laws enumerated in sections 91 and 92 are not in the logical sense mutually exclusive; they overlap or encroach upon one another in many more respects than is usually realized. To put it another way, many rules of law have one feature that renders them relevant to a provincial class of laws and another feature which renders them equally relevant logically to a federal class of laws. ...
>
> For a simple illustration, take the well-known rule that a will made by an unmarried person becomes void if and when he marries. Is this a rule of "marriage" (s. 91(26)) or of "property and civil rights" (s. 92(13))? In England and the common law provinces of Canada it occurs in the respective "Wills Acts" and its validity in Canada as a provincial law has not been challenged. ... *The decision as to which classification is to be used for a given purpose has to be made on non-logical grounds of policy and justice by the legal authority with the duty and power of decision in that respect.* The criteria of relative importance involved or such a decision cannot be a logical one, for logic merely displays to us of equivalent

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[526] 30 & 31 Vict., c. 3 (U.K.).

[527] "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 193-94 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 237-38 (1981) (emphasis added). See also Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" in The Future of Canadian Federalism 97 (P.-A. Crepeau & C. MacPherson eds. 1965) ("Nearly all laws or legislative schemes have a multiplicity of features, characteristics, or aspects by which they may be classified in a number of different ways, and hence potentialities of cross-classifications are ever present. The more complex the statute, the greater the number of logical possibilities in this regard. So, ... one aspect of ... [the challenged law] points to a federal category of power with logical plausibility, but, with equal logical plausibility, another aspect points to a provincial category of power").

> logical value all the possible classifications. There are as many possible classifications of a rule of law as that rule has distinct characteristics or attributes which may be isolated as criteria of classification.

[578] In order to answer the fourth question, there are two subsidiary issues that must be resolved.

a. Grammatical Solution

[579] First, is there a simple grammatical solution to the problem presented by a law that has both provincial and federal features? For example, a bankruptcy law, even though it is a law in relation to property and civil rights, is a law that only Parliament may pass. This is because section 91(21) of the *Constitution Act, 1867*[528] assigns to Parliament the specific authority to make bankruptcy and insolvency laws. It is obvious that Parliament has exclusive lawmaking authority with respect to this subset of property and civil rights laws. The same is true with respect to other subsets of "property and civil rights" laws such as banking,[529] bills of exchange, promissory notes, interest and copyright laws.[530] Professor Lederman astutely noted that "'property and civil rights' should be read 'property and civil rights except ... banking'".[531]

[580] If there is no grammatical solution, the inquiry continues.

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[528] 30 & 31 Vict., c. 3 (U.K.).

[529] *Canada v. Québec*, [1947] A.C. 33, 46 (P.C. 1946) (Que.) ("In their [Lordships'] view, a Provincial legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking").

[530] *Saskatchewan v. Canada*, [1949] A.C. 110, 123 (P.C. 1948) (Can.) ("But proper allowance must be made for the allocation of the subject-matter of 'interest' to the Dominion legislature under head 19 of s. 91 ... . There is another qualification to the otherwise unrestricted power of the provincial legislature to deal with civil rights in the head 18, 'Bills of Exchange and Promissory Notes'"); *Alberta v. Canada*, [1939] A.C. 117, 129 (P.C. 1938) (Can.) ("It is obvious, for example, that currency, paper money, patents, trade-marks and so forth are different kind of property, and therefore ... within s. 92(13); but this occasions no logical difficulty") & *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96, 110 (P.C. 1881) (Can.) ("In looking at sect. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and emulated, viz., '18, bills of exchange and promissory notes', which it would have been unnecessary to specify if authority over all contacts and the rights arising from them had belonged to the dominion parliament").

[531] "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 203 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 245 (1981). See also *Citizens Insurance Co. of Canada v. Parsons*, 7 A.C. 96, 108 (P.C. 1881) (Can.) ("So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that ... the general power should override the particular one") & *Bank of Toronto v. Lambe*, 12 A.C. 575, 585 (P.C. 1887) (Que.) ("as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures").

b. Relative Importance of the Provincial and Federal Aspects of the Contested Law

[581] To determine whether a law that displays features that reasonably justify its classification as a class of laws assigned to both levels of government may be passed only by one or by both levels of government, the relative importance of the provincial and federal features of the law must be assessed.[532] Are the benefits associated with a uniform national standard comparable to those derived from potentially diverse regional solutions? If so, both levels of government may pass the contested law. Are the benefits derived from a uniform national standard greater than those

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[532] This is a point Professor Lederman made in his groundbreaking 1953 article "Classification of Laws and the British North America Act" and is generally accepted by the Supreme Court and leading academics. Lederman, "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 203-04 & 207 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 246 & 248-49 (1981) ("The feature of the meaning of the rule deemed of outstanding importance is said to be 'the pith and substance,' 'the essence,' or 'the aspect that matters.' The feature deemed relatively unimportant is dismissed as merely 'incidental.' ... There is ... no special magic in any of these incantations. Plainly, whatever the form of expression adopted there is only one thing to be expressed: judgment on the relative importance of the federal and provincial features respectively of the meaning of the challenged law, for purposes of the distribution of legislative powers. *All the ... verbiage could be dispensed with and the words 'important' and 'unimportant' (or 'more important' and 'less important') substituted.* ... [A] challenged law with features of meaning relevant to both federal and provincial categories of laws has to be classified by that feature of it deemed most important for the purposes of the division of legislative powers in the country") (emphasis removed and added); *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 137 per Dickson, J. ("The constitutional question to be answered is whether the 'dominant or most important characteristic' of the *Heroin Treatment Act* is the medical treatment of drug addiction"); *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 286-87 per La Forest, J. ("Though pith and substance may be described in different ways, the expression 'dominant purpose' or 'true character' ... or 'the dominant or most important characteristic of the challenged law' appropriately convey the meaning to be attached to the term"); *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 62 per La Forest, J. ("While various expressions have been used to describe what is meant by the 'pith and substance' of a legislative provision, in *Whitbread v. Whalley* I expressed a preference for the description 'the dominant or most important characteristic of the challenged law'"); *Union Colliery Co. of British Columbia v. Bryden*, [1899] 580, 587 (P.C.) (B.C.) per Lord Watson ("The provisions [of the Coal Mines Regulation Act, 1890] ... appear to fall within the subjects assigned to the provincial parliament by s. 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by s. 91, sub-s. 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, sub-s. 10, or s. 92, sub-s. 13. But the *leading feature* of the enactments consists in this – that they have, and can have, no application expect to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia") (emphasis added); 1 P. Hogg, Constitutional Law of Canada 15-7 (5th ed. supp. looseleaf release 2018-1 ("The general idea of these and similar formulations is that it is necessary to identify the dominant or *most important* characteristic of the challenged law") (emphasis added) & G. Régimbald & D. Newman, The Law of the Canadian Constitution 177-78 (2d ed. 2017) ("In cases where there are potentially numerous subject-matters inherent within the statute, the court will decide which is the *most important* or dominant aspect of the statute and characterize that aspect as being the pith and substance or matter of the law") (emphasis added).

produced by potentially diverse regional responses?[533] Is there a pressing need for a national standard? If so, only Parliament may enact the impugned law. Or are the benefits to be derived from potentially different regional solutions greater than the benefits a single national standard offers? If so, only a provincial legislature may pass the law.

[582] Professor Lederman addresses this difficult and challenging task:[534]

> [A] rule of law for the purposes of the distribution of legislative powers is to be classified by that feature of its meaning which is judged the most important one in that respect. ... In this inquiry, the judges are beyond the aid of logic, because logic merely displays the many possible classifications, it does not assist in a choice between them. If we assume that the purpose of the constitution is to promote the well-being of the people, then some of the necessary criteria will start to emerge. When a particular rule has features of meaning relevant to both federal and provincial classes of laws, then the question must be asked, *Is it better for the people that this thing be done on a national level, or on a provincial level? In other words is the feature of the challenged law which falls within the federal class more important to the well-being of the country than that which falls within the provincial class of laws?* Such considerations as the relative value of uniformity and regional diversity, the relative merits of local versus central administration, and the justice of minority claims, would have to be weighed.

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[533] If so, some courts expressed this conclusion by claiming that the less important feature was only incidentally affected. E.g., *Reference re The Board of Commerce Act and the Combines and Fair Prices Act 1919*, 60 S.C.R. 456, 504 (1920) per Duff, J. ("we are not dealing with a statute clearly within one of the enumerated heads of section 91, and only incidentally affecting local undertakings, or other matters committed to the province") & *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 442 per Beetz, J. ("The *Anti-Inflation Act* [does] ... not interfere with provincial jurisdiction in an incidental or ancillary way, but in a frontal way and on a large scale").

[534] Lederman, "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 197-98 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 241 (1981) (emphasis removed and added). See also Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 186 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 251 (1981) ("Respecting the detailed aspects raised by the challenged law, one must ask – when does the need for a national standard by federal law outweigh the need for provincial autonomy and possible variety as developed by the laws of several provinces, or vice versa"); Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 619 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 303 (1981) ("judges ... must weigh such matters as the relative values of nation-wide uniformity versus regional diversity, the relative merit of local versus central administration, and the justice of minority claims, when provincial or federal statutes are challenged for validity under the established division of powers") & 1 P. Hogg, Constitutional Law of Canada 15-21 (5th ed. supp. looseleaf release 2018-1 ("The policy choice that lies at the base of a characterization decision is bound to be related to the ultimate consequence of the choice which is, I am assuming, the validity or invalidity of the statute. The choice must be guided by a concept of federalism. Is this the kind of law that should be enacted at the federal or the provincial level?").

[583] This comparative exercise focuses on the "social, economic, political, and cultural conditions of the country and its various regions and parts, and of course ... the systems of values that obtain in our society".[535]

[584] Suppose the Governor in Council invokes section 38(1) of the *Emergencies Act*[536] and issues a declaration of war and under section 40 of the *Emergencies Act* issues a number of regulations to be in force for the duration of the emergency. One of the section 40 orders provides that any strikes or lockouts in the public and private sectors must cease immediately and that no employer may lockout its employees and no trade union may strike while the declaration remains in force.

[585] No employer and trade union bound by this order would contemplate a constitutional challenge to the labour order and the *Emergencies Act*. Their constitutional validity would be indisputable.

[586] The existence of war conditions makes it obvious that important decisions affecting the ability of Canada to mobilize for war must be made by a delegate of Parliament. There has to be a central command. There has to be a single national standard. In wartime a nation must organize all its resources to maximize its ability to defend itself and does not have the luxury of allowing provincial labour boards to carry out their normal mandates and to allow strikes and lockouts so long as they are allowed by provincial law. Workers must be working to advance Canada's interests.

[587] The case for a uniform national rule overwhelms whatever can be said for provincial autonomy.

[588] If the importance of the interests advanced by federal regulation and provincial regulation are comparable, both a provincial legislature and Parliament may pass the law.[537]

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[535] Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 186 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 251-52 (1981). See also Trudeau, "Federalism, Nationalism, and Reason" in The Future of Canadian Federalism 30 (P.-A. Crepeau & C. MacPherson eds. 1965) ("Faced with provinces at very different stages of economic and political development, it was natural for the central government to assume as much power as it could to make the country as a whole a going concern. Whether this centralization was always necessary, or whether it was not sometimes the product of bureaucratic and political empire-builders acting beyond the call of duty, are no doubt debatable questions ... . [O]ver the years the central administrative functions tended to develop rather more rapidly than the provincial ones") & Mallory, "The Five Faces of Federalism" in The Future of Canadian Federalism 4 (P.-A. Crepeau & C. MacPherson eds. 1965) ("The new federal government in the first blush of its power in Ottawa was both a national coalition and a concentration of political talent which was bound to leave little political weight in the provinces").

[536] R.S.C. 1985, c. 22 (4th Supp.).

[537] Lederman, "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 201-02 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian

[589] *Canadian Western Bank v. Alberta*[538] illustrates this proposition.

[590] Eight federally chartered banks challenged provisions in Alberta's *Insurance Act*[539] that imposed a provincial licencing scheme on businesses selling described insurance products.

[591] The banks argued that the sale of the insurance products that triggered the application of the *Insurance Act* was authorized by the *Bank Act*[540] and could not be the subject of provincial

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Constitutional Dilemmas 244 (1981) ("But if the contrast between the relative importance of the two features is not *so sharp*, what then? ... When the court considers that the federal and provincial features of the challenged rule are of roughly equivalent importance so that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or a provincial legislature") (emphasis added); 1 P. Hogg, Constitutional Law of Canada 15-12 (5th ed. supp. looseleaf release 2018-1) ("The courts have not explained when it is appropriate to apply the double aspect doctrine, and when it is necessary to make a choice between the federal and provincial features of a challenged law. Lederman's explanation seems to be the only plausible one: the double aspect doctrine is applicable when 'the contrast between the relative importance of the two features is not so sharp'"); G. Régimbald & D. Newman, The Law of the Canadian Constitution 192 (2d ed. 2017) ("Professor Lederman has described this [double aspect] doctrine as being applicable to when the contrast between the relative importance of two features within a law is 'not so sharp'. Essentially, when the courts view the two matters within a law as being of nearly equal importance, then the double aspect doctrine will apply so that the statute is within the authority of both the federal and provincial levels of government"); *Rogers Communications Inc. v. City of Châteauguay*, 2016 SCC 23, ¶ 50; [2016] 1 S.C.R. 467, 490 (the Court adopted Professor Lederman's analysis); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 182 ("The double aspect doctrine is applicable, as Professor Lederman says, when the contrast between the relative importance of the two features is not so sharp. When, as here, the corporate-security federal and provincial characteristics of the insider trading legislation are roughly equal in importance there would seem little reason, when considering validity, to kill one and let the other live. ... Concurrent matters or fields have been recognized, among others, in the realms of temperance, insolvency, highways, trading stamps and aspects of Sunday observance. Concurrency in the sale of securities was recognized") & *Rio Hotel Ltd. v. New Brunswick*, [1987] 2 S.C.R. 59, 66 per Dickson, C.J. ("I cannot say that the federal characteristics of the subject matter are palpably more important than the provincial characteristics. The provincial regulatory scheme relating to the sale of liquor in the Province can, without difficulty, operate concurrently with the federal *Criminal Code* provisions"). See also *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 114 per Laskin, C.J. ("This conclusion [British Columbia's *Heroin Treatment Act* is valid provincial public health legislation] must not be taken as excluding the Parliament of Canada from legislating in relation to public health, viewed as directed to protection of the national welfare"); *Prince Edward Island v. Egan*, [1941] S.C.R. 396 (the Court upheld the constitutionality of a provision in Prince Edward Island's *Highway Traffic Act* cancelling for a twelve-month period the operator's licence of a person convicted of impaired driving under the *Criminal Code*.); *Re Validity of Section 92(4) of the Vehicles Act, 1957 (Sask)* [1958] S.C.R. 608 (the Court upheld the constitutionality of a provision in Saskatchewan's *Vehicles Act* authorizing the Highway Traffic Board to suspend the operator's licence of a person who refused to comply with a police officer's request to provide a breath sample) & *O'Grady v. Sparling*, [1960] S.C.R. 804 (the Court upheld the constitutionality of a provision in Manitoba's *Highway Traffic Act* making it a provincial offence to drive without due care and attention).

[538] 2007 SCC 22; [2007] 2 S.C.R. 3. See also *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725 (the Court held that federally chartered banks were subject to Québec's *Consumer Protection Act* and had to disclose credit card fees).

[539] R.S.A. 2000, c. 1-3.

[540] S.C. 1991, c. 46.

regulation on account of the doctrine of interjurisdictional immunity or the dominion paramountcy doctrine.

[592] The Supreme Court rejected these arguments.[541] It concluded that Parliament's decision to allow banks to sell insurance products in a provincially regulated market did not mean that the banks were immune from the reach of provincial insurance-market regulators.[542]

[593] Neither was the dominion paramountcy doctrine engaged.[543] The challenged provisions of the *Insurance Act* did not impose obligations on the banks that were inconsistent with those established by the *Bank Act* or frustrate the purpose of the process in the *Bank Act* allowing banks to compete in Alberta.

[594] In essence, the need for uniform national standards banks must meet if they choose to sell described insurance products was comparable to the benefits Canadians derived from regional standards – that may vary – governing the sale of described insurance products.

[595] *Canadian Western Bank v. Alberta* is authority for the proposition that enterprises primarily subject to federal law are not exempt from provincial laws of general application that have no or marginal impact on their core features.[544]

[596] Here are some other examples that demonstrate the implications of this principle.

[597] Banks and other undertakings primarily subject to federal regulation must comply with municipal zoning bylaws. They cannot open offices in parts of a community reserved for residential development. Nor can they ignore the governing building standard codes or the hours a business may be open to the public.

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[541] 2007 SCC 22, ¶ 4; [2007] 2 S.C.R. 3, 16.

[542] Id.

[543] Id.

[544] See *Bank of Toronto v. Lambe*, 12 A.C. 575, 586 (P.C. 1887) (Que.) (the Privy Council adjudged a Québec act taxing a number of enterprises, including banks, constitutional: "It has been earnestly contended that the taxation of banks would unduly cut down the powers of parliament in relation to ... banking .... Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the province where they carry on business can interfere at all with the power of making laws on the subject of banking") & *Québec v. Canadian Owners and Pilots Ass'n*, 2010 SCC 39, ¶¶ 40 & 41; [2010] 2 S.C.R. 536, 553 ("I conclude that the location of aerodromes lies at the core of the federal aeronautics power. ... The remaining question is whether the impact of [the provincial law] on the federal power is sufficiently serious to attract the doctrine of interjurisdictional immunity").

[598] In these examples the provincial and federal features of the bylaws are roughly comparable in importance and a bank or other enterprise primarily subject to federal regulation must comply with them.

[599] But there are laws that demonstrate both provincial and federal dimensions, one of which is more important than the other, with the result that only one jurisdiction may enact the challenged law.[545]

[600] The consequence of a determination that one feature of a challenged law is more important than the other serves as a yellow flag for jurists – consider very carefully the wisdom of this assessment. Professor Lederman forcefully delivers this message:[546]

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[545] Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 188 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 253 (1981) ("if there is sufficient contrast in relative importance between the competing federal and provincial features of the challenged law, then in spite of extensive overlap the interpretive tribunal can still allot exclusive legislative power one way or the other"). This concept captures the essence of the doctrine of interjurisdictional immunity. There is no need for this doctrine. See 1 P. Hogg, Constitutional Law of Canada 15-38.4 (5th ed. supp. looseleaf release 2018-1 ("The difficulty is to distinguish the occasions when the interjurisdictional immunity doctrine applies from the occasions when the pith and substance doctrine applies"). The interjurisdictional immunity doctrine receives mixed judicial reviews. *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, ¶ 161 per Wagner, C.J. & Brown, J. ("the idea underlying the doctrine of interjurisdictional immunity is better understood not as an independent doctrine but as a function of the pith and substance test, properly understood and applied"). See *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 36; [2007] 2 S.C.R. 3, 33 (the majority approved the notion that the doctrine of interjurisdictional immunity is "not ... particularly compelling") & *Ontario Public Services Employees' Union v. Ontario*, [1987] 2 S.C.R. 2, 18 per Dickson, C.J. ("doctrines like interjurisdictional and Crown immunity and concepts like 'watertight compartments' ... have not been the dominant tide of constitutional doctrines"). The Privy Council has repeatedly rejected the notion of interjurisdictional immunity. *Bank of Toronto v. Lambe*, 12 A.C. 575, 587 (P.C. 1887) (Que.) ("If ... [their Lordships] find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament"); *Forbes v. Manitoba*, [1937] A.C. 260, 271 (P.C. 1936) (Can.) (the Privy Council held that a province may impose a tax on the salary of a Dominion civil servant) & *Caron v. The King*, [1924] A.C. 999 (P.C.) (Can.) (the Privy Council upheld a decision that a member of the Québec cabinet was subject to the Dominion's *Income War Tax Act, 1917*). Compare *United States v. City of Detroit*, 355 U.S. 466, 469 (1958) ("This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress ... At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government") & *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, s. 114 (U.K.) ("A State shall not, without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to the State").

[546] "The Balanced Interpretation of the Federal Distribution of Legislative Power in Canada" in The Future of Canadian Federalism 98 (P.-A. Crepeau & C. MacPherson eds. 1965) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 271-72 (1981) (emphasis in original). See *Ontario v. Canada*, [1896] A.C. 348, 360-61 (P.C.) (Can.) ("the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To

> [O]nce such lists [of general classes of laws] have been made, those who must interpret the constitution encounter the broad extensions of meaning and the overlapping of concepts that generalized thought makes inevitable. At this point it is clear that such generalized concepts must be used with care if we would preserve the balance of our federal constitution – preserve, that is, a proper equilibrium between significant provincial autonomy and adequate central power.
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> The danger is this, that some of the categories of federal power and some of those of provincial power are capable of very broadly extended ranges of meaning. If one of these concepts of federal power should be given such a broadly extended meaning, *and also priority over any competing provincial concept*, then federal power would come close to eliminating provincial power.

[601] The municipal law under review in *Rogers Communications Inc. v. City of Châteauguay*[547] is a recent example of a marked degree of disparity in the impact of the provincial and federal aspects of the law. Châteauguay passed a law that prohibited Rogers from building a telecommunications tower on a particular municipal lot. The city did so to protect the health of those in the immediate vicinity of the proposed tower and because it would be an eyesore. Rogers valued this site because it allowed the business to service a segment of the community that its federal licence compelled it to service. The Supreme Court, adopting Professor Lederman's theory, declared that the federal aspect of Châteauguay's law was more important than its provincial dimension:[548] "We cannot see in this an equivalence between the federal aspect, that is, the power over radiocommunication, and the provincial aspects, namely the protection of the health and well-being of residents living nearby and the harmonious development of the municipality's territory".

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attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would ... not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures"). The same tension between proponents of federal and state rights exists in the United States. "Following the establishment of the federal government [in 1787] the debate over its powers continued to rage on for many years. Federalists such as Hamilton advocated control of national problems through federal legislation. The Republicans ... led by Jefferson, opposed the increasing activity of the federal government because they thought it a usurpation of powers reserved to the states". 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law: Substance and Procedure 301 (2d. ed. 1992).

[547] 2016 SCC 23; [2016] 1 S.C.R. 467.

[548] Id. at ¶ 51; [2016] 1 S.C.R. at 490-91.

[602] This is also what happened in *Reference re the Validity of Section 5(a) of the Dairy Industry Act*.[549] Parliament, responding to pressure from the dairy industry, invoked its criminal-law power – to protect the public from food products deleterious to human health – and prohibited the manufacture and sale of margarine in Canada. But Parliament's underlying assumption that margarine was harmful to human health was indefensible.[550] Scientific evidence supported the claim that margarine was as nutritious as butter.[551] In fact, margarine had long been a food staple in the United States, the United Kingdom and Europe.[552] Canadian consumed it when there was a shortage of butter after the First World War.[553]

[603] The Supreme Court of Canada declared the prohibition on the manufacture of margarine in Canada under section 5(a) of the *Dairy Industry Act* unconstitutional.[554] It canvassed the impact the law would have on those directly and indirectly affected by it. All the negative effects were on spheres of activity that the province had primary authority to regulate. The federal law denied consumers the freedom to incorporate margarine into their diets. It, in effect, forced them to buy dairy products instead. The federal ban on the manufacture of margarine adversely affected a segment of the agricultural sector. Farmers were denied the opportunity to grow and market soya beans, sunflowers and other natural products used in margarine production. Food enterprises were denied the opportunity to enter a profitable segment of the food business.[555] As well, the absence of margarine manufacturers meant that potential jobs were lost. And all this for no health benefits, a point Justice Rand emphasized:[556]

> [Parliament passed s. 5(a) of the *Dairy Industry Act*] to give trade protection to the dairy industry in the production and sale of butter to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces.

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[549] [1951] A.C. 179 (P.C. 1950) (Can.), aff'g, [1949] S.C.R. 1 (1948).

[550] [1949] S.C.R. 1, 48 (1948).

[551] Id.

[552] Id.

[553] Id. 57.

[554] Id. 68.

[555] Id. 86-87 per Locke, J.

[556] Id. 50.

[604] The existence of a marked disparity between the importance of the federal and provincial heads of power accounts for the outcome in *Toronto Electric Commissioners v. Snider*.[557] At issue was the constitutionality of a federal labour law that applied to employers whose enterprise carried on business within Ontario. The Privy Council concluded that the federal law's most important feature engaged property and civil rights within the province and that it was unconstitutional:[558]

> It is obvious that these provisions dealt with civil rights, and it is not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance.

[605] There is no need to evaluate the competing importance of two aspects of a law if there is binding precedent that has already undertaken this task and resolves the contest.[559] For example, the Privy Council declared in *Citizens Insurance Co. of Canada v. Parsons*[560] that "[Parliament's] authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province". In other words, the federal authority under the trade and commerce head of power authorizes laws that affect civil rights associated with extra-provincial transactions.

5. The Fifth Question

[606] If a court concludes that both levels of government have the constitutional competence to enact a law, one last query must be answered.[561] Is there a compelling reason why both laws should not be enforced? This is the preferable outcome[562]. A valid law should have legal effect. The text

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[557] [1925] A.C. 396 (P.C.) (Ont.).

[558] Id. 408.

[559] *Reference re the Validity of Section 5(a) of the Dairy Industry Act*, [1951] A.C. 179, 193 (P.C. 1950) (Can.) ("If these conflicting claims had never before been considered by the Board their Lordships would be faced with a task of great difficulty, but similar conflicts, on different sets of facts, have been resolved over and over again in past years"). See Lederman, "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 200 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 242 (1981).

[560] 7 A.C. 96, 113 (P.C. 1881) (Can.).

[561] There are special rules if both levels of government pass a law in relation to agriculture and old age pensions. Section 94A of the *Constitution Act, 1867* authorizes Parliament to "make laws in relation to old age pensions ... but no such laws shall affect the operation of any law present or future of a provincial legislature in relation to any such matter". Québec has an old age pension law. Section 95 assigns to both Parliament and the provincial legislatures the authority to "make Laws in relation to Agriculture in the Province". A provincial law, according to section 95, will only be deprived of its effect if it is "repugnant to any Act of the Parliament of Canada".

[562] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, ¶ 4 per Gascon, Côté & Rowe, J.J. ("Where possible, the Court has sought to maintain a role for the two orders of government in areas of overlapping jurisdiction")

of sections 91,[563] 92A(3)[564] and 95[565] of the *Constitution Act, 1867* support the view that if the two laws are not harmonious the federal law must be given effect. This is the dominion paramountcy doctrine.[566]

[607] When is the doctrine engaged?

[608] A narrow formulation obviously advances provincial interests.[567]

[609] This is because a narrow formulation as opposed to a broad one increases the likelihood that more provincial laws will have force and not be deprived of effect on account of the dominion paramountcy doctrine.

& Canadian Western Bank v. Alberta, 2007 SCC 22, ¶ 37; [2007] 2 S.C.R. 3, 33 ("a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government") (emphasis in original).

[563] *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) ("And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature ... assigned exclusively to the Legislatures of the Provinces").

[564] Id. ("Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict").

[565] Id. ("and any Law of the Legislature of a Province relative to Agriculture ... shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada").

[566] Lederman, "Classification of Laws and the British North America Act" in Legal Essays in Honour of Arthur Moxon 202 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 244-45 (1981) ("it is a principle of our constitution that in the event of a collision between a federal law and a provincial law each valid under the double-aspect theory, the federal features of the former law are considered in the last analysis more important than the provincial features of the latter"); Lederman, "Cooperative Federalism: Constitutional Revision and Parliamentary Government in Canada, 78 Queen's Q. 7, 9 (1971) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 376 (1981) ("In the event of conflict, the judicial doctrine of dominion paramountcy is to the effect that federal legislation prevails and provincial legislation is suspended or inoperative") *& Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 32; [2007] 2 S.C.R. 3, 30 ("the doctrine of federal paramountcy ... recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse. Under our system, the federal law prevails").

[567] *Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, 807-08 per Wilson, J. ("the narrower the definition of conflict, the broader the scope within which valid provincial legislation can operate: the broader the definition of conflict, the greater the impact of the paramountcy doctrine to cut it down. ... [T]he trend of the more recent authorities favours a restrictive approach to the concept of 'conflict' and a construction of impugned provincial legislation, where this is possible, so as to avoid operational conflict with valid federal legislation"); *Reference re Securities Act*, 2011 SCC 66, ¶ 60; [2011] 3 S.C.R. 837, 867 ("As Dickson C.J. pointed out, a restrained approach to doctrines like federal paramountcy is warranted") *& Husky Oil Operations Ltd. v. Workers' Compensation Board*, [1995] 3 S.C.R. 453, 539 per Iacobucci, J. ("I would emphasize again that this Court has traditionally declined to invoke the paramountcy doctrine in the absence of actual operational conflict. ... [It is] appropriate to adopt as narrow a definition of operational conflict as possible in order to allow each level of government as much area of activity as possible within its respective sphere of authority").

[610] A broad protocol favors federal values.[568]

[611] Professor Lederman and the Supreme Court support a narrow scope for the doctrine. This promotes a healthy respect for provincial laws and balances the influence of Parliament and provincial legislatures.

[612] Here is Professor Lederman's opinion on the topic:[569]

> [T]here may well be both a valid federal law and a valid provincial law directed to the same person concerning the same things, but requiring from them different courses of conduct and thus having certain differing effects. Now if these different courses of conduct and effects are merely cumulative and not conflicting, then both rules may operate. But if the two rules call for inconsistent behaviour from the same people, they are in conflict or collision and both cannot be obeyed. In these circumstances the courts have laid it down that the federal rule is to prevail and the provincial one is inoperative and need not be observed. The suspension of the provincial law continues so long as there is a federal law inconsistent in the sense explained. ...
>
> For example, a provincial statute says that a certain creditor is a secured creditor, but the federal *Bankruptcy Act* says he is an unsecured creditor. There can be only one scheme for priority among creditors in the event of bankruptcy of the debtor, hence the federal statute prevails and the provincial one is inoperative for repugnancy.

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[568] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶ 70; [2007] 2 S.C.R. 3, 52 ("To interpret incompatibility broadly has the effect of expanding the powers of the central government, whereas a narrower interpretation tends to give provincial governments more latitude").

[569] "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon 202 (J. Corry, F. Cronkite & E. Whitmore eds. 1953) reprinted in W. Lederman Continuing Canadian Constitutional Dilemmas 244 (1981) & Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 190 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 255 (1981). See also Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada", 9 McGill L.J. 185, 191 (1963) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 256 (1981) ("In addition to the patent and positive conflict of terms just considered, there is another type of conflict or inconsistency to be examined. The federal legislation ... may carry the express or tacit implication that there shall not be any other legislation on the concurrent subject by a province. If this negative implication is present, any supplemental provincial statute would be in conflict with it, though there is no conflict between comparable terms of the statute") & Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers" in The Future of Canadian Federalism 105 (P.-A. Crepeau & C. MacPherson eds. 1965) ("One authority must be paramount in the event of conflict in a concurrent field, for the citizen cannot be subjected to two laws that contradicted one another").

[613] In *Multiple Access Ltd. v. McCutcheon,*[570] Justice Dickson, as he then was, adopted Professor Lederman's narrow statement of the dominion paramountcy doctrine.

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

[614] Justices Binnie and LeBel, in *Canadian Western Bank v. Alberta,*[571] gave the concept a slightly greater scope:

> [T]he impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine. ...
>
> That being said, care must be taken not to give too broad a scope to ... [this gloss]. ... The fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject.

[615] *Canadian Western Bank v. Alberta*[572] is an example of the application of a narrow formulation of the dominion paramountcy doctrine. Because there was no provision in the *Bank Act* that contained the consumer protection features in Alberta's *Insurance Act*, there was no operational conflict and Alberta's consumer protection law applied to banks that chose to sell insurance in Alberta.

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[570] [1982] 2 S.C.R. 161, 191. See also *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, ¶ 68; [2013] 3 S.C.R. 53, 85-86 (adopted *Multiple Access*); *Chatterjee v. Ontario*, 2009 SCC 19, ¶ 36; [2009] 1 S.C.R. 624, 648 ("If the dominant purpose of the provincial enactment is in relation to provincial objects, the law will be valid, and if the enactments of both levels of government can generally function without operational conflict they will be permitted to do so"); *M&D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, 973 ("In the event of an express contradiction, the federal enactment prevails to the extent of the inconsistency"); *Rio Hotel Ltd. v. New Brunswick*, [1987] 2 S.C.R. 59, 65 per Dickson C.J. ("Although there is some overlap between the licence condition precluding nude entertainment and various provisions of the [*Criminal*] *Code*, there is no direct conflict. It is perfectly possible to comply with both the provincial and the federal legislation") & *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 140 per Dickson, J. ("The two enactments are not in conflict in the sense that they are operationally incompatible or that compliance with one law necessarily requires the breach of the other").

[571] 2007 SCC 22, ¶¶ 73 & 74; [2007] 2 S.C.R. 3, 53. See also *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, ¶ 14; [2005] 1 S.C.R. 188, 195 ("In my view, the overarching principle to be derived from *McCutcheon* and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means").

[572] 2007 SCC 22; [2007] 2 S.C.R. 3.

[616] Here is an example of an operational conflict.[573]

[617] Suppose a municipality passed a bylaw that required a retail vendor of newspapers and real estate magazines or any other undertaking that wished to either temporarily or permanently place equipment on a public right of way to secure a municipal permit before doing so.[574] Canada Post commences an action challenging the applicability of the bylaw to its collection or community mailboxes. It claims that a federal regulation[575] validly passed under the *Canada Post Corporation Act*[576] gives it the absolute right to install collection and community mail boxes wherever it likes.

[618] Assuming that the federal feature of the challenged law – it regulates a part of a postal delivery service – is of comparable importance to the provincial feature of the law – it regulates property in the province, and both levels of government can enact the law, there is a conflict between the bylaw and the federal regulation. The latter states that Canada Post may locate its mail boxes wherever it wishes on public property. In short, Canada Post does not need the municipality's permission to put a mail box where it pleases. The bylaw, on the other hand, stipulates that Canada Post cannot locate a collection or community mail box in a place the municipality does not approve. This conflict activates the dominion paramountcy doctrine. The bylaw does not apply to Canada Post's activities.

6. Summary

[619] To summarize, here are the right questions posed in the correct order.

[620] First, why did Parliament or a provincial legislature pass the challenged law? How does it impact those who are subject to its terms? How does it affect the conduct of those on the ground?

[621] Second, taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the challenged law display a feature that reasonably justifies its classification as a class of laws assigned to the provincial legislatures under the *Constitution Act, 1867*[577] or any other enactment?

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[573] See *M & D Farm Ltd v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, 983 ("Under the terms of this order [obtained under Manitoba's *Family Farm Protection Act* Manitoba Agricultural Credit Corporation] was authorized to move forward against the appellants' land and to realize on the appellants' debt. An order has been made under a provincial statute that purported to authorize the very litigation that the stay issued pursuant to s. 23 of the federal [*Farm Debt Review Act*] ... purported to prohibit. In short, there is an operational incompatibility in the orders, issuing under the two statutes").

[574] See *Canada Post Corp. v. City of Hamilton*, 2016 ONCA 767; 403 D.L.R. 4th 695.

[575] *Mail Receptacles Regulation*, SOR/83-743.

[576] R.S.C. 1985, c. C-10, s. 19(1)(k).

[577] 30 & 31 Vict., c. 3 (U.K.).

[622] If not, the inquiry is over. A provincial legislature may not validly enact the law. Only Parliament has the constitutional authority to do so.

[623] If there is a positive answer to the second question, the inquiry continues.

[624] Third, taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, does the challenged law display a feature that reasonably justifies its classification as a class of laws assigned to Parliament under the *Constitution Act, 1867* or any other enactment?

[625] If not, the inquiry ends. Parliament has no constitutional authority to make the law. Only a provincial legislature may pass it.

[626] If the answer to the third question is "yes", the next question arises.

[627] Fourth, given that the challenged law displays features that reasonably justify its classification as a class of laws assigned to *both* the provinces and Parliament under the *Constitution Act, 1867* or any other enactment, does only Parliament or a provincial legislature or do both have the constitutional authority to enact the contested law?

[628] Is there a need for a national standard? Or would Canada be a better place if provincial legislators were free to solve the problem as they see fit? In other words, what are the relative values of uniformity and diversity? If the benefits associated with a national standard and those derived from potentially diverse regional standards are comparable, both a provincial legislature and Parliament may pass the law. If the benefits associated with a national standard exceed the benefits derived from potentially varied regional responses, only Parliament may pass the law. If the benefits associated with potentially varied responses exceed the benefits associated with a single national standard, only a provincial legislature may pass the law.

[629] Fifth, if both levels of government have the constitutional competence to enact the contested law, is there conflict between the laws under review and a law passed by the other jurisdiction on the same subject matter or are the provincial and federal laws incompatible? If so, the doctrine of dominion paramountcy applies and the federal law prevails and the provincial law does not apply.

E. Environment Is Not a Head of Power Assigned to Either the Parliament of Canada or the Provincial Legislatures

[630] A review of the *Constitution Act, 1867*[578] reveals that "environment" is not a head of power or class of laws assigned to either the Parliament of Canada or the provincial legislatures.[579]

[631] This not surprising. The environment, as we understand the term today, was not a pressing matter in 1867.[580] There was no such thing as environmental law then.

[632] Even if there was some interest today – which there is not – in amending the *Constitution Act, 1867* to allocate "environment" as a head of power to either Parliament or the provincial governments, neither level of government would acquiesce to the other adding this head of power to its list of classes of laws.[581]

[633] This is because the addition of "environment" to either lawmaker's arsenal would completely disrupt the current balance of power and give to the level of government that secured the constitutional mandate to make environmental laws a jurisdictional base of such immense impact that it would render meaningless a large portion of the other heads of power.[582] It would be like giving the level of government that was entitled to make laws in relation to the environment a ninety meter head start in a 100 meter race.

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[578] 30 & 31 Vict., c. 3 (U.K.).

[579] *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 286 per LaForest, J. ("this Court in *Oldman River* .... made it clear that the environment is not ... a subject matter of legislation under the *Constitution Act, 1867*. ... Rather it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial") & *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 63 per LaForest, J. ("I agree that the *Constitution Act, 1867* has not assigned the matter of environment *sui generis* to either the provinces or Parliament. The environment, as understood in its *generic* sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government"). Nor is "environment" a class of law in the *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12 (U.K.) and *The Constitution of India*. Environment is a broad concept that consists of many different classes of laws. For example, the Indian Constitution states that the central government is responsible for the "[r]egulation and development of inter-State rivers and river valleys" and the regional governments may pass laws relating to the "protection against pests and prevention of plant diseases". Both levels of government may pass laws relating to the "[p]rotection of wild animals and birds".

[580] Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada", 23 U. Toronto L.J. 54, 54 (1973) ("the problem of environmental management was virtually unknown [in 1867]").

[581] Id. 85 ("it is ... obvious that 'environmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal").

[582] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 610 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 296 (1981).

[634] "Environment" is a broad concept that consists of many different classes of laws already enumerated in the *Constitution Act, 1867* – for example, public property,[583] trade and commerce,[584] Sable Island, [585] navigation and shipping, [586] lands reserved for Indians, [587] criminal law, [588] connecting works and undertakings, [589] direct taxation, [590] management of public lands [591] and hospitals,[592] municipal institutions,[593] local works and undertakings,[594] property and civil rights,[595] local matters, [596] nonrenewable resources, forestry resources and electrical energy [597] and agriculture.[598]

[635] Each of these enumerated heads of power or class of laws could serve as the constitutional foundation for a law passed to safeguard the environment.

[636] Almost every decision a person makes affects the environment. Will I drive to work? Will I car pool? Or will I ride my bike or take public transportation? If enough commuters abandon their gasoline-powered automobiles, there will be less carbon dioxide in the atmosphere.[599] Less carbon dioxide in the atmosphere translates into less global warming. Will I purchase a gasoline-powered or an electric-powered vehicle? If enough consumers purchase electric-powered vehicles, there would be a noticeable reduction of carbon dioxide in the atmosphere. Will I mow my lawn with a gasoline-powered or electric lawn mower or an old-fashioned reel mower? If enough

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[583] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(1A) (U.K.).

[584] Id. s. 92(2).

[585] Id. s. 91(9).

[586] Id. s. 91(10).

[587] Id. s. 91(24).

[588] Id. s. 91(27).

[589] Id. ss. 91(29) & 92(10)(a) & (b).

[590] Id. s. 92(2).

[591] Id. s. 92(5).

[592] Id. s. 92(7).

[593] Id. s. 92(8).

[594] Id. s. 92(10).

[595] Id. s. 92(13).

[596] Id. s. 92(16).

[597] Id. s. 92A.

[598] Id. s. 95.

[599] California Air Resources Board asserts that "[i]n California, about half the air pollution comes from cars and trucks". "Simple Solutions to Help Reduce Air Pollution" (September 19, 2011).

gardeners forsook the gasoline-powered mower, there would be less carbon dioxide in the air. Will I purchase a gas or electric stove? If enough cooks chose the environment over the benefits associated with precise heat control, there, again, would be less carbon dioxide in the atmosphere. Will I fly to Hawaii for a vacation? Or will I vacation closer to home? If enough travelers abandon air travel, there will be less jet fuel consumed and less pollution. Will I continue to consume meat and support the Alberta cattle industry? Or will I become a vegetarian? It takes much more water to produce a unit of meat than is required for most vegetable products, and plants do not produce methane, as cattle do. Will I consume locally grown produce even though it is more expensive? Will I drink carrot juice instead of orange juice produced in Florida, California or Mexico? If enough people choose carrot juice there will be fewer trucks carrying fruit making the trip from the southern United States. This translates into less carbon dioxide in the atmosphere. Will I play golf and support the environment or play tennis? There are lots of trees on golf courses. Trees absorb carbon dioxide. There are not many trees on tennis courts. Will I take canvas bags to the grocery store and stop using plastic bags?[600] Again, if large numbers of consumers adopted this habit, the grocers would have less demand for plastic bags. This translates into less use of petroleum products and less carbon dioxide in the atmosphere. The list could go on.

[637] Almost every decision an enterprise or undertaking makes affects the environment. For example, the operator of an electricity-generating plant must decide on the fuel source. Will it be readily available and low-cost coal? Or will it be natural gas or atomic energy?[601] An oil sands operator may consider whether it is feasible to use biodiesel on site. A car rental company must decide whether to offer customers the option of renting an electric vehicle.

[638] Chief Justice Lamer and Justice Iacobucci understood that allotting authority to pass environmental laws to Parliament would severely erode the powers of provincial legislatures. It would give Parliament the authority to regulate matters never before contemplated by the strongest federal supporters and threaten the federal structure currently in place:[602]

> The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or ... may have an

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[600] California Air Resources Board, "Simple Solutions to Help Reduce Air Pollution" (September 19, 2011) ("Use durable reusable grocery bags and keep them in your car so you're never caught off guard").

[601] Atomic energy may be the power source the world ultimately adopts to reduce greenhouse gas emissions to acceptable levels. Federal Environment Agency, National Inventory Report for the German Greenhouse Gas Inventory 1990-2017 (Submission under the United Nations Framework Convention on Climate Change and the Kyoto Protocol) 159 (2019) ("Thereafter, beginning in 2008, a temporary marked emissions decrease occurred, as a result of increased use of nuclear power, natural gas and renewable energies").

[602] *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 256 (emphasis added). See also *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 652-53 (2012) per Scalia, Kennedy, Thomas and Alito, JJ. ("If Congress can reach out and command even those furthest removed from an interstate market to participate in the [health insurance] market, then the Commerce Clause becomes a font of unlimited power").

> immediate or long-term harmful effect on the environment" .... *One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances*. Moreover, the countless spheres of human activity, both collective and individual, which could potentially fall under the ambit of the Act are apparent. Many of them fall within areas of jurisdiction granted to the provinces under s. 92. Granting Parliament the authority to regulate so completely the release of substances into the environment by determining whether or not they are "toxic" would not only inescapably preclude the possibility of shared environmental jurisdiction; it would also infringe severely on other heads of power ... .

[639] Nor is it unusual that a well-known modern class of laws is not on the list of heads of power assigned to the central and regional governments. There are many modern legal subjects that are not specifically identified and allocated to the central or regional or both governments in the *Constitution Act, 1867*.[603] For some the explanation is that they did not exist in 1867. Aviation, automobiles, computers and entertainment are some of the members of this large set. Some were just overlooked – national capital or citizenship laws.

[640] Just because "environment" is not a head of power expressly listed in the *Constitution Act, 1867* does not mean that the general division-of-powers analytical principles do not apply or that there is a constitutional lacuna.

[641] They do and there is not.

[642] This is easy to illustrate.

[643] Neither "employment law" nor "labour law" appears in the heads of power enumerated by sections 91 and 92 of the *Constitution Act, 1867*.

[644] At issue in *Toronto Electric Commissioners v. Snider*[604] was the constitutionality of Parliament's *Industrial Disputes Investigation Act, 1907*.[605] This enactment allowed the federal Minister for Labour to appoint a board with a mandate to recommend fair terms of employment and prohibited strikes and lockouts after a dispute was referred to the board.

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[603] *Québec v. Canadian Owners and Pilots Ass'n*, 2010 SCC 39, ¶ 28; [2010] 2 S.C.R. 536, 550 & 1 P. Hogg Constitutional Law of Canada 17 ch. 17 (5th ed. supp. looseleaf release 2018 – 1).

[604] [1925] A.C. 396 (P.C.) (Ont.).

[605] S.C. 1907, c. 20.

[645] The fact that labour relations is not a head of power expressly assigned to either the central or regional governments had no impact on the correct division-of-powers analysis. The Privy Council asked the questions set out in the questions presented part above.[606]

[646] This is also true for the resolution of disputes about laws that affect the environment.

F. Both Parliament and the Provinces May Enact Laws that Affect the Environment

[647] The legal regulation of environmental matters affects heads of power that are assigned to both Parliament and the provincial legislatures.

[648] Suppose all Canadian lawmakers agreed that any motor vehicle used by a commercial enterprise must be powered by an electric source. Parliament could pass a law regulating interprovincial and international enterprises and undertakings and any other enterprises or undertakings under its control – airlines, railroads, trucking companies and atomic energy stations, for example. The provinces could regulate local enterprises and undertakings subject to its laws – oil sands,[607] other mines, local truckers, manufacturers, universities and hospitals, for example.

[649] It is indisputable that the central and regional governments may enact legislation that affects the environment.[608]

[650] Justice La Forest said so in *Friends of the Oldman River Society v. Canada*:[609] "[I]n exercising their respective legislative powers both levels of government may affect the environment, either by acting or not acting". As did Chief Justice Lamer and Justice Iacobucci in

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[606] [1925] A.C. 396, 404 (P.C.) (Ont.) ("It is clear that this enactment was one which was competent to the Legislature of a Province under s. 92. In the present case the substance of it was possibly competent, not merely under the head of property and civil rights in the Province, but also under that of municipal institutions in the Province").

[607] But see *Syncrude Canada Ltd. v. Canada*, 2016 FCA 160; 398 D.L.R. 4th 91 (the Court upheld a Federal Court decision dismissing Syncrude's constitutional challenge to the *Renewable Fuels Regulations*, SOR/2010-189, s. 5(2) stipulation that diesel fuel produced in Canada consist of not less than two percent renewable fuels).

[608] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 605 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 291-92 (1981) ("labour relations ... and pollution ... have not been enfranchised as new federal subjects by virtue of the federal general power. Rather, each of these subjects has been itself subdivided into several parts that could be reclassified piecemeal according to some of the already established specific categories of ... federal and ... provincial subjects. The parts are ... distributed accordingly, some to the federal Parliament and others to the provincial legislatures") & Gibson, Constitutional Jurisdiction Over Environmental Management in Canada, 23 U. Toronto L.J. 54, 85 (1973) ("'environmental management' does not ... constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial").

[609] [1992] 1 S.C.R. 3, 65.

The Queen v. Hydro-Québec:[610] "This Court has unanimously held that the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament".

1. Provincial Jurisdiction

[651] A number of heads of power assigned by the *Constitution Act, 1867*[611] to provincial legislatures – for example, management of public lands[612] and hospitals,[613] municipal institutions,[614] local works and undertakings,[615] property and civil rights,[616] matters of local or private nature,[617] regulation of nonrenewable natural resources, forestry resources and electrical energy[618] and agriculture[619] – justify provincial regulation of the environment.[620]

[652] One or more of these heads of power allow a province to ban the use of gasoline-powered motor vehicles or lawnmowers or subsidize consumers who purchase electric vehicles and lawnmowers, energy efficient furnaces or solar panels. Or a province could require industries primarily subject to provincial regulation to use fuels that produce less carbon dioxide emissions.[621] Or a municipality may limit the amount of water a resident may use for lawns or water features. Or it may ban the application of chemical fertilizers.

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[610] [1997] 3 S.C.R. 213, 255. See also id. 299 per La Forest, J. ("it is well ... to recall that 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").

[611] 30 & 31 Vict., c. 3 (U.K.).

[612] Id. s. 92(5).

[613] Id. s. 92(7).

[614] Id. s. 92(8).

[615] Id. s. 92(10).

[616] Id. s. 92(13).

[617] Id. s. 92(16).

[618] Id. s. 92A.

[619] Id. s. 95.

[620] See Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada", 23 U. Toronto L.J. 54, 54 (1973).

[621] E.g., *Renewable Fuels Standard Regulation*, Alta. Reg. 29/2010. But see *Syncrude Canada Ltd. v. Canada*, 2016 FCA 160; 398 D.L.R. 4th 91 (the Court upheld a Federal Court decision dismissing Syncrude's constitutional challenge to the federal *Renewable Fuels Regulation*, SOR/2010-189, s. 5(2) stipulation that diesel fuel produced in Canada consist of not less than two percent renewable fuel).

2. Federal Jurisdiction

[653] The heads of power assigned to Parliament – trade and commerce,[622] raising of money by any mode or system of taxation,[623] navigation and shipping,[624] sea coast and inland fisheries,[625] Indian lands,[626] criminal law,[627] works and undertakings connecting the provinces,[628] declarations that a work is for the general advantage of Canada,[629] agriculture[630] and residual power[631] – give the central government a solid legislative foundation for many environmental initiatives.[632]

a. Works and Undertakings Connecting the Provinces

[654] Justice La Forest, in *Friends of the Oldman River Society v. Canada*,[633] explained how Parliament's jurisdiction over interprovincial and international rail lines enables the central government to pass environmental standards directly affecting rail lines:

> [O]ne might postulate the location and construction of a new line which would require approval under the relevant provisions of the Railway Act. ... That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. ... The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval.

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[622] Id. s. 91(2).

[623] Id. s. 91(3).

[624] Id. s. 91(10).

[625] Id. s. 91(12).

[626] Id. s. 91(24).

[627] Id. s. 91(27).

[628] Id. ss. 91(29) & 92(10)(a) & (b).

[629] Id. ss. 91(29) and 92(10)(c).

[630] Id. s. 95.

[631] Id. s. 91. Aeronautics is a residual head of power.

[632] See Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada", 23 U. Toronto L.J. 54 (1973).

[633] [1992] 1 S.C.R. 3, 66.

[655] Or Parliament could invoke its power over aviation and interconnecting works and undertakings and designate the types of fuels airplanes and interprovincial railways and trucking operations must use.

b. Criminal Law

[656] In *The Queen v. Hydro-Québec*[634] the Supreme Court held that the federal government's criminal law power authorized a *ban* on the discharge of polychlorinated biphenyls into the environment: "Parliament may validly enact *prohibitions* under its criminal law power against *specific acts* for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain *toxic* substances".

[657] But the criminal law power cannot be used for illegitimate purposes, as was the case in the *Margarine Reference*[635]:

> The power cannot be employed colourably. Like other legislative powers, it cannot ... "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. ... [I]t has been "accepted that some legitimate public purpose must underlie the prohibition".

[658] Parliament could not invoke the criminal law power to prohibit the mining of a type of coal produced only in Alberta, allegedly to reduce the amount of environmental degradation produced by its subsequent use if a similar ban was not placed on a different type of coal mined only in British Columbia that posed comparable risk to the environment when burned. Most reasonable persons would suspect that Parliament acted to advance the interests of coal mine owners in British Columbia and not to reduce Canada's greenhouse gas emissions. Cynics might suggest that such a law was passed to appeal to the government's supporters in British Columbia. Such a law would be a gross invasion of Alberta's jurisdiction under section 92A of the *Constitution Act, 1867*[636] over the "development, conservation and management of non-renewable natural resources".

[659] Second, just because Parliament relies on the criminal law power does not trump the general principles governing division-of-powers jurisprudence. In the end, the crucial inquiry is whether the provincial and federal features of an impugned law are comparable in importance or there is a marked disparity between the two. Is one feature more important than the other? The *Hydro-Québec* majority observed that "a particular prohibition could be so broad or all-

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[634] [1997] 3 S.C.R. 213, 298 per La Forest, J. (emphasis added). See also id. 300.

[635] *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 291 per La Forest, J.

[636] 30 & 31 Vict., c. 3 (U.K.).

encompassing as to be found to be, in pith and substance really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment".[637]

c. Fisheries

[660] In *The Queen v. Fowler*[638] the accused successfully alleged that a provision in the *Fisheries Act*[639] prohibiting the dumping of debris in water frequented by fish was unconstitutional. The Supreme Court declared the impugned law unconstitutional because it was not a law in relation to fisheries. Instead, it sought "to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects"[640]. The Court characterized the *Fisheries Act* section as a law in relation to property and civil rights. The law's impact on provincial sovereignty was not necessarily incidental to the valid exercise of a federal power[641].

d. Works Declared To Be for the General Advantage of Canada

[661] Sections 91(29) and 92(10)(c) allow Parliament to expressly declare[642] a work to be for the general advantage of Canada or two or more provinces. The effect of this declaration is to allow Parliament to pass laws in relation to the work that is the subject of the declaration. This would include laws that may affect the environment.[643]

[662] Parliament has made section 92(10)(c) declarations many times in the past. It has exercised the power infrequently in the current era.[644]

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[637] Id. 298.

[638] [1980] 2 S.C.R. 213.

[639] R.S.C. 1970, c. F-14, s. 33(3).

[640] *The Queen v. Fowler*, [1980] 2 S.C.R. 213, 224.

[641] Id. 226. See *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292 (the Court upheld a federal law restricting the deposit of deleterious substances into the water as it was restricted to deposits that threaten fish, fish habitat or the use of fish).

[642] *St. John & Québec Railway v. Jones*, 62 S.C.R. 92, 95 & 100 (1921) & *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, 220.

[643] *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 65-66.

[644] E.g., *Atomic Energy Control Act*, R.S.C. 1985, c. A-16, s. 18 ("All works and undertakings constructed (a) for the production, use and application of atomic energy ... are, and each of them is declared to be, works or a work for the general advantage of Canada"); *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c. 12, s. 9 ("The works of the new corporation are hereby declared to be works for the general advantage of Canada"); *Cape Breton Development Corporation Act*, S.C. 1967-68, c. 36, s. 35 ("The works and undertakings operated or carried on by the companies on the Island of Cape Breton ... are hereby declared to be works for the general advantage of Canada"); *Canadian National Railways Act*, R.S.C. 1970, c. C-10, s. 18(1) ("The railway or other transportation works in Canada

e. Residual Head of Power

[663] Peace, order and good government is a head of power expressly assigned to Parliament in section 91 of the *Constitution Act, 1867*.[645] It is the first head of power identified in section 91. But in spite of its leading position and apparent broad scope,[646] it is not a plenary lawmaking power equivalent to that of the sole lawmaker in a unitary state.[647]

[664] Peace, order and good government is a residual head of power[648] – to be exercised only with respect "to all Matters, not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

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of the National Company and of every company mentioned or referred to in Part I or Part II of the schedule and of every company formed by any consolidation or amalgamation of any two or more of such companies are hereby declared to be works for the general advantage of Canada") & *Railway Act*, R.S.C. 1970, c. R-2, s. 6(1)(c) ("every railway ..., whether constructed under the authority of the Parliament of Canada or not, now or hereafter owned, controlled, leased, or operated by a company wholly or partly within the legislative authority of the Parliament of Canada ... shall be deemed and is hereby declared to be a work for the general advantage of Canada").

[645] 30 & 31 Vict., c. 3 (U.K.).

[646] *The Queen v. Wetmore*, [1983] 2 S.C.R. 284, 294 per Dickson, J. ("Taken literally, the category of legislation for the peace, order and good government of Canada is so wide that it threatens completely to overwhelm the legislative competence of the provinces"). See Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority", 57 Can. B. Rev. 531, 542 (1979) ("'peace, order and good government' ... [is a] phrase [that] had been used throughout British colonial history to confer the full range of legislative authority characteristic of a unitary, not a federal, state").

[647] Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority", 57 Can. B. Rev. 531, 542 (1979) ("the introductory clause ... [does not assign] ... to Parliament ... authority to make laws in relation to peace, order and good government but authority to make laws in relation to matters 'not coming within' the provincial heads of power. In other words, Parliament is not authorized to legislate in relation to a matter caught by the provincial categories simply because it might in some sense be thought to qualify as contributing toward the 'peace, order and good government of Canada'").

[648] *Jones v. New Brunswick*, [1975] 2 S.C.R. 182, 189 (1974) ("[The opening paragraph of section 91 of the *Constitution Act, 1867* confers a] purely *residuary power* ... [on Parliament]") (emphasis added); *Reference re The Board of Commerce Act and the Combines and Fair Prices Act 1919*, [1922] 1 A.C. 191, 197 (P.C. 1921) (Can.) ("No doubt the initial words of s. 91 ... confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammelled by the enumeration of special heads in s. 91"); *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695, 705 (P.C.) (Ont.) per Viscount Haldane ("the British North America Act [gives] ... the *residuary powers* ... to the Dominion Central Government") (emphasis added); *Canada v. Alberta*, [1916] 1 A.C. 588, 595 (P.C.) (Can.) ("There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92") & *Ontario v. Canada*, [1896] A.C. 348, 360-61 (P.C.) (Can.) per Lord Watson ("These enactments ... indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power ...

[665] A new residual head of power may only be introduced after a determination has been made that the new head of power is not assigned by section 92 to the provincial legislatures.[649]

[666] It also stands to reason that a new head of power cannot be substantially comparable to a head of power listed in section 91. A residual head of power is designed to capture heads of power that are not already allocated. The defender of federal legislation would have no need to invoke the residual head of power if there was a comparable head enumerated in section 91.[650]

[667] The residual peace, order and good government power is like any other head of power. It is neither more nor less important than any other enumerated head of power.[651] It is not a trump power. A champion of a federal law that invokes the residual head of power must be prepared to

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would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures"). See also 1 P. Hogg, Constitutional Law of Canada 17.1-17.2 (5th ed. supp. loose-leaf ed. Release 2018-1) ("[the] power to make laws for the 'peace, order, and good government of Canada' ... is *residuary* in its relationship to the provincial heads of power, because it is expressly confined to 'matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces'. It is clear from this language that any matter which does not come within a provincial head of power must be within the power of the federal Parliament") (emphasis added); Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority", 57 Can. B. Rev. 531, 531 (1979) ("By its terms the clause constitutes a residual category of federal law-making authority") & Gibson, "Measuring 'National Dimensions'", 7 Man. L.J. 15, 33 (1976) ("the 'P.O. & G.G.' power is merely *residual* in nature; it can operate only in the absence of relevant provincial jurisdiction") (emphasis added). See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people").

[649] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 442 per Beetz, J. ("The Parliament of Canada ..., under s. 91 of the Constitution, cannot make laws in relation to matters coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces"). See Newman, "Federalism, Subsidiarity, and Carbon Taxes", 82 Sask. L. Rev. 187, 200 (2019) ("Only where there is an entire matter actually not constitutionally susceptible of provincial jurisdiction is there an argument for the application of a residual POGG power outside the existing heads of federal jurisdiction").

[650] It is questionable whether there is any need for a wartime emergency power. Section 91(7) – "Militia, Military and Naval Service, and Defence" – would serve as the constitutional foundation for most wartime provisions. See Gibson, "Measuring 'National Dimensions'", 7 Man. L.J. 15, 17 (1976) ("If the subject matter of the legislation can be found within ... [the list of enumerated federal powers], the question is settled").

[651] *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695, 705 (P.C.) (Ont.) ("The enumeration in s. 92 is not in any way repealed in the event of such an ... [emergency] but a new aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units") & *Reference re The Board of Commerce Act, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 200 (P.C. 1921) (Can.) ("For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance").

defend it, passing the tests embedded in the five questions that must be asked and answered in a division-of-powers case.[652]

[668] Professor Lederman explained it this way in his classic 1975 article "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation":[653]

> The twenty-nine ... enumerated powers ... add greatly to the competence that would have been invested in the federal Parliament by the federal general power alone, though no doubt there is a modest amount of overlapping. On the other hand, the federal general power is no mere appendage to the twenty-nine enumerated powers, an appendage labelled "for emergencies only". It covers considerable ground that the enumerated powers do not cover.

[669] If the defender of an impugned federal law concludes that none of the enumerated heads of power assigned to Parliament serves as a constitutional foundation for the impugned law, the defender must rely on the residual federal power. And if a previously recognized residual head of power will not serve the purpose, the defender must propose a new head of power or class of laws.

[670] Before detailing the traits of a new residual head of power or class of laws, it is important to state a basic proposition. The criteria that are used to identify a new residual head of power or class of laws are completely different from those utilized to determine whether a challenged law is constitutional – by asking and answering the five questions that are the essential elements of a sound division-of-powers analysis.

[671] To qualify as a new residual head of power or class of laws, a proposed new head of power or class of laws must display three traits.

[672] First, the proposed new head of power must be qualitatively distinct from the heads of power or classes of laws assigned to the provincial legislatures under section 92 and elsewhere in the *Constitution Act, 1867*.[654] For example, a court should not accord residual-head-of-power status

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[652] This is so even if the new head of power is a wartime emergency. The fact that the federal class of laws is obviously more important than the provincial class of laws engaged does not relieve the constitutional adjudicator the burden of posing and answering the fourth of the five questions that arise in a division-of-powers case. Football games last four quarters, even though the eventual outcome of some games may be obvious by halftime.

[653] 53 Can. B. Rev. 597, 603 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 290 (1981).

[654] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 457 per Beetz, J. ("[a new residual head of power must have] distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern"); *Reference re The Board of Commerce Act, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 197 per Viscount Haldane ("the initial words of s. 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not

to "consumer protection" laws. This is a subset of the provincial property-and-civil-rights head of power. It is not qualitatively different from section 92(13).

[673] *Reference re The Board of Commerce Act, and The Combines and Fair Prices Act, 1919*[655] illustrates this fundamental proposition. Parliament created a legal regime that allowed the Board of Commerce to combat widespread wartime hoarding of the essentials of life – food, clothing and gasoline – by householders and businesses.[656] Canada wanted the courts to recognize "undue combination and hoarding" as a new head of power.[657] The Privy Council wisely refused to do so.[658] The Privy Council appreciated that a federal statute that limited the amount of stipulated property that a person could accumulate and authorized a statutory delegate to order the property owner to sell stipulated property at a non-free-market price was a law of a class assigned to provincial legislatures – property and civil rights laws in force in the province.[659] Viscount Haldane unequivocally rejected the notion that "under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided".[660]

[674] Second, the language used to describe the proposed head of power or class of laws must have a narrow focus. Justice Le Dain insisted on "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern".[661] A proposed head of power must

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withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92") & *Reference re Insurance Act, 1910*, 48 S.C.R. 260, 302-03 per Duff J. (1913) ("legislation declaring the qualifications required to enable persons ... in any given province to enter into ... [insurance] contracts ... would be legislation in relation to civil rights. If I am correct ... the exception found in the introductory clause of section 91 excludes the subject-matter of this section from the general authority of the Dominion").

[655] [1922] 1 A.C. 191 (P.C. 1921) (Can.).

[656] *The Board of Commerce Act*, S.C. 1919, c. 37 & *The Combines and Fair Price Act, 1919*, S.C. 1919, c. 45.

[657] [1922] 1 A.C. 191, 197 (P.C. 1921) (Can.).

[658] Id.

[659] Id. ("No doubt the initial words of s. 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in s. 92, untrammeled by the enumeration of special heads in s. 91").

[660] Id.

[661] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432. See also Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 95 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 310 (1981) ("to qualify for addition to the federal list of powers by virtue of the residual [power] ..., a new subject must earn its way to a place on the federal list. This it may do if, as a matter of hard fact and evidence in our society as it has developed, at the critical time, the subject is *real, discrete and quite limited in scope*, and is moreover of national dimension or significance as tested by the judgment that it makes good sense for the relevant and necessary legislation to be national legislation,

display the same features as are common to most of the heads of power or classes of laws enumerated in sections 91 and 92 and elsewhere in the *Constitution Act, 1867* – such as "Municipal Institutions in the Province" or "The Solemnization of Marriage in the Province".[662]

[675] A head of power or class of laws cannot be so broad – inflation[663] or the environment,[664] for example – that if added to the federal heads of power under the residual power the breadth and integrity of provincial jurisdiction would be in jeopardy.

[676] It would make no sense to approve a new head of power or class of laws that upset the balance of power between the central and regional governments. The constitution makers would never have condoned the use of the residual power to circumvent the careful allocation of lawmaking authority between Parliament and the provincial legislatures. Justice Le Dain opined that the "scale of impact on provincial jurisdiction ... [must be] reconcilable with the fundamental distribution of legislative power under the Constitution"[665].

[677] This proposition explains why a majority in *Reference re Anti-Inflation Act*[666] dismissed the notion that inflation could become a new residual head of power, accepting Professor Lederman's argument[667] on behalf of one of the parties. Justice Beetz declared that

> [t]he "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it

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rather than local legislation that may vary from province to province") (emphasis added) & Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 606 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 292 (1981) ("the new subject should also have an identity and unity that is quite limited and particular in its extent").

[662] See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 141; [2019] 9 W.W.R. 377, 439-40.

[663] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 452 per Beetz, J. ("The 'containment and reduction of inflation' can be achieved by various means including monetary policies. – a federal field –, the reduction of public expenditures, federal, provincial and municipal – and the restraint of profits, prices and wages, – a federal or a provincial field depending on the sector").

[664] *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 213, 256 per Lamer, C.J. & Iacobucci, J. ("One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances").

[665] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[666] [1976] 2 S.C.R. 373, 437 & 458.

[667] Id. 421 ("One of the submissions made by counsel for Secondary School Teachers' organizations concerned provincial co-operation, but it was put in terms of an objection to the validity of the federal legislation, the proposition being that inflation was too sweeping a subject to be dealt with by a single authority"). Professor Lederman acted for the Ontario Secondary School Teachers' Federation.

> knows no bounds. Its recognition as a *federal head of power* would render most provincial powers nugatory.[668]

[678] Professor Lederman made the same point: "Sweeping new themes or aggregates like 'inflation' or 'pollution' would bring the federal constitution to an end if they were allowed to dominate the division of legislative powers ... by virtue of the permanent operation of the federal general power".[669]

[679] Comparable harm would be risked if "social justice", "economic growth", "happiness", "quality of life", "climate change" and "environment" was recognized as a new residual head of power. There would be very few federal laws that could not be buttressed by such amorphous and vague heads of power. For example, "social justice", "happiness" and "quality of life" could be invoked to justify a federal law requiring Canadian lawyers to volunteer a specified number of hours on an annual basis at community legal assistance offices. Provinces are responsible for the regulation of lawyers and other professionals.[670]

[680] Third, the proposed new head of power or class of laws must be one that obviously should be assigned to the federal Parliament.[671] Is Canada best served by only a single law on the subject and must Parliament be the lawmaker? Can the problem be resolved only by action on the part of the central government? The reason to assign the proposed new head of power to Parliament should be of the same compelling nature as accounts for the enumerated heads of power in section 91. Take "currency and coinage" for example. There is no reasonable basis to assert that the provinces should issue their own currency. There can only be one lawmaker and it must be Parliament. The same is true for the "national capital" head of power. No observer familiar with division-of-power principles would argue that Parliament should not be assigned lawmaking authority with respect to national capital laws – the size of the national capital region and zoning within the region.[672]

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[668] Id. 458 (emphasis added).

[669] Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 96 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 311 (1981).

[670] E.g., *Legal Profession Act*, R.S.A. 2000, c. L-8 & *Health Professions Act*, R.S.A. 2000, c. H-7.

[671] *Ontario v. Canada*, [1896] A.C. 348, 360 (P.C.) (Can.) ("These enactments ... indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance") & *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432 ("The national concern doctrine applies to ... matters of national concern"). See Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 606 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 292 (1981) ("the new subject must ... arise out of the needs of our society as something that necessarily requires country-wide regulation at the national level").

[672] *Munro v. National Capital Commission*, [1966] S.C.R. 663.

[681] This concept may be what Justice Le Dain had in mind when he expressed the view that it is important to consider – when deciding whether a federal law, the constitutionality of which depends solely on the residual head of power – "what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the inter-provincial aspects of the matter".[673]

[682] A proposed new head of power may pass the third test even if it is not of national concern. Can it be said that "Sea Coast and Inland Fisheries"[674] and "Beacons, Buoys, Lighthouses, and Sable Island"[675] are heads of power of national concern? I do not think so. Canadians that reside in parts of the country far from the sea or major lakes will seldom, if ever, be affected by laws of this nature. Are these heads of power allotted to the federal government because the constitution makers decided that there should only be a single law on the subject and that Parliament is best suited to pass it? I am convinced that this is the case.

[683] Professor Lederman opined that the criteria for a new residual head of power "are not easy to meet and should be strictly applied".[676] Professor Newman, of the University of Saskatchewan's College of Law, urged courts to be reluctant to give their imprimatur to proposed new federal residual heads of power:[677]

> While it may be possible to identify new gaps over time, and such was seemingly done with marine pollution ..., there should certainly be no rush to do so in the context of areas subject to enumerated and established powers. To override provincial powers in the name of certain policy objectives is to undermine the federation.

Reference re Anti-Inflation Act[678] is manifestly consistent with the cautionary notes sounded by Professors Lederman and Newman.

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[673] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[674] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 91(12).

[675] Id. s. 91(9).

[676] Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 93 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 310 (1981). See also Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 607 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 293 (1981) ("It should in principle be very difficult to add a subject ... to the federal [residual] list").

[677] "Federalism, Subsidiarity, and Carbon Taxes", 82 Sask. L. Rev. 187, 200 (2019).

[678] [1976] 2 S.C.R. 373, 458 per Beetz, J. ("The 'containment and reduction of inflation' does not pass muster as a new subject matter ... [or head of power]").

[684] To summarize, the defender of legislation advancing a new head of residual power – none of the recognized new heads of federal power are helpful – must meet three tests. First, the new proposed head of power must be qualitatively distinct from the heads of power or classes of law assigned to provincial legislatures under section 92 and elsewhere in the *Constitution Act, 1867*. Second, it must not be so broad as to contain within it the capacity to undermine important provincial heads of power. The head of power must have a narrow focus. "[I]t must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern".[679] Third, the head of power must be one that Parliament should obviously have. There can only be a single law on the subject and Parliament is the best lawmaker.

[685] I will now discuss some specific heads of power that have been judicially approved as heads of power or classes of laws within the set of the federal residual power.[680]

i. National Capital

[686] The *Constitution Act, 1867*[681] says very little about the capital of the new dominion. Section 16 declares that "[u]ntil the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa".

[687] None of the enumerated heads of power in sections 91 and 92 remotely relate to the national capital. This is surprising. The *Constitution of the United States of America*[682] contains such a provision and those responsible for the drafting of the *Constitution Act, 1867* must have been aware of this. The *Commonwealth of Australia Constitution Act* also expressly grants Parliament "exclusive power to make laws ... with respect to ... [t]he seat of government of the Commonwealth".[683]

[688] Parliament enacted the *National Capital Act*.[684] The *Act* created the National Capital Commission and authorized it to expropriate land for the purpose of establishing a green belt within the national capital region.[685]

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[679] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432 per Le Dain, J.

[680] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can B. Rev. 597, 605 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 291 (1981) ("Aviation, atomic energy and the incorporation of Dominion companies have each been enfranchised as additions to the list of federal subjects by virtue of the residuary reach of the federal general power").

[681] 30 & 31 Vict., c. 3 (U.K.).

[682] Art. 1, § 8 ("The Congress shall have Power to ... exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may ... become the Seat of the Government of the United States").

[683] 63 & 64 Vict., c. 12, s. 52 (U.K.).

[684] S.C. 1958, c. 37.

[685] Id. ss. 3 & 13(1).

[689] A landowner whose land the Commission sought to expropriate challenged the constitutionality of the expropriation provisions in the *National Capital Act*.[686]

[690] Justice Cartwright, for the Court, noted that none of the enumerated heads of power in section 92 authorized a provincial legislature to pass laws in relation to the national capital. This determination led him to the conclusion that Parliament had the authority to pass laws in relation to the national capital.[687]

[691] Justice Cartwright appreciated that the challenged law had features that reasonably justified its classification as a property and civil rights law[688] and that this was potentially a constitutional foundation for a determination that a province had the constitutional authority to pass this law. The exercise of the expropriation power in the *National Capital Act* resulted in the transfer of title for the expropriated land from the landowner to the Crown:[689] "There is no doubt that the exercise of the powers conferred upon the Commission by the *National Capital Act* will affect the property and civil rights of residents in those parts of the two provinces which make up the National Capital Region".

[692] Justice Cartwright, having determined that no federal enumerated power dealt with the national capital region, settled on the federal residual head of power.[690]

[693] While Justice Cartwright did not expressly consider whether "national capital region laws" met the test for a new federal head of power under the residual power, he did so by implication. It is obvious that there can only be a single law on this subject. He proceeded on the assumption that "national capital region" was a class of laws of a character comparable to most of the other enumerated heads of power in sections 91 and 92 of the *Constitution Act, 1867*. He was correct. "National capital region" is sufficiently precise, narrow and discrete to be a workable class of law capable of being a head of power.[691] And it presented no danger to the balance of power between

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[686] *Munro v. National Capital Commission*, [1966] S.C.R. 663.

[687] Id.

[688] Id. 671.

[689] Id.

[690] Id. 670.

[691] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 457 per Beetz, J. ("the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and radio, the development conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern").

the central and regional governments.[692] "National capital" should be a head of power for which Parliament is responsible[693]. This is not debatable.

[694] He concluded, in effect, that the provincial interests were much less important than the federal features of the law and that the Commission had the constitutional authority to expropriate the plaintiff's land. No other outcome would have been defensible.

ii. Institutions and Agencies of the Parliament and Government of Canada

[695] In 1974 the Supreme Court of Canada[694] opined that Parliament had the constitutional right to enact the *Official Languages Act*[695] and make the "English and French languages ... the official languages of Canada for all purposes of the Parliament and Government of Canada".[696] Chief Justice Laskin observed that "[n]o authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada."[697]

[696] But a constitutional foundation must nonetheless be identified. This is easy to do.

[697] Chief Justice Laskin[698] stated that the constitutional foundation for the *Official Languages Act* is the new head of power in relation to the institutions and agencies of Parliament and the Government of Canada subsumed by the section 91 residual power.[699] This accords with common

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[692] Id. 458 per Beetz, J. ("The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters").

[693] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 452 per La Forest, J. ("Many of these subjects are ... obviously of extra-provincial concern. They are thus appropriate for assignment to the general federal legislative power") & *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 457 per Beetz, J. ("the development, conservation and improvement of the National Capital Region ... [is a] clear ... [instance] of distinct subject ... [matter] which ... [does] not fall within any of the enumerated heads of s. 92 and which, by nature ... [is] of national concern").

[694] *Jones v. New Brunswick*, [1975] 2 S.C.R. 182 (1974).

[695] R.S.C. 1970, c. O-2.

[696] Id. s. 2.

[697] [1975] 2 S.C.R. 182, 189 (1974). See also *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 426-27 per Laskin, C.J. ("with respect to the federal public service, federal legislative power needs no support from the existence of exceptional circumstances to justify the introduction of a policy of restraint to combat inflation").

[698] [1975] 2 S.C.R. 182, 189 (1974).

[699] Professor Lederman agreed. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 613 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 298 (1981).

sense.[700] It would be nonsensical to conclude that a province had any constitutional right to determine the official languages of the institutions and agencies of the Government of Canada[701] or that there should be more than one lawmaker for this class of laws. This determination in no way undermines the necessary balance of power between Parliament and the provincial legislatures.

iii. Radio

[698] Radio communication is also a distinct head of power that falls under the residual power, assuming that radio communication is not captured by section 92(10)(a) – "Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province".[702] It would appear that the Privy Council characterized radio communication as a federal head of power on account of section 92(10)(a)[703]: "Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking 'connecting the Province with other Provinces and extending beyond the limits of the Province.' But further, ... they think broadcasting falls within the definition of 'telegraphs.'"

iv. Aeronautics

[699] In 1951 the Supreme Court of Canada[704] held that aeronautics was a head of power not listed in section 92 of the *Constitution Act, 1867* and was captured by Parliament's residual head of power.[705]

[700] The plaintiffs, operators of an air freight business, challenged a Manitoba law that authorized a municipality to pass bylaws regulating the location of aerodromes[706] and West St. Paul's bylaw prohibiting aerodromes in a designated part of the municipality.[707]

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[700] See *The Constitution of India*, art. 343(3) ("Parliament may by law provide for the use, after the ... period of fifteen years of – (a) the English language, or (b) the Devanagari form of numerals for such purposes as may be specified in the law").

[701] See id. art. 343(1) ("The official language of the Union shall be Hindi in Devangari script").

[702] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 455 per Beetz J. ("The ratio of the *Radio* case is not altogether clear").

[703] *The Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304, 315 (P.C.) (Can.).

[704] *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (1951).

[705] [1952] 1 S.C.R. 292, 308 per Kerwin, J., 311 per Kellock & Cartwright, JJ., 318 per Taschereau & Estey, JJ. & 328 per Locke, J.

[706] *The Municipal Act*, R.S.M. 1940, c. 141, s. 921.

[707] *Rural Municipality of West St. Paul By-law No. 292.*

[701] While the Court did not ask whether aeronautics has a sufficiently narrow focus to qualify as a workable head of power and must be the responsibility of Parliament, it clearly does.[708] There is no difficulty in determining if a law displays a feature that allows it reasonably to be classified as a law in relation to aeronautics. Professor Lederman observed that "technologically and industrially aviation has a factual unity as a transportation system and implications for transportation as a force in the life and development of Canada that make provincial boundaries frustrating or irrelevant".[709]

v. Great Emergencies

[702] No reasonable person familiar with constitutional values would oppose the wartime exercise by the central government of lawmaking authority allotted in peacetime to the provincial legislatures under section 92 of the *Constitution Act, 1867*[710]. The notional observer would understand that in times of war power must be concentrated with central command. Wartime does not allow for the luxury of diversity. It compels uniform nation-wide laws. Wartime powers are qualitatively different from peacetime powers.

[703] Section 91(7) of the *Constitution Act, 1867* assigns to Parliament the authority to make laws relating to the "Militia, Military and Naval Service, and Defence".

[704] While there is no case law supporting this view, section 91(7) justifies many wartime rules – rationing, curfews, night-time lighting restrictions and related emergency measures – that, in the absence of war, could only be made by the provinces. "Defence" merits a broad reading.[711]

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[708] In India the central government has authority over aeronautics. *The Constitution of India*, art. 246 & Seventh Schedule, List 1, s. 29 ("Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies").

[709] "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 607 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 293 (1981).

[710] *Reference re Wartime Leasehold Regulations*, [1950] S.C.R. 124, 130 per Rinfret, C.J. ("There is no doubt that under normal conditions the subject matter of rents belongs to the provincial jurisdiction under the Head of Property and Civil Rights, in Section 92 of *The British North America Act*").

[711] *Cf, The Queen v. Schneider*, [1982] 2 S.C.R. 112, 136-37 per Dickson, J. ("Section 92, it is true does not contain a specific head of power dealing with health and public welfare. Section 92(7) provides for the physical facilities of provincial health care ... . This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned").

[705] For some reason, the Privy Council never considered the utility of section 91(7) when discussing the scope of Parliament's wartime jurisdiction. This may be attributable to the Privy Council's belief that the residual power included wartime emergency measures.[712]

[706] The High Court of Australia has frequently recognized that the federal defence power under s. 51(vi) of the *Commonwealth of Australia Constitution Act*[713] confers broad federal legislative authority during times of war. [714]

[707] If section 91(7) of the *Constitution Act, 1867* was properly interpreted, there would be no need to tap into the federal residual power when building a constitutional foundation for wartime emergency legislation.

[708] In 1921, Viscount Haldane, like Lord Watson, a provincial-rights supporter,[715] declared that a national emergency may qualify as a distinct head of power that is not enumerated in the heads of power assigned to the provincial legislatures and exist under the federal residual power:[716]

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[712] W. McConnell, Commentary on the British North America Act 193 (1977).

[713] 63 & 64 Vict., c. 12 (U.K.).

[714] During World War I, Australia enacted legislation conferring broad executive regulatory powers in relation to "any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth". *War Precautions Act 1914*, No. 10, s. 5 (Cth.). Various controversial measures enacted under this power were upheld by the High Court as a valid exercise of s. 51(vi). These included provisions enabling the detention of persons without the right to a trial (*Lloyd v. Wallach*, 20 C.L.R. 299 (1915)), restricting certain financial transactions (*Welsbach Light Company of Australasia v. Commonwealth*, 22 C.L.R. 268 (1916)) and setting maximum prices for bread and flour (*Farey v. Burvett*, 21 C.L.R. 433 (1916)). During World War II, the High Court generally accepted the principle that s. 51(vi) enabled the legislature to infringe human rights in times of war. The Court upheld federal regulations restricting or prohibiting the production of certain consumer goods (*Stenhouse v Coleman*, 69 C.L.R. 457 (1944)) and enabling detention of persons considered likely to endanger public safety (*Little v. Commonwealth*, 75 C.L.R. 94 (1947)). The High Court has also upheld federal legislation under s. 51(vi) when the nation is not strictly at war. For instance, following the September 11, 2001 terrorist attacks on the United States, the Australian government enacted a suite of anti-terrorism legislation enabling the executive to issue interim control and preventive detention orders in the absence of criminal charges. A 5-2 majority of the Court upheld these measures, noting that while legislative power under s. 51(vi) is not as broad when the country is not actually at war, it can still operate at an expanded scope when the country is facing periods of increased international tension, or falling short of ostensible peace. *Thomas v. Mowbray*, 233 C.L.R. 307 (2007).

[715] Corry, "Constitutional Trends and Federalism" in Evolving Canadian Federalism 118 (1958) ("It is well known that, on the whole, the Judicial Committee of the Privy Council gave a narrow, restrictive interpretation of the powers of Parliament under the B.N.A. Act and a correspondingly wide interpretation to the powers of the provincial legislature").

[716] *Reference re The Board of Commerce Act and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 197-98 (P.C. 1921) (Can.) (emphasis added). Accord *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 444 per La Forest, J. ("The federal Parliament clearly has power to deal with a grave emergency without regard to the ordinary division of legislative power under the Constitution. The most obvious manifestation of this power is in times of war or civil insurrection, but it has in recent years also applied in peacetime to justify the control of rampant inflation").

> In *special circumstances*, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and is not covered by them. ... It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided ... . It can, therefore, be only under necessity in *highly exceptional circumstances* ... that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole ... . It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere ... to oust the exclusive character of the Provincial powers under s. 92.

[709] This case stands for the proposition that a great wartime emergency may qualify as a specific head of power not listed in section 92 and properly be the subject of a law passed by Parliament under the residual head of power.

[710] This head of power validates the *War Measures Act*.[717]

[711] At the same time, Viscount Haldane warns that a robust emergency doctrine could gravely damage the balanced distribution of provincial and federal heads of power in that it would authorize a wholesale invasion of provincial authority to regulate property and civil rights.[718]

[712] Viscount Haldane also suggested that this emergency power could not be exercised unless there was evidence to support the claim an emergency existed.[719]

[713] In addition, he suggested that Parliament could not invoke this extraordinary emergency power if the "co-operation of the Provincial Legislatures" would adequately address the problem.[720] This is an important qualification.[721]

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[717] R.S.C. 1985, c. W-2.

[718] *Reference re The Board of Commerce Act and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 200 (P.C. 1921) (Can.).

[719] Id. 200-01 ("however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached").

[720] Id. 201.

[721] Suppose during wartime all provincial governments and the federal government agreed that rent controls were necessary. If all the provinces were able to act expeditiously and implement agreed-upon measures, Parliament could not enact rent control measures that affected rental rates within a province.

[714] The following year Viscount Haldane and the Privy Council upheld a wartime paper-pricing order under *The War Measures Act, 1914*[722] on precisely this basis:[723]

> Their Lordships ... entertain no doubt that ... in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in s. 92 is not in any way repealed in the event of such an occurrence, but a *new* aspect of the business of Government is recognized as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the Legislatures of the Provinces as individual units.

[715] Viscount Haldane made it clear that this extraordinary power depended on a determination that provincial legislatures committed to the solution of the problem did not have the legislative tools to solve it:[724]

> It may be, for example, *impossible* to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil right in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within s. 91, because in their fullness *they extend beyond what s. 92 can really cover*. The kind of power adequate for dealing with them is *only* to be found in that part of the constitution which establishes power in the State as a whole.

[716] Over fifty years later, a majority of the Supreme Court, in *Reference re Anti-Inflation Act*,[725] sanctioned in peacetime a federal law that covered the wages of workers otherwise subject

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[722] S.C. 1915, c. 2.

[723] *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695, 705 (P.C.) (Ont.) (emphasis added). See also *Co-operative Committee on Japanese Canadian v. Canada*, [1947] A.C. 87, 101 (P.C. 1946) (Can.) ("On certain general matters of principle there is not, since the decision in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* ... any room for dispute. Under the *British North America Act* property and civil rights in several Provinces are committed to the Provincial legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole").

[724] [1923] A.C. 695, 704 (P.C.) (Ont.) (emphasis added).

[725] [1976] 2 S.C.R. 373.

primarily to provincial jurisdiction and a broad range of topics within the domain of provincial legislature to uphold Parliament's response[726] to an economic emergency.[727]

[717] Chief Justice Laskin, writing for four of the seven-judge majority, opined that the Court[728]

> would be unjustified in concluding ... that the Parliament of Canada did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which ... was *temporarily necessary* to meet a situation of *economic crisis* imperiling the well-being of the people of Canada as a whole and *requiring* Parliament's stern intervention in the interests of the country as a whole.

[718] The *Reference re Anti-Inflation Act* supports federal laws[729] that respond by temporary measures to great economic emergencies that imperil the welfare of Canada.

[719] In short, great economic emergencies of a temporal nature exist as a distinct head of power that is subsumed within the set of the federal residual power.[730]

[720] Environmental degradation had not breached that barrier in 1988. Justice La Forest, in *The Queen v. Crown Zellerbach Canada Ltd.*,[731] asserted that pollution is not of "such grave proportions as to require the displacement of the ordinary division of the legislative power under the Constitution".

[721] It could sometime.

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[726] *Anti-Inflation Act*, S.C. 1974-75-76, c. 75.

[727] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 439 per Ritchie, J. for Maitland & Pigeon JJ. ("When the words 'serious national concern' [in the preamble] are read against the background of these excerpts from the White Paper it becomes apparent that they were employed by Parliament in recognition of the existence of a national Emergency").

[728] [1976] 2 S.C.R. 373, 425 (emphasis added).

[729] Id. 436-37 per Ritchie, J. for Maitland & Pigeon, JJ. ("In my opinion [highly exceptional economic conditions prevailing in times of peace] ... exist where there can be said to be an urgent and critical situation adversely affecting all Canadians and being of such proportions as to *transcend the authority vested in the Legislatures of the Provinces* and thus presenting an emergency which can only be effectively dealt with by Parliament in the exercise of the powers conferred on it by s. 91 of the *British North America Act* to make laws for the peace, order and good government of Canada. The authority of Parliament in this regard is, in my opinion, limited to dealing with critical conditions and the necessity to which they give rise and must perforce be confined to legislation of a temporary character") (emphasis added).

[730] *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 131 ("Nor can it be said, on the record, that heroin addiction has reached a state of emergency as will ground federal competence under residual power").

[731] [1988] 1 S.C.R. 401, 444-45.

[722] Suppose a 200-meter asteroid explodes in the atmosphere over northern Québec and totally destroys everything within a 400-mile radius of the contact point. The explosion sends a shock wave that knocks out Canada's communication system. The debris from the impact immediately turns day into night around the world. Nothing will grow in some parts of the country. Chaos results.

[723] An irrefutable argument could be made that this is a great environmental emergency and that Parliament would have the constitutional authority to pass laws that would normally be the domain of the provincial legislatures for the duration of the great emergency. [732]

vi. Narcotics Control

[724] In *The Queen v. Hauser*, [733] a four-justice majority concluded that "narcotic control" legislation was a new head of power under the residual head of power.

vii. Ocean or Marine Pollution

[725] The Supreme Court, in *The Queen v. Crown Zellerbach Canada Ltd.*, [734] by a four-to-three majority, added marine pollution to the heads of power that are part of the set capturing residual heads of power.

[726] Justice La Forest, writing for Justices Beetz and Lamer, strongly disagreed. He cited with approval Professor Lederman's view that if environmental pollution was approved as a residual head of power "then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial power". [735]

[727] The dissenter said this: [736]

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[732] *The Queen v Hydro-Québec*, [1997] 3 S.C.R. 213, 287 ("under the general power to legislate for the peace, order and good government, Parliament may enact a wide variety of environmental legislation in dealing with an emergency of sufficient magnitude to warrant resort to the power. But the emergency would, of course, have to be established").

[733] [1979] 1 S.C.R. 984, 1000 per Pigeon, J. ("the most important consideration for classifying the *Narcotic Control Act* as legislation enacted under the general federal residual power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private nature'. The subject-matter of this legislation is thus properly to be deal with ... as such other new developments as aviation ... and radio communications").

[734] [1988] 1 S.C.R. 401, 436 & 437-38.

[735] Id. 456 citing Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 610 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 296 (1981).

[736] [1988] 1 S.C.R. 401, 456 & 459.

> And I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government. ...
>
> ...
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> ...The prohibition in fact would apply to the moving of rock from one area of provincial property to another. I cannot accept that the federal Parliament has such wide legislative power over local matters having local import taking place on provincially owned property. The prohibition in essence constitutes an impermissible attempt to control activities on property held to be provincial ... But here the provision simply overreaches. In its terms, it encompasses activities – depositing innocuous substances into provincial waters by local undertakings on provincial lands – that fall within the exclusive legislative jurisdiction of the province.

[728] Justice La Forest was keenly aware of the dangers associated with the attribution to the federal government's residual head of power the power to control pollution: [737]

> 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.

[729] This has already happened.

[730] The federal government has enacted legislation that mandates the type of fuels enterprises primarily subject to provincial regulation must utilize. Section 5(2) of the federal *Renewable Fuels Regulations*[738] stipulates, in part, that diesel fuel produced or sold in Canada must contain two percent renewable fuel. The constitutional foundation for this regulation is not apparent to me.[739]

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[737] Id. 447-48 (emphasis added).

[738] S.O.R./2010-189.

[739] See *Syncrude Canada Ltd. v. Canada*, 2016 FCA 160; 398 D.L.R. 4th 91 (the Court upheld the constitutionality of section 5(2) of the federal *Renewable Fuels Regulation*).

viii. Other New Federal Residual Heads of Power

[731] The Supreme Court of Canada has already recognized "national capital", "institutions and agencies of Parliament and the government of Canada", "aeronautics", "radio", "great wartime and economic emergencies", "narcotics control" and "ocean and marine pollution" as examples of the federal government's residual heads of power.

[732] There may be more in the future. "[T]he possibilities of enfranchising new specific subjects ... are always open".[740] But the test for a new residual head of power is very demanding.[741]

G. There Is No Need for a National Concern Doctrine

[733] There is not now and there has never been a pressing or any need for a national concern doctrine.[742]

[734] What was required in 1867 and is still needed today are criteria that record the benchmarks of a new federal residual heads of power. In Professor Lederman's words, "when is it proper to enfranchise a new category to be added to the thirty-one existing specific federal categories by virtue of the residuary significance of the federal general power?"[743] I have set out the criteria earlier in this judgment.

H. But There Is a National Concern Doctrine

[735] Despite the fact that there is no need for a national concern doctrine and no doctrinal basis to support its existence, there is one.

[736] In 1988 Justice Le Dain, writing for the four-judge majority in *The Queen v. Crown Zellerbach Canada Ltd.*,[744] recorded what he understood "to be firmly established [conclusions]":

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[740] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 607 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 293 (1981).

[741] Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 93 (1977) & Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 607 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 310 & 293 (1981) & Newman, "Federalism, Subsidiarity, and Carbon Taxes", 82 Sask. L. Rev. 187, 200 (2019).

[742] See Newman, "Federalism, Subsidiarity, and Carbon Taxes", 82 Sask. L. Rev. 187, 201 (2019) ("the case law does not support the three-branch description of ... [the POGG power] often cheerily offered by those who would centralize the federation").

[743] "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 605 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 291 (1981).

[744] [1988] 1 S.C.R. 401, 431-32 (emphasis added).

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally *matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern*;

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.

[737] This passage demands close scrutiny.

1. Great Emergencies Is One of the Residual Heads of Power

[738] The peace, order and good government head of power is a residual head of power. A national emergency class of law is just an example of a class of laws assigned to Parliament under the residual power. Justice Le Dain makes neither point in his first conclusion.

2. Matters of a Local or Private Nature Cannot Be Transformed into Matters of National Concern

[739] Justice Le Dain states that "[t]he national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern".[745]

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[745] Id. 432.

[740] While Justice Le Dain is correct when he states that the residual head of power may capture matters that did not exist in 1867 – aeronautics, for example – the true explanation for allotting the subject matter to Parliament is the fact that the head of power or class of laws is not assigned to the provincial legislatures in section 92 or elsewhere in the *Constitution Act, 1867*[746] or in any other enactment and meets the other applicable criteria for a new residual head of power discussed above.

[741] A new head of power or class of laws can be added under the residual head of power even if the facts creating the need for a new head of power existed in 1867 so long as the head of power or class of laws is not enumerated in section 92. This explains why Parliament has the authority to make laws relating to the national capital region or the official languages of Parliament and federal government institutions. Ottawa was the national capital in 1867 and Parliament existed in 1867. Nonetheless, for some reason the constitution makers did not identify these as classes of laws expressly assigned to Parliament in section 91 of the *Constitution Act, 1867*.

[742] Justice Le Dain's assertion that "matters of a local or private nature" can somehow be transformed into "matters of national concern" overlooks the fact that a majority of the Supreme Court of Canada in *Reference re Anti-Inflation Act*[747] – Justices Martland, Ritchie,[748] Pigeon, Beetz[749] and de Grandpré – made it clear that the provincial legislatures' authority to legislate with respect to local matters did not evaporate just because conditions which prompted provincial intervention also appeared in other provinces and caused Parliament to conclude that there ought to be a uniform national response.

[743] This was not a bold move on the part of Justices Martland, Ritchie, Pigeon, Beetz and de Grandpré.

[744] It was the law.

[745] The Privy Council said precisely this in Reference re The Board of Commerce Act and the Combines and Fair Prices Act, 1919[750] and Canada v. Ontario.[751]

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[746] 30 & 31 Vict., c. 3 (U.K.).

[747] [1976] 2 S.C.R. 373.

[748] Id. 437.

[749] Id. 457-58.

[750] [1922] 1 A.C. 191 (P.C. 1921) (Can.).

[751] [1937] A.C. 355 (P.C.) (Can.).

[746] In the former case, Viscount Haldane forcefully rejected the notion that Parliament could invoke its residual power in peacetime just because troubling conditions had a national foothold:[752]

> It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in s. 92, and it not covered by them. ... [I]t is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces.

[747] In the latter case, the Privy Council affirmed the Supreme Court of Canada's opinion that Parliament's *Employment and Social Insurance Act*[753] was *ultra vires*. Lord Atkin did so summarily:[754]

> There can be no doubt that, prima facie, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. ... *A strong appeal ... was made on the ground of the special importance of unemployment insurance in Canada at the time of, and for some time previous to the passing of the Act.* ... It is sufficient to say that the present Act does not purport to deal with any special emergency. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent ... .

[748] Justice Ritchie, in *Reference re Anti-Inflation Act*, writing for Justices Martland and Pigeon, asserted that "unless such concern is made manifest by circumstances amounting to a national emergency, Parliament is not endowed under the cloak of the 'peace, order and good government' clause with the authority to legislate in relation to matters reserved to the Provinces under s. 92 of the *British North America Act*".[755] This is an unequivocal statement that a national emergency qualifies as a residual head of power or class of law but a national concern does not.

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[752] [1922] 1 A.C. 191, 197 (P.C. 1921) (Can.).

[753] *The Unemployment and Social Insurance Act*, S.C. 1935, c. 38.

[754] [1937] A.C. 355, 365-66 (P.C.) (Can.) (emphasis added).

[755] [1976] 2 S.C.R. 373, 437.

[749] Justice Beetz, with whom Justice Ritchie expressed his "full agreement",[756] completely rejected the notion that the presence in a number of provinces of the conditions that warranted the exercise of provincial jurisdiction somehow was a constitutional invitation to the federal government to invade provincial jurisdiction.[757] He accurately described the deleterious impact the national domain doctrine would have on provincial jurisdiction:[758]

> If the ... [national concern] submission is correct, then it could also be said that the promotion of economic growth or the limits to growth or the protection of the environment have become global problems and now constitute subject matters of national concern going beyond local provincial concern or interest and coming within the exclusive legislative authority of Parliament. It could equally be argued that older subjects such as the business of insurance or labour relations, which are not specifically listed in the enumeration of federal and provincial powers and have been held substantially to come within provincial jurisdiction have outgrown provincial authority whenever the business of insurance or labour have become national in scope. It is not difficult to speculate as to where this line of reasoning would lead: a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly.

[750] This is an unanswerable argument.[759]

[751] How can a local matter subject to provincial regulation be transformed into a national matter subject to permanent federal regulation just because the conditions that warrant provincial intervention replicate themselves in other provinces? Nothing in the provinces has changed. Just to state the question is to answer it.

[752] Suppose Parliament passes an *Expedited Court Process Act* to expedite judicial resolution of disputes. It contains an aggressive rocket-docket feature that would come into force in a province only if the Governor in Council declared that a province's court rules inadequately dealt with court delay. Could Canada defend this foray into undisputed provincial jurisdiction[760] on the ground that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada. ...

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[756] Id.

[757] Id. 445.

[758] Id.

[759] See id. 400 per Laskin, C.J. ("I agree, of course, that the mere desire for uniformity cannot be a support for an exercise of the federal general power").

[760] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14).

Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued".[761]

[753] The notion that a local matter can be transformed into a national matter is, from a provincial perspective, very dangerous and, taking into account the principles of federalism, unsound.[762] It should be abandoned once and for all.

[754] Somewhat surprisingly, the opinion of the four dissenters in *The Queen v. Hydro-Québec*[763] who contemplated the availability of Parliament's residual power and considered whether "the protection of the environment and of human life and health against any and all potentially harmful substances could be a 'new matter' which would fall under the POGG power" never mentioned the refusal of the majority in *Reference re Anti-Inflation Act*[764] to recognize that a local matter could lose that status if enough provinces experienced the same problem.

[755] This omission may simply be attributable to the fact that the defender of the legislation under attack in *Hydro-Québec* never relied on this branch of the suspect national concern doctrine.

[756] No other decision of the Supreme Court of Canada, as far as I am aware, has revisited the demise of the transformation component of the so-called national concern doctrine perpetrated by the five justices in *Reference re Anti-Inflation Act*.[765]

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[761] *Hryniak v. Mauldin*, 2014 SCC 7, ¶ 1; [2014] 1 S.C.R. 87, 92.

[762] *Reference re The Board of Commerce Act and The Combines and Fair Prices Act, 1919*, 60 S.C.R. 456, 513 (1920) per Duff J. ("In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions ... may from time to time in the vicissitude of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures"); *Reference re Insurance Act, 1910*, 48 S.C.R. 260, 304 (1913) per Duff, J. ("The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great importance it is for that reason a matter which is not substantially local in each of the provinces"), aff'd, [1916] 1 A.C. 588, 597 (P.C.) (Can.) per Viscount Haldane ("No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are today freely transacted under provincial authority"); *Reference re Natural Products Marketing Act, 1934*, [1936] S.C.R. 398, 422-23 per Duff, J. ("[*The Board of Commerce Act*] was supported on ... the ground that in the year 1919, when it was enacted, the evils of hoarding and high prices in respect of the necessaries of life had attained such dimensions 'as to affect the body politic of Canada'. ... Nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted").

[763] [1997] 3 S.C.R. 213, 259 per Lamer, C.J. & Iacobucci, J.

[764] [1976] 2 S.C.R. 373.

[765] E.g., *Labatt Breweries of Canada Ltd. v. Canada*, [1980] 1 S.C.R. 914, 945 per Estey, J. ("I see no basis for advancing the proposition that the impugned statutory provisions and regulations as they relate to malt liquor find their basis in law in the peace, order and good government clause of s. 91") & *The Queen v. Schneider*, [1982] 2 S.C.R. 112, 131 per Dickson, J. ("There is no material before the Court leading one to conclude that the problem of heroin

[757] This may account for the failure of Canada, in *Reference re Securities Act*,[766] to even advance the argument that the need to protect investors and provide a fair and efficient capital market was no longer a local concern and now had a national dimension so as to stand as a new residuary head of power under section 91. Instead, Canada argued that "the securities market has evolved from a provincial matter to a national matter affecting the country as a whole and that, as a consequence, a federal general trade and commerce power gives Parliament legislative authority over all aspects of securities regulation".[767]

[758] Of interest, the Supreme Court rejected Canada's section 91(2) general trade and commerce power argument:[768]

> Canada has shown that aspects of the securities market are national in scope and affect the country as a whole. However, considered in its entirety, the proposed Act is chiefly directed at protecting investors and ensuring the fairness of capital markets through the day-to-day regulation of issuers and other participants in the securities market. These matters have long been considered local concerns subject to provincial legislative competence over property and civil rights within the province. Canada has not shown that the securities market has so changed that the regulation of all aspects of securities now falls within the general branch of Parliament's power over trade and commerce under s. 91(2).

3. A New Residual Head of Power Cannot Undermine the Fundamental Distribution of Legislative Powers Between the Central and Regional Legislators

[759] Justice Le Dain asserts that it is necessary to consider whether the "scale of impact on provincial jurisdiction ... is reconcilable with the fundamental distribution of legislative power under the Constitution".[769]

[760] This principle is indisputably sound and of fundamental importance in a federal state.

[761] A federal residual head of power or class of laws must not be allowed to become the medium that diminishes the vigor of the enumerated heads of power assigned to the provincial

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dependency as distinguished from illegal trade in drugs is a matter of national interest and dimension transcending the power of each province to meet and solve its own way").

[766] 2011 SCC 66; [2011] 3 S.C.R. 837.

[767] Id at ¶ 4; [2011] 3 S.C.R. at 845.

[768] Id. at ¶ 6; [2011] 3 S.C.R. at 846.

[769] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

legislatures to such a degree that its use converts a federal state into a unitary one.[770] Professor Lederman alerted us to this grave danger when in 1977 he asserted that "[s]weeping new themes or aggregates, like 'inflation' or 'pollution', would bring the federal constitution to an end".[771]

[762] I discussed this important principle earlier.

4. Provincial Inability to Counteract Action or Inaction in Another Province that Harms Interests Outside the Harm-Causing Jurisdiction

[763] Justice Le Dain believes that a court contemplating the status of a proposed new head of power under the residual power must 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".[772]

[764] This consideration assumes that there is a causal connection between provincial inaction or action and harm caused to another province of territory. This would be the case, as I suggested in oral argument, if British Columbia declined to deploy adequate fire suppression resources to forest fires around Burns Lake and the heavy smoke polluted the air flowing over Alberta and Saskatchewan.

[765] But sometimes there is no causal connection between unwise provincial decisions and the harm another province suffers. In this reference, it does not matter whether Alberta, Saskatchewan and Ontario emit more greenhouse gases than the federal cabinet would like. Their emissions level will have no impact whatsoever on the climates of any Canadian provinces or territories. Canada is responsible for roughly 1.6 percent of the planet's greenhouse gas emissions.[773] Global warming's impact on any Canadian province or territory turns on the response of the leading global emitters – China, the United States, the European Union, India and Russia.[774] Greenhouse gas emissions circulate in the atmosphere.[775]

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[770] See *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 71 ("I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse").

[771] "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 96 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 311 (1981).

[772] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[773] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 5 (2019).

[774] Government of Canada, Global greenhouse gas emissions <https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/global-greenhouse-gas-emissions.html>.

[775] United Nations Framework Convention on Climate Change, art. 1(3).

[766] If there is no causal connection, this factor, as Justice Le Dain has described it, is not in play.

[767] Excluding the context in which the dominion paramountcy doctrine operates, why would the jurisdiction of the federal government depend on whether a provincial legislature either exercised its admitted constitutional authority or failed to exercise its admitted constitutional authority to the detriment of those outside the province? It should not.[776]

[768] Suppose British Columbia devotes no resources to combating the pine beetle scourge. As a result, pine beetles spread rapidly towards Alberta. British Columbia ignores Alberta's entreaties to act. Alberta complains to Ottawa about British Columbia's indifference to its neighbor's welfare and asks Canada to intervene. Could Parliament pass a law allowing federal forest rangers to burn infected parts of British Columbia's forests and to spray chemicals on British Columbia's trees in the anticipated path of the beetles? Or do sections 92(5) of the *Constitution Act, 1867*[777] – "The Management and Sale of Public Lands belonging to the Province and of the Timber and Wood thereon" – and 92A – "management of ... forestry resources in the province" – mean that only British Columbia can undertake these measures in the absence of a justified declared environmental emergency by Parliament? I think so. Alberta would have to convince British Columbia to change its pine beetle policy.

[769] Is it conceivable that the jurisdiction of the provincial governments might be expanded if the federal government failed to exercise its admitted jurisdiction?

[770] Suppose that the federal government decided to repeal the *Bankruptcy and Insolvency Act*.[778] Could a province, in spite of the fact that section 91(21) assigns to Parliament the authority to make "Bankruptcy and Insolvency" laws, fill the void and pass a bankruptcy law with the same features as the repealed federal law? I doubt it.[779]

[771] What is relevant is whether a province has the authority to enact remedial measures.

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[776] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 66; [2019] 9 W.W.R. 377, 419 per Richards, C.J. ("Parliament cannot somehow acquire additional authority because of a provincial decision not to act in relation to a particular matter. Parliament either has legislative authority to act or it does not. There is no constitutional magic in the fact a province has failed to move in a particular policy area") & *Contra Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶ 4; 436 D.L.R. 4th 1, 13.

[777] 30 & 31 Vict., c. 3 (U.K.).

[778] R.S.C. 1985, c. B-3.

[779] See R. Wood, Bankruptcy and Insolvency Law 8-10 (2d ed. 2015).

[772] In short, the adverse impact provincial action or inaction within its jurisdiction may have outside the province, is not a relevant consideration when assessing Parliament's jurisdiction. What is relevant is the absence of provincial jurisdiction to enact remedial legislation.

I. Application of the General Principles

[773] This part applies the general principles discussed above to the facts of this case and answers the questions a division-of-powers case presents.

[774] The first question asks why the lawmaker passed the contested law and how it alters the behaviour of those subject to its terms.

[775] This data allows the court to identify the features of the law that are essential in the classification process.

[776] One of the best examples of how to ascertain the impact a law has on the ground is Justice Locke's opinion in *Reference re the Validity of Section 5(a) of the Dairy Industry Act*.[780] At issue was the constitutionality of Parliament's attempt to advance the interests of Canada's dairy industry by criminalizing the manufacture and sale of margarine in Canada. Justice Locke adverted to all the lost local benefits that were associated with the growth of crops used in the production of margarine – jobs, sale of inputs and equipment and the provisions of services.[781]

1. The Legislative Purpose

[777] The preamble of the *Greenhouse Gas Pollution Pricing Act*[782] is the depository of valuable information relevant to a rational resolution of the constitutional attack on the *Act*.

[778] First, it records the key international instruments that Canada has ratified – the 1992 United Nations Framework Convention on Climate Change[783] and the 2015 Paris Agreement.[784]

[779] Second, it identifies the goal of the 2015 Paris Agreement – hold the increase in the global average temperature below a stipulated level to reduce the harmful effects global warming has on humankind, other life forms and the planet.

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[780] [1949] S.C.R. 1 (1948).

[781] Id. 86-87.

[782] S.C. 2018, c. 12, s. 186.

[783] 1771 U.N.T.S. 107 (entered into force March 21, 1994).

[784] Can. T.S. 2016 No. 9 (entered into force November 4, 2016).

[780] Third, it declares in broad terms that Canadians and anyone else who lives in Canada must change the way they live – alter their behaviour – so that the amount of greenhouse gases emitted in Canada are reduced and are at or below a level Canada has identified in processes that are a part of the Paris Agreement.

[781] Fourth, the preamble expresses Parliament's concern that some provinces might decline to implement the greenhouse gas emission reduction measures that Parliament considers necessary and, by its inaction, jeopardize the welfare of the environment.

[782] Fifth, to eliminate the risk associated with provincial failure to implement greenhouse gas emission reduction measures that meet with Parliament's approval, Parliament must introduce national minimum greenhouse gas emission standards to reduce the risk that Canada will fail to meet its Paris Agreement greenhouse gas emission reduction targets.

[783] Here are the segments of the *Act*'s preamble that accomplish these five goals:[785]

> Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change;
>
> Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that climate change is a national problem that requires immediate *action* by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians;
>
> Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;
>
> Whereas *behavioural change* that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;
>
> ...
>
> Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;

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[785] S.C. 2018, c. 12, s. 186 (emphasis added).

> And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada.

[784] So why did Parliament pass the *Greenhouse Gas Pollution Pricing Act*? Parliament passed the *Act* and introduced national minimum greenhouse gas emissions standards to reduce the risk that some provinces would adopt climate change strategies unacceptable to Parliament and would jeopardize Canada's ability to meet its international greenhouse gas emissions commitment.

2. The Impact of the *Greenhouse Gas Pollution Pricing Act* on Those Subject to Its Terms

[785] Canada, exercising its authority under the *Greenhouse Gas Pollution Pricing Act*,[786] has implemented minimum standards in two discrete areas – fuel charges and operation-based pricing systems – that are in force in provinces and territories that either construct no greenhouse gas emissions standards or construct standards that do not meet the federal minimum standards.

[786] I cannot think of a better way to document the impact the federal minimum standards may have on Canadians and their enterprises and undertakings than to set out the anticipated consequences of the *Greenhouse Gas Pollution Pricing Act* on predictable activities.

a. Canadians and Their Enterprises and Undertakings

[787] Part 1 of the *Greenhouse Gas Pollution Pricing Act* applies in Alberta. It imposes charges on fuels that emit greenhouse gases and are distributed to consumers.

[788] Suppose G lives in rural Leduc County and works in the Nisku Business Park – a commuting distance of roughly twenty kilometers one-way on secondary highways. G drives a 2019 Ford F250 pick-up truck, with a 182-liter fuel tank that averages 6.3 kilometers per liter of gasoline when driving on the highway. Assuming G works 250 days in 2020, G will drive an annual total of 10,000 kilometers commuting to and from work. Based on his mileage and the fuel efficiency of his vehicle, G can expect to spend approximately $105 more on gas for his Ford F250 as a result of the federal fuel charge, in commuting to and from work.[787]

[789] G does not have the option of biking or taking public transit to work. G may choose to reduce his gas costs by purchasing a vehicle with better fuel mileage. For instance, if he switches to a 2019 F150 pick-up truck with a ninety-eight-liter fuel tank that averages 10.8 kilometers per

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[786] S.C. 2018, c. 12, s. 186.

[787] Canada estimates that Albertans can expect to pay an average of 6.63 cents more per liter of gas in 2020. The carbon price will be $20 from January 1, 2020 to March 31, 2020 and $30 from April 1, 2020 to March 31, 2021.

liter of gasoline, he will only pay $60 more per year for gas in 2020. He will also have decreased his commute-related gasoline consumption by approximately 660 liters.

[790] Suppose B lives in the suburban Edmonton neighbourhood of Mill Woods and works in downtown Edmonton – a commuting distance of roughly fourteen kilometers one-way. B drives a 2009 Mazda Protégé, with a fifty-five-liter fuel tank that averages 7.7 kilometers per liter when driving in the city. Assuming B works 250 days in 2020, B will drive an annual total of 7,000 kilometers commuting to and from work. Based on B's mileage and the fuel efficiency of B's vehicle, B can expect to spend approximately $60 more on gas commuting to and from work.

[791] B cannot afford to purchase a new, more fuel-efficient car. The added cost of the fuel charge may be enough to cause B to decide to take the bus to and from work. This would add an average of twenty minutes to B's commute one-way and the cost of a bus pass, but would save B both the additional costs related to the fuel charge incurred as a result of B's commute and the costs B was already paying for gas before the fuel charge was imposed. B will also have decreased her commute-related gasoline consumption to zero – a total decrease of approximately 909 liters.

[792] Suppose E lives in the inner-city Edmonton neighbourhood of Parkallen and works at the University of Alberta – a commuting distance of roughly three kilometers one-way. E does not own a car and either walks or bikes to work or rides the city bus. She uses a reel push mower and has an electric stove. Her home is heated by a geothermal system. E spends no money on gas. To this extent, E will be unaffected by the fuel charge.

[793] These examples do not consider the additional costs G and B will also face in heating their homes, operating their gas stoves, mowing their lawns with gasoline-powered mowers, removing snow from their driveways with gasoline-powered snow blowers, and through other types of fuel-related consumption. G, B and E will also incur additional costs if they purchase some of the many goods and services the purchase price of which is increased by the carbon pollution pricing charge. Taxi fares and the cost of a cup of coffee will probably go up. A taxi operator will have to pay more for fuel. A restaurant will have to pay more for the natural gas it needs to carry on business. The Government of Canada predicts that the average cost impact for an Alberta household of four will be $534.[788]

[794] Under Canada's climate action incentive payment program, G, B and E are eligible for the same nontaxable basic annual payment of $444 in 2020.[789] G is also entitled to a ten percent

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[788] Department of Finance Canada, Climate Action Inventive Payments for 2020 <https://www.canada.ca/en/department.finance/news/2019/12/climate-action-incentive-payment-amounts-for-2020.html>.

[789] Government of Canada, Alberta and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/alberta.html>.

supplement for living outside a census metropolitan area, bringing G's total payment to $488.[790] It is very likely that each of G, B and E will receive more money back through climate action incentive payments than they are paying in increased fuel charges. For most Albertans, the climate action incentive payments will exceed the extra costs the fuel charges represent. Of course, some time will separate when G, B and E incur the additional cost attributable to the carbon charge and when they receive credit for the climate action incentive payment on a tax return.

[795] These examples illustrate how the fuel charge may incentivize different types of consumers to decrease their consumption of carbon-based fuels and therefore contribute to fewer greenhouse gas emissions.

[796] In the end, the *Greenhouse Gas Pollution Pricing Act*[791] creates a legislative structure that intentionally puts G, B and E in a position where they may address a number of questions the answers to which will affect the amount of greenhouse gases they consume and the amount of greenhouse gases they will emit.[792]

[797] Here are some of those questions:

1. Am I prepared to move closer to the city centre so that I will consume less gasoline in my daily commute?

2. Am I prepared to live in a smaller space so that my consumption of natural gas for heating purposes will be reduced?

3. Am I prepared to wear a sweater in my house so that I can reduce the inside house temperature and still be comfortable?

4. Am I prepared to replace my gas stove with an electric stove so that I will consume less natural gas?

5. Am I prepared to purchase a higher-efficiency furnace or a geothermal heating system so that I can reduce the amount of natural gas I use to heat my home?

6. Am I prepared to purchase solar panels so that I can reduce the amount of electricity I purchase?

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[790] Id.

[791] S.C. 2018, c. 12, s. 186.

[792] The *Act* assumes that it will cause those subject to its terms to consume less greenhouse gases and reduce their greenhouse gas emissions and increase the likelihood that Canada will discharge its Paris Agreement commitment. For that to happen, many Albertans will have to make life-style choices that cause them to consume smaller amounts of greenhouse gas-emitting fuels.

7. Am I prepared to make the investments required to reduce the amount of heat loss through the exterior of my home – windows, walls and attic? This may mean replacing my windows and the insulation in my walls and attic.
8. Am I prepared to replace my gasoline-powered lawn mower and acquire a push reel mower or an electric mower?

9. Am I prepared to replace my gasoline-powered snow blower and acquire an electric snow blower or shovel the snow by hand?

10. Am I prepared to purchase an electric car or, if not, a vehicle that consumes less gasoline or diesel than the one I currently operate?

11. Am I prepared to improve my driving habits so that I will consume less fuel? This may involve regular checks of the tire pressure – because proper inflation promotes operational efficiencies – or driving at a slower speed or without sudden acceleration.

12. Am I prepared to take public transportation sometimes?

13. Am I prepared to car pool?

14. Am I prepared to ride my bike?

15. Am I prepared to walk more?

16. Am I prepared to eat less red meat or become a vegetarian? The meat business produces large amounts of methane emissions.

[798] Enterprises – small and medium businesses – and undertakings – schools, universities and hospitals, for example – that Albertans operate will also incur additional costs because of the carbon levy.

[799] These payors will be reimbursed in some form for these extra costs. But I do not know the details.

[800] So how does the *Greenhouse Gas Pollution Pricing Act* affect Albertans and the enterprises and undertakings they operate who are subject to its terms? The impugned *Act*, as designed, affects the decisions most Albertans make every day about how they and their families will live and how the enterprise and undertaking they operate will function. No other single federal law, with the

possible exception of the *Income Tax Act*,[793] has greater impact on how Albertans go about their daily lives.

[801] The Government of Québec accurately assessed the magnitude of the societal changes required to live with reduced reliance on greenhouse gas consumption and the consequential communal reduction of greenhouse gas emissions: "We have the possibility to reinvent our society".[794] By 2030 our world may be completely different than it was at the end of the last century. If so, this would be remarkable.

b. Large Emitters of Greenhouse Gases

[802] Part 2 of the *Greenhouse Gas Pollution Pricing Act*[795] – the output-based pricing system – does not currently apply to Alberta, as a result of the federal cabinet's acceptance of Alberta's provincial emissions pricing regime, the Technology Innovation and Emissions Reduction program.[796]

[803] Part 2 applies in Saskatchewan[797] – to electrical generation and natural gas transmission pipelines – and Manitoba, Ontario, New Brunswick, Prince Edward Island, Yukon and Nunavut.[798]

[804] Alberta's new program applies to facilities emitting more than 100,000 tonnes of CO_2e.[799] Facilities emitting less than 100,000 tonnes of emissions can apply to have their facilities regulated under the Technology, Innovation and Emissions Reduction program.[800] Program-regulated facilities must reduce their emissions by ten percent in 2020, and then by an additional one percent each year after 2020. Facilities that fail to meet their annual reduction targets must pay to the province a charge of $30 per tonne in CO_2e or purchase an equivalent amount in credits or offsets, depending on the circumstances. Emitters who fall below their emissions maximum will be rewarded with credits equivalent to $30 per tonne.

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[793] R.S.C. 1985 (5th suppl.), c. 1.

[794] Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 4 (2012). 7 Appeal Record Alberta A2451.

[795] S.C. 2018, c. 12, s. 186.

[796] Government of Canada, Alberta and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/alberta.html>.

[797] Government of Canada, Saskatchewan and pollution pricing <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/saskatchewan.html>.

[798] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, sch. 1.

[799] Affidavit of Robert Savage sworn August 1, 2019 and filed August 2, 2019, s. 128. 1 Appeal Record Alberta A19.

[800] They may wish to do so because they may earn valuable offset credits if they meet greenhouse gas emission targets and it would facilitate their exemption from the federal fuel charge. Id. 2 Appeal Record Alberta A573.

[805] By comparison, under the federal regime, greenhouse gas emissions are priced at $30 per tonne of CO_2e in 2020.[801] This price will increase annually by $10 per tonne, up to $50 per tonne. This regime applies automatically to facilities emitting 50 kilotonnes or more, while facilities with annual emissions below this amount can apply to be subject to the federal pricing regime.

[806] So how does the contested *Act* impact enterprises and undertakings to whom it applies? They have to commit substantial resources to acquire the equipment necessary to reduce their greenhouse gas emissions to the designated level or reduce their production. If enterprises and undertakings fail to reduce their greenhouse gas emissions to or below designated levels, they must purchase tradeable credits or pay the federal treasury an amount related to the size of the overage. I understand that Canada has committed to transfer these funds to the province in which the large emitters who paid them are located.[802]

3. The *Greenhouse Gas Pollution Pricing Act* Displays Features that Reasonably Justify Its Classification as a Class of Laws Assigned to the Provincial Legislatures

[807] Now that I have recorded the purpose of the *Greenhouse Gas Pollution Pricing Act*[803] and how it impacts those subject to its terms, I must consider the second question – does the impugned law display features that reasonably justify its classification as a class of laws the *Constitution Act, 1867*[804] or any other statute assigns to provincial legislatures?

[808] If the challenged law displays no feature that reasonably justifies classifying it as a class of laws assigned to a provincial legislature, only Parliament may pass the law. There is no need to continue with the analysis.

[809] If the impugned enactment displays features justifying its classification as a class of laws assigned to a provincial legislature, the third question must be answered.

[810] Parliament passed the challenged law to cause Canadians and enterprises and undertakings located in Canada to adopt new behaviours that will result in the diminished consumption of greenhouse gases and reduced greenhouse gas emissions.

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[801] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, sch. 4.

[802] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, exhibit U. 3 Appeal Record Canada R747.

[803] S.C. 2018, c. 12, s. 186.

[804] 30 & 31 Vict., c. 3 (U.K.).

[811] I proceed on the assumption that Canadians and those who control enterprises and undertakings subject to the *Greenhouse Gas Pollution Pricing Act* will pay the applicable fuel charges or other charges and will respond in the manner the *Act* anticipates – alter their behaviour and consume less greenhouse gases.

[812] Some Canadians will enter into contracts with automobile dealers and purchase electric cars or smaller gasoline-powered vehicles. They may sell or trade in their old vehicles.

[813] Canadians will enter into home improvement contracts with renovators and acquire more energy-efficient insulation, windows and doors.

[814] These transactions involve contracts and the exchange of property. This triggers section 92(13) of the *Constitution Act, 1867*.

[815] Businesses that are local works and undertakings under section 92(10) of the *Constitution Act, 1867* will also adopt measures that are designed to reduce their consumption of greenhouse gases.

[816] Many large emitters in Alberta lease the lands on which their undertakings are located. This brings into play sections 92(5) – management of provincial public lands – and section 92A – nonrenewable natural resources.

[817] Large emitters subject to Part 2 of the *Greenhouse Gas Pollution Pricing Act* will also adopt new strategies that reduce the negative impact the operations-based pricing system has on them. They will acquire new equipment that reduces their greenhouse gas emissions or enter into contracts with other enterprises to acquire their offsetting credits or pay a charge to the federal government for emitting more greenhouse gases than they are allowed. These scenarios also engage sections 92(10) and (13).

[818] The *Greenhouse Gas Pollution Pricing Act* displays features that reasonably justify its classification as a management of public lands law,[805] a local work and undertaking law,[806] a property and civil rights law,[807] a local matter law[808] and a nonrenewable natural resources law.[809]

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[805] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(5) (U.K.).

[806] Id. s. 92(10).

[807] Id. s. 92(13).

[808] Id. s. 92(16).

[809] Id. s. 92A.

4. The *Greenhouse Gas Pollution Pricing Act* Displays No Features that Justify Its Classification as a Class of Laws Assigned to Parliament

[819] The determination that the challenged law displays features that justify its classification as a class or classes of laws assigned to provincial legislatures under the *Constitution Act, 1867*[810] brings the third question into play – does the *Greenhouse Gas Pollution Pricing Act*,[811] taking into account the purpose of the challenged law and how the challenged law impacts those subject to its terms, display a feature that reasonably justifies its classification as a class of laws assigned to Parliament under section 91 or another section of the *Constitution Act, 1867* or any other statute?

[820] If not, only a provincial legislature may pass the challenged law and the *Greenhouse Gas Pollution Pricing Act* is unconstitutional.

a. The Attorney General of Canada's Proposed New Head of Power or Class of Laws

[821] The Attorney General of Canada argued before us that Parliament's authority to enact the *Greenhouse Gas Pollution Pricing Act*[812] resides in its residual authority to pass laws for the peace, order and good government of Canada:[813] "[T]he *Act* comes under the national concern branch of Parliament's POGG power. The essential character of the *Act* relates to a matter of national concern: establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions".

[822] This is not exactly the position Canada took before the Court of Appeal for Saskatchewan[814] or the Court of Appeal for Ontario.[815]

[823] Chief Justice Richards recorded the inconsistent nature of Canada's position before the Court of Appeal for Saskatchewan:[816]

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[810] 30 & 31 Vict., c. 3 (U.K.).

[811] S.C. 2018, c. 12, s. 186.

[812] Id.

[813] Factum of the Attorney General of Canada, ¶ 74.

[814] The Attorney General of Canada asked the Court of Appeal for Saskatchewan to recognize "GHG emissions" as a new head of power. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 127; [2019] 9 W.W.R. 377, 436.

[815] The Attorney General of Canada asked the Court of Appeal for Ontario to recognize "cumulative dimensions of GHG emissions" as a new head of power. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶¶ 60 & 227; 436 D.L.R. 4th 1, 25 & 65.

[816] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶¶ 127 & 134; [2019] W.W.R. 377, 436 & 438 (emphasis in original).

> In its factum, Canada took the position that the matter of national concern in issue here is "GHG emissions". To quote from paragraph 87 of the factum, "GHG emissions are a quintessential matter of national concern". ...
>
> ...
>
> In oral argument, Canada reacted to these concerns by changing its position and asserting that the matter to be included under Parliament's POGG authority should not be "GHG emissions" but rather "the *cumulative dimensions* of GHG emissions". Perhaps because it was introduced so late in the day, the "cumulative dimensions" idea was not well developed. Canada referred to cumulative atmospheric concentrations, cumulative global and national impacts and the cumulative effect of emissions from each province but did not fully explain these notions.

[824] So did Chief Justice Strathy with regard to the nature of Canada's argument before the Court of Appeal for Ontario:[817]

> The Attorney General of Canada submits that the *Act* is constitutional under the national concern branch of the POGG power contained in s. 91 of the *Constitution Act, 1867*. The "pith and substance" of the *Act* is the "cumulative dimensions of GHG emissions", which Canada says is a matter of national concern that the provinces are constitutionally incapable of addressing.
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> In Canada's reply factum and in oral submissions, counsel for the Attorney General of Canada adopted an alternative submission advanced principally by the intervener the David Suzuki Foundation, that the *Act* can be supported under the "emergency" branch of the POGG power. Canada also submits that it would be willing to accept any of the alternative heads of power suggested by the interveners.

[825] I am not critical of Canada's fluid position. The Attorney General of Canada is entitled to describe the new head of power for which he seeks judicial recognition any way he sees fit. His counsel is entitled to propose a new head of power or class of laws that she concludes the Court is most likely to approve – make it as minimally invasive of provincial heads of power as possible – and, at the same time, be sufficiently broad to increase the likelihood that the new head of power will be adjudged ultimately as the constitutional foundation for the *Greenhouse Gas Pollution Pricing Act*. The risk counsel takes when she shifts ground so frequently is that the judicial audience may be somewhat less receptive given the indecisive path the proposed head of power followed to reach the courthouse door.

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[817] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶¶ 60 & 61; 436 D.L.R. 4th 1, 25.

[826] But to be clear, the burden is on the Attorney General of Canada to clearly state the new head of power for which he seeks judicial recognition. This is an obligation counsel and only counsel bears.[818] Judges have no mandate to search the galaxy of possible options for a new head of power or class of laws that meets the constitutional criteria for a new class of laws or head of power.

[827] Professor Lederman, as one would expect, has thought about this issue. Here is his considered opinion:[819]

> *Counsel* seeking to invoke the federal general power in order to support a challenged federal statute on a new basis will search the whole range of dozens or hundreds of philosophically relevant classifications in order to find the one unlisted class that may serve their purpose – the one which they can then propose as a new subject for the federal list by virtue of allegedly sufficient evidence of social fact and social need for this type of regulation.

[828] The Attorney General of Canada asks us to recognize "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions"[820] as a new head of power or class of laws.

[829] At the outset, it is necessary to understand what a minimum national standard is. It means that the standard incorporated in the minimum national standard becomes or may become the law in those provinces or territories whose own standards fall short of the benchmarks incorporated in the minimum national standards. In those jurisdictions, it is not a minimum national standard, it is

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[818] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 417 per Laskin, C.J. ("The Attorney-General of Canada ... [contended] that the Act, directed to containment and reduction of inflation, concerned a matter which went beyond local or private or provincial concern and was of a nature which engaged vital national interests, among them the integrity of the Canadian monetary system") & 442 per Beetz, J. ("The first submission made by *Counsel* for Canada and for Ontario is that the subject matter of the *Anti-Inflation Act* is the containment and the reduction of inflation") (emphasis added); *Contra, Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶¶ 10-11; [2019] 9 W.W.R. 377, 403 per Richards, C.J. ("[Canada's proposed new heads of power] must be rejected because it would allow Parliament to intrude so deeply into areas of provincial authority that the balance of federalism would be upset. Further, it would hamper and limit provincial efforts to deal with GHG emissions. However, Parliament does have authority over a narrower POGG subject matter – the establishment of minimum national standards of price stringency for GHG emissions ... [, a new head of power never proposed by the Attorney General of Canada]").

[819] "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 606 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 292-93 (1981) (emphasis added).

[820] Factum of the Attorney General of Canada, ¶ 74.

the law regarding greenhouse gas emissions that must be obeyed. Nobody subject to it cares that Parliament calls it a minimum national standard. For them, it is simply the law.[821]

b. The Proposed New Head of Power or Class of Laws Fails the Test for Valid New Heads of Power

[830] I cannot accept that this proposed new head of power or class of laws meets the test for a new head of power or class of laws. In fact, I cannot conceive of any formulation[822] for a new head of power or class of laws that would both meet the test for a new head of power and would serve as a constitutional foundation for the *Greenhouse Gas Pollution Pricing Act*.[823]

i. The Proposed New Head of Power Is Irreconcilable with Federalism Principles

[831] This proposed new head of power is nothing more than a collection of heads of power or classes of laws already assigned to both levels of government under the *Constitution Act, 1867*.[824] It would authorize federal laws supported by the federal residual head of power that interfere during a nonemergency peacetime period on a scale never before seen, with the way those in the jurisdictions in which the minimum greenhouse gas emission standard is the law – as it is in part in Alberta and other provinces – lead their daily lives and how they operate the enterprises and undertakings for which they are responsible. These are matters provincial legislatures are responsible for regulating. The proposed new head of power or class of laws and the *Act* Canada claims is validated by it affects how Albertans and the residents of all provinces and territories make decisions that impact the amount of greenhouse gas emissions they and their families and the enterprises and undertakings they operate will generate and how much they and their family and the enterprises and undertakings they operate will spend on goods and services represents an unprecedented and unjustifiable expansion of federal lawmaking authority and a corresponding diminution of provincial authority.

[832] A new head of power or class of laws that could sustain a federal law like the *Greenhouse Gas Pollution Pricing Act* – an enactment that casts its shadow on just about every decision Albertans, Manitobans and residents of Saskatchewan, Ontario and New Brunswick make when

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[821] *Contra, Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 5; [2019] 9 W.W.R. 377, 402 per Richards, C.J. ("Significantly, the *Act* operates as no more than a backstop. It applies only in those provinces or areas where the Governor in Council concludes GHG emissions are not priced at an appropriate level").

[822] This includes the new head of power that the Court of Appeal for Saskatchewan approved – "the establishment of minimum national standards of price stringency for GHG emissions". *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 40, ¶ 11; [2019] 9 W.W.R. 377, 403.

[823] S.C. 2018, c. 12, s. 186.

[824] 30 & 31 Vict., c. 3 (U.K.).

they go about their daily lives and operate the enterprises and undertakings for which they are responsible – is suspect. The magnitude of the federal expansion and provincial contraction of lawmaking authority upsets the balance between the lawmaking authority of Parliament and the provincial legislatures to such a degree that it is irreconcilable with the fundamental federalism principle embedded in the *Constitution Act, 1867*.[825] Its "scale of impact on provincial jurisdiction"[826] is too great to justify any new head of power or class of laws that would serve as the constitutional foundation for the *Greenhouse Gas Pollution Pricing Act*.[827]

[833] Chief Justice Richards came to the same conclusion.[828] He rejected Canada's plea to approve "GHG emissions" and "the cumulative dimensions of GHG emissions" as new heads of power.[829] These two proposals, he opined, "would allow Parliament to intrude so deeply into areas of provincial authority that the balance of federalism would be upset".[830]

[834] Justices Ottenbreit and Caldwell agreed:[831]

> The *Act* pervades the life and economy of each Province it affects. It unilaterally imposes federal policy in place of Provincial policy on the same matter, a matter over which the Provinces have exclusive jurisdiction. The *Act* sets forth an approach to GHG mitigation that hinders a Province's ability to fashion its own, local response to GHG emissions at the level that is most suited to achieving the nuanced response that a diverse country requires.

[835] Approbation of the new head of power or class of laws Canada seeks would, to say the least, destabilize our federal system.[832] It would end federalism as we know it.

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[825] This balance manifests itself in many different ways. As I explained earlier when discussing the dominion paramountcy doctrine, "a narrow scope for the doctrine ... promotes a healthy respect for provincial laws and balances the influence of Parliament and provincial legislatures".

[826] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[827] Newman, "Federalism, Subsidiarity, and Carbon Taxes", 82 Sask. L. Rev. 187 (2019).

[828] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 10; [2019] 9 W.W.R. 377, 403. See also id. at ¶ 138; [2019] 9 W.W.R. 377 at 439.

[829] Id. at ¶¶ 136-38; [2019] 9 W.W.R. at 438-39.

[830] Id. at ¶ 10; [2019] 9 W.W.R. at 403.

[831] Id. at ¶ 473; [2019] 9 W.W.R. at 551.

[832] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 607-08 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 293-94 (1981) ("it is essential in our federal country that the balance between federal and provincial subjects of primary legislative powers should remain stable – reasonably constant – subject only to a process of gradual changes when these are rendered truly necessary by the demands of new conditions in our society from time to time").

[836] Canada is really asking for judicial approbation of "environment" or "climate change" as a new head of power or class of laws.

[837] While it is true that "environment" as a class of laws captures some activities that may have little impact on global warming or climate change – pollution of rivers, for example, "environment" and "climate change" are for purposes of the federal residual power analysis substantially the same.

[838] There is no doubt in my mind that "climate change" suffers from the same infirmities that prohibit judicial recognition of "environment" as a new head of power. "Climate change" is an amalgamation of many existing enumerated heads of power in the *Constitution Act, 1867* and its presence on the federal list of powers would completely destabilize the balance between the regional and central governments' lawmaking authority.

[839] The Supreme Court of Canada has repeatedly stated that "environment" is not a head of power or a class of laws assigned to either Parliament or the provincial legislatures.[833]

[840] As already noted, this is because "environment" as a class of laws consists of many different classes of laws already enumerated in the *Constitution Act, 1867* and its assignment to Parliament or the provincial legislatures would render meaningless a large number of other enumerated heads of power.[834]

[841] I am not aware of any federal constitution that recognizes "environment" or "climate change" as a class of laws. *The Constitution of India* has over 200 classes of laws and neither "environment" nor "climate change" appears as a class of laws.

[842] The makers of the *Constitution Act, 1867* never contemplated that the residual power class of laws would serve as the portal for massive federal forays into provincial lawmaking terrain.

[843] Professor Lederman emphasized the dangers inherent in constitutionalizing aggregate concepts: "Sweeping new themes or aggregates, like 'inflation' or 'pollution', *would bring the*

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[833] *Friends of the Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, 65 & *The Queen v. Hydro-Québec*, [1997] 3 S.C.R. 215, 255.

[834] Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 610 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 296 (1981) ("If ... [environmental pollution] were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial power").

federal constitution to an end if they were allowed to dominate the division of legislative powers ... by virtue of the permanent operation of the federal general power".[835]

[844] So did Justice Beetz in *Reference re Anti-Inflation Act*:[836]

> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

ii. The Proposed New Head of Power Does Not Have a Narrow Focus

[845] A proposed head of power must have a narrow focus, as do most of the enumerated heads of power or class of laws in the *Constitution Act, 1867*. It must be precise. Justice Le Dain advanced this benchmark: "[I]t must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern".[837] Professor Lederman insisted that it be "real, discrete and quite limited in scope".[838]

[846] Because the formulation constructed by the Attorney General of Canada sweeps in a number of enumerated powers it does not have this characteristic.

[847] A federal law the validity of which depends on the proposed new head of power could affect a broad swath of life. A minimum national greenhouse gas emission standard if in force in a province covers many of the activities of families as they go about their daily lives and the enterprises and undertakings they operate.

[848] This is exactly the effect the federal government expected and wanted the *Act* to have. Parliament would not have given the *Act* this breadth unless it concluded Canadians had to make dramatic changes with the way they interacted with greenhouse gases. If the minimum emissions standards had no bite, why would Parliament have adopted them.

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[835] "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 96 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 311 (1981).

[836] [1976] 2 S.C.R. 373, 458. See also *Ontario v. Canada*, [1896] A.C. 348, 360-61 (P.C. Can.) ("To attach any other construction to the general power ... would ... practically destroy the autonomy of the provinces").

[837] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[838] Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975", 84 Queen's Q. 90, 95 (1977) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 310 (1981).

[849] If Canada had proposed a narrower new head of power – greenhouse gas emissions of light trucks, for example – it may have passed the narrow focus test but it still would have failed the other two parts of the test. A significant segment of drivers in Alberta and other provinces own a light truck. While the scale of impact of "greenhouse gas emissions of light trucks" would not constitute as draconian an abridgment of a province's lawmaking rights as the proposed new head of power the Attorney General of Canada presents for consideration, it is still far too great to warrant judicial approbation. And even if this alternative head of power passed the "scale of impact on provincial jurisdiction" criterion, it would not give the central government the extra lawmaking jurisdiction it needs to capture control over enough greenhouse-gas-emissions activities normally subject to provincial control to make a noticeable difference in the war against greenhouse gas emissions. The proposed new head of power would also stumble over the third hurdle.

iii. It Is Not Obvious that Parliament Should Have This Power

[850] Justice Le Dain thought it would be helpful when assessing the merits of a proposed new head of power or class of laws 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".[839]

[851] As I noted earlier, this proposition assumes that there is a causal connection between provincial action or inaction and specific harmful consequences other provinces experience.

[852] The failure of Alberta, Saskatchewan, Ontario or any other province or territory to implement greenhouse gas emission reduction measures that satisfy the federal cabinet will have no impact whatsoever on the climates or environments of other parts of Canada, or any part of the world.[840] What happens in China,[841] the United States, the European Union, India and the Russian

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[839] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[840] Affidavit of John Moffet affirmed September 30, 2019 and filed October 8, 2019, ¶ 7. 1 Appeal Record Canada R4 ("The impacts [of greenhouse gas emissions] are global, and throughout Canada and are not correlated to the location of the GHG emission source. GHG emissions circulate in the atmosphere, so emissions anywhere raise atmospheric concentration everywhere") & Environment and Climate Change Canada, Canadian Environmental Sustainability Indicators: Global greenhouse gas emissions 5 (2019) ("Greenhouse gases remain in the atmosphere for periods ranging from a few years to thousands of years. As such, they have a worldwide impact, no matter where they were first emitted"). See *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, ¶ 21; 436 D.L.R. 4th 1, 17 per Strathy, C.J. ("the international community has recognized that the solution to climate change is not within the capacity of any one country and has ... sought to address the issue through global cooperation") & *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶ 155; [2009] 9 W.W.R. 377, 444 per Richards, C.J. ("Of course, given the relative insignificance of any province's emissions as compared to global emissions as a whole, the concern is perhaps more theoretical than real").

[841] In 2014 China produced twenty-six percent of global greenhouse gas emissions, a 63.9 percent increase in emissions from 2005. Environment and Climate Change Canada, Canadian Environmental Sustainability Indicators

Federation seals the fate of the planet. These five states are responsible for over sixty percent of global greenhouse gas emissions in 2014.[842]

[853] In any event, as I explained earlier, the more helpful and theoretically sound inquiry is this: do the provinces have the legislative lawmaking tools needed to reduce greenhouse gas emissions? They do. And they are using them.

[854] Provincial governments of all political stripes recognize that greenhouse gas emissions produced by human activity contribute to global warming and are committed to reducing greenhouse gas emissions.[843]

Global greenhouse gas emissions 5 (2019) (data provided by World Resources Institute, Climate Analysis Indicator Tool (2017)).

[842] Id.

[843] British Columbia, cleanBC our nature. our power. our future. 5 (December 2018). 6 Appeal Record Alberta A2008 ("The full scope of actions envisioned in CleanBC ... will accomplish our 2030 GHG reduction goals"). Alberta, Alberta's 2008 Climate Change Strategy: Responsibility/Leadership/Action 9 (2008). 1 Appeal Record Alberta A312 ("Climate change is real. Our planet is warming and it's doing so at a faster pace than at any other time in our recorded history"); Government of Saskatchewan, Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy 1 (2017). 7 Appeal Record Alberta A2505 ("We wholeheartedly support efforts to reduce greenhouse gases. ... We propose a broad and comprehensive approach, one that connects the very real global problem of climate change to the day-to-day priorities of people"); Manitoba Sustainable Development, A Made-In-Manitoba Climate and Green Plan: Hearing from Manitobans 1 (2017). 6 Appeal Record Alberta A2075 ("Climate change is real and is already impacting us. It is being accelerated by carbon and greenhouse gas emissions from humans. Scientists all over the world agree climate change is happening and poses a growing threat to how we live and work"); Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 3 (2018). 6 Appeal Record A2138 ("We will continue to do our share to reduce greenhouse gases and we will help communities and families prepare to address climate change. With hard work, innovation and commitment, we will ensure Ontario achieves emissions reductions in line with Canada's 2030 greenhouse gas reduction targets under the Paris Agreement"); Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 3 (2012). 7 Appeal Record Alberta A2450 ("The reality of climate change is now well established. Average temperatures on the surface of the earth and oceans have risen, leading to climatic disturbances that are already occurring in almost all regions of the world. ... Global warming is already a reality in Québec. Average annual temperatures in southern Québec increased by 0.3°C to 1.5°C between 1960 and 2008"); Municipal Affairs and Environment Climate Change Branch, The Way Forward: On Climate Change in Newfoundland and Labrador 4 (2019). 6 Appeal Record Alberta A2220 ("The science is clear. Climate change is happening and is being caused by human activities such as burning fossil fuels and deforestation. The impacts are already being felt – each of the last three decades has been the warmest on record"). New Brunswick, Transitioning to a Low-Carbon Economy: New Brunswick's Climate Action Plan 3 (2016). 6 Appeal Record Alberta A2197 ("The science of climate change is clear. The Intergovernmental Panel on Climate Change, the world's foremost authority on climate change, has projected that an increase in global temperatures of more than 2 degrees Celsius will result in irreversible and catastrophic impacts. The current level of greenhouse gas emissions ... is expected to raise global temperatures by 3.5°C before the end of this century"); Nova Scotia Environment, Toward a Greener Future: Nova Scotia's Climate Change Action Plan 1 (January 2009). 6 Appeal Record Alberta A2334 ("Most of the world's governments accept the 2007 report from the United Nations' Intergovernmental Panel on Climate Change. ... Among its key conclusions is that human activity is warming the planet, with severe consequences") & Prince Edward Island, Taking Action: A Climate Change Action

[855] My review of the climate change policies of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec and the eastern provinces confirms this.

[856] Anybody reading the Vancouver Declaration would fairly conclude that all its signatories, and the federal government was a signatory, envisaged a leading role for the provinces and territories:[844]

> We will build on the leadership shown and actions taken by the provinces and territories, as exemplified by the 2015 Quebec Declaration and Canadian Energy Strategy, by working together and including federal action. ... Together, we will leverage technology and innovation to seize the opportunity for Canada to contribute global solutions and become a leader in the global clean growth economy.

[857] This is not surprising.

[858] Provincial efforts to reduce greenhouse gas emissions are noteworthy. This is so regardless of which political party was in power.

[859] Ontario closed its coal-fired electricity-generating plants. This step helped reduce Ontario's annual greenhouse gas emissions below 2005 levels by twenty-two percent as of 2017.[845]

[860] Alberta has invested heavily in carbon capture utilization and storage initiatives. The Shell Canada Scotford upgrader Quest carbon capture and storage project is a successful venture.[846] In less than four years the project has safely stored the carbon dioxide emissions one million cars would produce annually.

Plan for Prince Edward Island 2018-2023, at 4. 7 Appeal Record Alberta A2414 ("The earth's climate is changing and there is overwhelming scientific evidence to support that much of the change is being caused by human activity").

[844] Vancouver Declaration on Clean Growth and Climate Change 1 (March 3, 2016). 7 Appeal Record Alberta A2598. See also *Reference re The Board of Commerce and the Combines and Fair Prices Act*, 1919, [1922] 1 A.C. 191, 201 (P.C. 1921) (Can.) (Parliament could not invoke the great emergency residual power if the "cooperation of the Provincial Legislatures would adequately address the problem").

[845] Ministry of the Environment, Conservation and Parks, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan 7 (2018). 6 Appeal Record Alberta A2142.

[846] Shell Canada, "Quest CCS Facility Reaches Major Milestones: Captures and Stores Four Million Tonnes of CO_2" <https://www.shell.ca/en_ca/media/news-and-media-releases/news-releases-2019/quest-ccs-facility-reaches-major-milestone.html>. 1 Appeal Record Alberta A343.

[861] Electricity generation in Manitoba[847] and Québec[848] produces minimal greenhouse gas emissions.

[862] Suppose the Green Party governed all the provinces and territories and utilized all the powers those jurisdictions had to reduce greenhouse gas emissions to levels the governments considered acceptable. Even if the federal government did nothing to cause enterprises and undertakings subject to its jurisdiction to reduce their greenhouse gas emissions, it seems likely that Canada, in this scenario, would meet its Paris Agreement targets. My review of the data contained in Canada's 2019 national inventory report to the secretariat of the United Nations Framework Convention on Climate Change suggests that a very high proportion of Canada's greenhouse gas emissions are produced by emitters primarily subject to provincial regulation.[849]

[863] I suspect that if the Green Party was the majority in most provincial legislatures and a party whose commitment to the environment was less vigorous than the Green Party formed the federal government, some of the intervenors may have advanced different arguments.

[864] A proposed new head of power must be one that Parliament should obviously possess. Is Canada best served by a single law in force throughout the Dominion and must Parliament be the lawmaker?[850]

[865] In my opinion, the new head of power the Attorney General of Canada proposes is most certainly not one that Parliament should possess in the absence of a valid climate emergency. Both levels of government must play a role in reducing the amount of greenhouse gas emissions within

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[847] Manitoba Sustainable Development, A Made-in-Manitoba Climate and Green Plan: Hearing from Manitobans 10 (2017). 6 Appeal Record A2084 ("[Manitoba has] one of the cleanest electricity grids in Canada and the world with over 99 percent of ... [its] electricity generated from clean renewable resources").

[848] Id. & Québec, Québec in Action Greener by 2020: 2013-2020 Climate Change Action Plan 7 (2012). 7 Appeal Record Alberta A2454.

[849] Environment and Climate Change Canada, 2019 National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada (Canada's Submission to the United Nations Framework Convention on Climate Change) Part 1, at 4 (2019) ("In 2017 the Energy sector (consisting of Stationary Combustion, Transport and Fugitive Sources) emitted 583 Mt of greenhouse gases or 82% of Canada's total GHG emissions ... . The remaining emissions were largely generated by the Agriculture and ... [Industrial Processes and Product Use] sectors (approximately 8% each) with minor contributions from the Waste sector (3%)").

[850] *Ontario v. Canada*, [1896] A.C. 348, 360-61 (P.C.) (Can.) ("These enactments ... indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance") & Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", 53 Can. B. Rev. 597, 606 (1975) reprinted in W. Lederman, Continuing Canadian Constitutional Dilemmas 292 (1981) ("[does the proposed new head of power] arise out of the needs of our society as something that necessarily requires country-wide regulation at the national level").

their jurisdiction.[851] Assigning a power this broad to Parliament would be completely inconsistent with fundamental federalism principles, one of the principles on which the *Constitution Act, 1867*[852] is based. It would destabilize the current balance between the lawmaking authority of both levels of government.

[866] It is difficult to comprehend how Canada can realistically assert that the proposed new head of power meets this criterion when the architecture of the *Act* it is said to buttress contemplates a major role for provincial initiatives. Indeed, if all the provinces and territories adopted greenhouse gas emission standards that satisfied the federal cabinet, the *Greenhouse Gas Pollution Pricing Act* would be nothing more than a cheerleader.

[867] Justice Beetz expressed similar reservations about the checkered application of the *Anti-Inflation Act*:[853]

> [T]he *Anti-Inflation Act* does not apply to the provincial public sector except by provincial consent. The provincial public sector is a most substantial one as it comprises all provincial offices, all municipal offices, all public bodies performing a function of government in the provinces and all other bodies as provide what are generally considered to be public services. These would presumably include all the public education institutions, all public hospitals, all public producers of energy ... A province which opts into the scheme of the *Anti-Inflation Act* may do so for only part of the Guidelines to only part of the provincial public sector.
>
> It may be argued that those exemptions and options were put into the Act and the Guidelines in order to make their administration lighter and easier or as a matter of federal-provincial comity. *Still, a situation of national emergency does not, at first sight, lend itself to opting in and opting out formulae nor to large scale exemptions.*

[868] To summarize, Canada's proposed new head of power or class of laws does not pass the test for a new head of power. First, the proposed head of power would upset the balance between

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[851] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 392 Laskin, C.J. ("Although it is conceded that the Parliament of Canada could validly legislate as it has done if it had limited the legislation to the federal public service and to enterprises or undertakings which are within exclusive federal legislative authority, such as interprovincial transportation and communication services, radio operations, aerial navigation atomic energy enterprises, banks and works declared to be for the general advantage of Canada") & 440-41 per Beetz, J. ("It is conceded that the Parliament of Canada has legislative competence to enact such legislation with respect to both the public and private federal sectors and to regulate prices, profit margins, dividends and compensation for commodities and services supplied by the federal government and its agencies or by private institutions or undertakings coming within exclusive federal jurisdiction such as banks, railways, bus lines and other transportation undertakings extending beyond the limits of a province, navigation and shipping undertakings and the like").

[852] 30 & 31 Vict., c. 3.

[853] *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 469 (emphasis added).

the lawmaking authority of Parliament and the provincial legislatures. Second, the proposed head of power is an amalgam of a number of classes of laws already assigned to both the central and regional governments in the *Constitution Act, 1867*. It does not have the requisite "singleness, distinctiveness and indivisibility."[854] Third, it is not obvious that Parliament should have this new head of power. Indeed, Canada is not best served by a single law passed by Parliament on this subject. Canada is best served if both the central and regional governments have authority to make laws designed to reduce greenhouse gas emissions in the jurisdiction for which they are responsible.

VII. Conclusion

[869] I am of the opinion that Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act*[855] are unconstitutional.[856] I express no opinion on the constitutionality of Parts 3 and 4.

[870] I acknowledge counsel's assistance. They actively engaged with the Court,[857] welcomed questions that raised issues on which panel members needed assistance[858] and provided different perspectives. Many acted pro bono, in keeping with the best traditions of the bar.

Special Hearing heard on December 16, 17 and 18, 2019

Opinion filed at Edmonton, Alberta
this 24th day of February, 2020

"Wakeling, J.A."

Authorized to sign for Wakeling J.A.

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[854] *The Queen v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 432.

[855] S.C. 2018, c. 12, s. 186.

[856] I have carefully considered the thoughtful arguments advanced by the intervenors that supported the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. They have not convinced me that there is a constitutional foundation for the *Act*. I agree, in large part, with Chief Justice Richards' assessment, in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶¶ 165-204; [2019] 9 W.W.R. 377, 446-57, of the intervenors' arguments.

[857] Wakeling, The Oral Component of Appellate Work, 5 Dalhousie L.J. 584, 588 (1979) ("Judges and lawyers alike, as a unit, struggle for the best solution. Those on both sides of the bench make their contribution and without this co-operation the legal system will not attain its full problem solving potential").

[858] A. Scalia & B. Garner, Making Your Case: The Art of Persuading Judges 189 (2008) ("Given the very limited time available for oral argument, judges want to hear counsel's response to the questions that the brief has raised in their minds, rather than sit through a repetition of legal points on which they may already be persuaded").

Feehan J.A. (Dissenting):

TABLE OF CONTENTS

I. Overview

[871] The Lieutenant Governor in Council of Alberta, by Order in Council 112/2019 dated June 20, 2019, has referred the following question to this Court pursuant to s 26 of the *Judicature Act*, RSA 2000, c J-2: Is the *Greenhouse Gas Pollution Pricing Act (Canada) [Loi sur la tarification de la pollution causée par les gaz à effet de serre],* [being part 5 of the *Budget Implementation Act, 2018*, no 1, SC 2018, c 12, s 186] unconstitutional in whole or in part?

[872] I have determined that the *Act* is wholly constitutional and *intra vires* the Government of Canada pursuant to the national concern branch of the federal government's residual peace, order and good government jurisdiction set out in the preamble of s 91 of the *Constitution Act, 1867* (UK), 30 & 31, Vict c 3.

[873] In coming to this conclusion, I in large part agree with the reasoning of Richards, CJS, Jackson and Schwann, JJA, in the majority decision of the Court of Appeal for Saskatchewan, 2019 SKCA 40, and Hoy, ACJO, in concurring reasons in the Court of Appeal for Ontario, 2019 ONCA 544. I also agree with Wakeling, JA that a division of powers case invites a court to consider the five questions set out in the Questions Presented part of his judgment. I have done so implicitly in these reasons.

II. Climate Change

1. Greenhouse Gases Defined

[874] Greenhouse gases trap infrared radiation (heat) in the atmosphere instead of letting it escape outward. Canada defines greenhouse gases as being "those gaseous constituents of the atmosphere, both natural and anthropogenic [originating in human activity], that absorb and re-emit infrared radiation", quoting from the 1992 *United Nations Framework Convention on Climate Change.* Alberta describes greenhouse gases as "a group of gases that, when released into the atmosphere, accumulate over time and contribute to climate change." CO_2 is the most prevalent greenhouse gas. Each greenhouse gas has a different global warming potential based on its ability to trap heat in the atmosphere relative to CO_2. Therefore, "CO_2 equivalence" is used to measure different greenhouse gases using a common unit: s 170, Schedule 3. For example, CO_2 has a CO_2 global warming potential of 1 (1 tonne of CO_2 emitted = 1 tonne of CO_2 equivalent emitted); methane has a global warming potential of 25 (1 tonne of methane emitted = 25 tonnes of CO_2 equivalent emitted).

[875] The fuel charge under Part 1 of the *Act* applies to 21 greenhouse gas emitting fuels listed in Schedule 2 of the *Act*, including gasoline, fuel oil, propane, natural gas, coke, and coal. Part 2 of the *Act* defines greenhouse gases for the purposes of Part 2 as the gases "in column 1 of Schedule

3": s 169. Schedule 3 includes 33 gases such as carbon dioxide, methane, and nitrous oxide, each with an assigned CO_2 equivalence.

2. The Impact of Greenhouse Gases on the Environment

[876] The first three paragraphs of the Preamble of the *Act* read:

> Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change;
>
> Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity;
>
> Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities....

[877] Canada describes global climate change as "an urgent threat to humanity." All of the parties and intervenors before this Court agree it is a critical and important issue.

[878] In 2018, the global surface temperature was 0.85°C higher than the average temperature between the years 1951 and 1980. The temperatures in this country have increased at roughly double that average global rate.

[879] Warming temperatures are causing more volatile climate systems and more extreme weather events. Since 2016, significant forest fires have occurred in Alberta, British Columbia, and Ontario. Since 2017, major floods have occurred in Ontario, Quebec, British Columbia, and New Brunswick. Both forest fires and flooding are expected to become increasingly frequent.

[880] Climate change causes permafrost to melt, which may damage infrastructure, especially for remote Indigenous communities, particularly in British Columbia and the North. Researchers predict First Nations commercial fisheries will have a decline in the commercial catch potential of most species. The Athabasca Chipewyan First Nation explains that climate change disrupts the cycles for caribou migration, gathering food, and gathering medicinal plants on which they depend.

3. *International Treaties, Canada's Commitments, and Actions on Greenhouse Gas Emissions*

[881] In 1992 Canada signed the *United Nations Framework Convention on Climate Change*, which came into force on March 21, 1994. The *Framework Convention* aims to address the increasing atmospheric concentrations of greenhouse gases and foster cooperation among all countries to combat climate change. Article 2 states its ultimate objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

[882] Under the *Framework Convention*, Canada committed to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." To achieve this, Canada pledged to report on its policies and projected emissions with "the aim of returning individually or jointly to...1990 [greenhouse gas emission] levels."

[883] The *Conference of the Parties* is an annual meeting established by the *Framework Convention*. The *Kyoto Protocol* was adopted following the third *Conference of the Parties* meeting in December 1997 and established binding reduction commitments for developed countries. Canada ratified the *Kyoto Protocol* on December 17, 2002 and committed to reduce its greenhouse gas emissions for the years 2008-2012 to an average of 6% below 1990 levels. Canada submitted its notification of withdrawal from the *Kyoto Protocol* in December 2011, which took effect one year later. Canada did not meet its *Kyoto Protocol* commitments.

[884] At the fifteenth *Conference of the Parties* meeting in December 2009 the *Copenhagen Accord* was signed by 114 of the 194 parties to the *Framework Convention*. Under the *Copenhagen Accord,* Canada pledged to reduce its greenhouse gas emissions by 17% from its 2005 levels by 2020. Again, Canada has not met this commitment.

[885] On May 15, 2015 Canada communicated that its intended "nationally determined contribution" (greenhouse gas emission target) was an economy-wide target to reduce emissions to 30% below 2005 levels by 2030.

[886] Canada attended the twenty-first *Conference of the Parties* meeting in December 2015. Following the conference, the Prime Minister met with all provincial and territorial Premiers on March 3, 2016 where they adopted the *Vancouver Declaration on Clean Growth and Climate Change*. Canada explained that "[i]n the *Vancouver Declaration,* First Ministers agreed to work together to develop a concrete plan to achieve Canada's international commitments" and restated that Canada's greenhouse gas emission target was an economy-wide target to reduce emissions to 30% below 2005 levels by 2030. To do this, the First Ministers committed to implementing a broad range of greenhouse gas mitigation policies, including carbon pricing mechanisms.

[887] On October 5, 2016 Canada became a signatory to the *Paris Agreement*, which came into force in November 2016. It has been ratified by the European Union and 179 states. Canada says:

> The adoption of the *Paris Agreement* was the culmination of years of negotiations under the... [*Framework Convention*]. The *Paris Agreement* is a commitment to accelerate and intensify the actions and investments needed for a sustainable low-carbon future.... The *Paris Agreement*...aims to strengthen the global response to the threat of climate change...by holding the increase in the global average temperature to well below 2°C above pre-industrial levels.

[888] The *Vancouver Declaration* established a Working Group on Carbon Pricing Mechanisms. All provinces and territories, including Alberta, had at least one senior official on the Working Group. The *Working Group Final Report* evaluated how carbon pricing could help Canada meet its greenhouse gas reduction targets, modelled different carbon price scenarios, considered the implications of carbon pricing in Canada (equity, competitiveness impacts, and carbon leakage), and summarized the considerations raised by Indigenous representatives.

[889] In follow-up to the work done by the Working Group, the Prime Minister announced the *Pan-Canadian Framework* to pricing carbon pollution in Parliament on October 3, 2016. The same day, the "Pan-Canadian Approach to Pricing Carbon Pollution" was published.

[890] On December 9, 2016 the Federal Government released the "Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy." Based on the *Working Group Final Report*, the following principles guide the Pan-Canadian approach to pricing carbon pollution:

a) Carbon pricing should be a central component of the Pan-Canadian Framework;

b) The approach should be flexible and recognize carbon pricing policies already implemented or in development by provinces and territories;

c) Carbon pricing should be applied to a broad set of emission sources across the economy;

d) Carbon pricing policies should be introduced in a timely manner to minimize investment into assets that could become stranded and maximize cumulative emission reductions;

e) Carbon price increases should occur in a predictable and gradual way to limit economic impacts;

f) Reporting on carbon pricing policies should be consistent, regular, transparent, and verifiable;

g) Carbon pricing policies should minimize competitiveness impacts and carbon leakage, particularly for emissions-intensive, trade-exposed sectors; and

h) Carbon pricing policies should include revenue recycling to avoid a disproportionate burden on vulnerable groups and Indigenous peoples.

[891] All provinces, except Saskatchewan, and all three territories had adopted the *Pan-Canadian Framework*. Alberta explained that some provinces have since decided not to implement all aspects of the framework.

[892] The *Pan-Canadian Framework* outlines criteria that provincial carbon pricing systems must meet to ensure they are effective. This is enforced by a federal "backstop" that applies to jurisdictions that have not met the elements of the scientific benchmark set out in the *Framework* or where a province or territory has not opted into the *Act*. Environment and Climate Change Canada is tasked with determining if provinces have met the benchmark. Three documents were published by Canada to provide guidance for national standards of stringency that provinces could adopt to meet the benchmark: *Technical Paper: Federal Carbon Pricing Backstop*, *Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark*, and *Supplemental Benchmark Guidance*.

[893] On December 10, 2017 Canada's Minister of Environment and Climate Change and Minister of Finance wrote to their provincial and territorial ministerial counterparts to outline the federal government's next steps to price carbon, which included:

a) in early January 2018, Canada would release draft legislative proposals for the federal backstop, with an opportunity to review the draft and provide comments;

b) by March 30, 2018, any province or territory choosing the federal scheme, in whole or in part, was asked to confirm this by written reply;

c) by September 1, 2018, any province or territory opting to establish or maintain its own provincial or territorial carbon pricing system that meets the benchmark, was asked to outline how the province or territory was implementing carbon pricing. Based on the information provided, as well as follow-up information as needed, Canada agreed to work with the provinces and territories to confirm whether their carbon pricing system meets the benchmark;

d) on January 1, 2019, Canada would implement the federal backstop, in whole or in part, in any province and territory that does not have a carbon pricing system that meets the benchmark; and

e) from 2019 onwards, there would be an annual verification process to ensure carbon pricing systems continue to meet the benchmark and major changes to provincial and territorial systems will be monitored on an ongoing basis.

[894] After releasing draft legislation for public comment and a paper on the proposed design of the output-based pricing system in Part 2, the *Act* was introduced in the House of Commons as Part 5 of the *Budget Implementation Act, 2018*, No 1 (Bill C-74).

[895] On June 21, 2018 the *Act* received Royal Assent.

[896] Upon enactment, Ontario, New Brunswick, Manitoba, Saskatchewan, Yukon (by agreement), and Nunavut (by agreement) were subject to Part 1 (the fuel charge). Ontario, Manitoba, New Brunswick (voluntarily), Prince Edward Island (voluntarily), Saskatchewan (in part), Yukon (by agreement), and Nunavut (by agreement) were subject to Part 2 of the *Act* (the output based pricing system).

[897] Alberta was not originally subject to the *Act* because it imposed its own carbon levy in 2017 under its *Climate Leadership Act*, SA 2016, c C-16.9 and the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255/2017. However, on May 30, 2019 Alberta repealed this legislation. On June 13, 2019 the federal government announced its intention to implement in Alberta the backstop fuel charge under Part 1. On December 6, 2019 the federal government announced that Alberta's *Technology Innovation and Emissions Reduction* regulations satisfied the benchmark for Part 2 and Alberta would not be subject to the federal output-based pricing system.

4. Alberta's Actions on Greenhouse Gas Emissions

[898] In 2002, Alberta created a comprehensive climate change plan: *Albertans & Climate Change: Taking Action, 2002*. Alberta invested $7 million into a $30 million research partnership with industry to improve the conventional oil and gas recovery process. Alberta says that within two years of the plan's introduction, emissions intensity dropped 16% below 1990 levels.

[899] In 2004, Alberta was the first Canadian jurisdiction to require industrial emitters to measure and report their greenhouse gas emissions: *Specified Gas Reporting Regulation*, Alta Reg 251/2004, pursuant to the *Emissions Management and Climate Resilience Act*, SA 2003, E-7.8.

[900] In 2007, Alberta incentivized large emitters to reduce emissions through a greenhouse gas emissions trading system: *Specified Gas Emitters Regulation*, Alta Reg 139/2007. This required

industrial emitters to reduce their emissions below their historical benchmark and pay or submit credits to the Climate Change and Emissions Management Fund for excess emissions. In 2018, the *Specific Gas Emitters Regulation* was replaced by the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255/2017, which was a product-based sector standard approach. If a facility's emissions exceeded the benchmark, it was required to purchase credits or pay at a rate of $30 per tonne of CO_2 equivalence. This revenue was recycled into innovative technology and projects that would reduce greenhouse gas emissions in Alberta.

[901] In 2010, Alberta introduced the Renewable Fuel Standard requiring that gasoline in Alberta be blended with an annual average of at least 5% renewable content and that diesel be blended with an annual average of at least 2% renewable content until January 31, 2020.

[902] In 2015, Alberta contributed $745 million to Shell Canada's Quest Carbon Capture and Storage project (Canada also contributed $120 million). Alberta also committed $485 million to the Alberta Carbon Trunk Line which has the capacity to store 14.6 Mt of CO_2 per year and which anticipated capturing 1.68 Mt of CO_2 in 2019.

[903] In 2016, Alberta announced coal-generated electricity would be eliminated by 2030 and aimed to replace two-thirds of its coal-generated electricity with renewable sources and one-third with electricity from natural gas. Alberta Energy estimates up to 287 Mt of greenhouse gas emissions may be avoided between 2030 and 2061 by the phase-out of coal-fired electricity generation. Additionally, Alberta also signed the Alberta-UK Low Carbon Innovation and Growth framework intended to facilitate partnerships and drive economic development and diversification while enhancing low carbon technology and innovation collaboration.

[904] In 2017, Alberta enacted the *Climate Leadership Act*, SA 2016, c C-16.9, which imposed a carbon tax on the consumption of heating and transportation fuels at a rate of $20 per tonne in 2017 and $30 per tonne in 2018. Alberta also enacted the *Renewable Electricity Act*, SA 2016, c R-16.5 which promotes large-scale renewable electricity generation and creates a target "that at least 30% of the electric energy produced in Alberta, measured on an annual basis, will be produced from renewable energy resources.": s 2(1). Additionally, Alberta signed a Memorandum of Understanding with China's National Development and Reform Commission Energy Research Institute committing both jurisdictions to strengthening linkages to expand markets for clean and efficient energy technologies.

[905] In 2018, the Alberta Carbon Conversion Technology Centre was established to test and advance carbon capture utilization and storage technology. Alberta also enacted the *Methane Emission Reduction Regulation*, Alta Reg 244/2018.

[906] In 2019, the *Small Scale Generation Regulation*, Alta Reg 194/2018 became effective, which allows small-scale and community generation of electricity, to decrease reliance on more emission-intensive sources.

[907] Alberta's newest greenhouse gas reduction strategy is the Technology Innovation and Emissions Reductions program. It forecasts reducing greenhouse gas emissions by 40 to 45 million tonnes from 2016 levels by 2030.

[908] Despite Alberta's significant efforts, since 2005 Alberta's total greenhouse gas emissions have increased. In 2005 Alberta's total greenhouse gas emission was 231 Mt of CO_2 equivalence. In 2017 it had increased by 18% to 273 Mt of CO_2 equivalence: Environment and Climate Change Canada, *National Inventory Report 1990-2017: Greenhouse Gas Sources and Sinks in Canada*, 2019, 32.

III. The *Act* – How It Works

[909] The formal title of the *Greenhouse Gas Pollution Pricing Act* is:

> *An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendment to other Acts.*
>
> *Loi visant à atténuer les changements climatiques par l'application pancanadienne de mécanismes de tarification à un large éventail de sources d'émissions de gaz à effet de serre et apportant des modifications corrélatives à d'autres lois.*

[910] The *Act* is comprised of four parts and four schedules. Only Part 1, Part 2, and the schedules, are relevant to the reference question posed in this matter. Part 1 creates a fuel charge on fuel distributed to consumers. Part 2 applies to industrial greenhouse gas emitters who are exempt from Part 1 but pay a charge on emissions that exceed a limit calculated on the facilities' industry and its annual production.

[911] Provinces and territories will not be subject to Part 1, Part 2, or either, if the Governor in Council determines that their provincial or territorial carbon pollution pricing system (an explicit price-based carbon tax, carbon levy, cap and trade, or performance-based emissions system) meets the federal benchmark, to be equal to or greater than Canada's target to reduce emissions to 30% below 2005 levels by 2030. Jurisdictions can voluntarily adopt the federal carbon pricing system in lieu of developing their own.

[912] The goal of using carbon pricing, set out in the *Working Group Final Report*, 7, is to "reduce emissions by sending a price signal to the economy as a whole and to various economic actors." The primary factor the Governor in Council must consider in determining whether a

province or territory will be listed under Part 1 or Part 2 is "the stringency of provincial pricing mechanisms for greenhouse gas emissions": s 166(3).

1. The Preamble

[913] The preamble to the *Act* sets out the explicit background and purpose intended by the drafters. Four distinct principles can be discerned:

a) anthropogenic greenhouse gas emissions contribute to global climate change (paras 1-5);

b) Canada has committed internationally and with the provinces to reduce its greenhouse gas emissions (paras 6-10);

c) to accomplish this, there is a need to effect behavioural change leading to increased energy efficiencies (para 11); and

d) the purpose of the *Act* will be to utilize stringent [rigorous standards of performance] pricing mechanisms to reduce greenhouse gas emissions on the "polluter pays" principle (paras 12-16).

2. Part I: Fuel Charges

a. *Payment of Charges by Producers and Registered Distributors*

[914] A producer (which is not a covered facility, registered distributor, or registered specified air, marine or rail carrier) must pay a fuel charge at the time of production. A registered distributor must pay a fuel charge based on the amount of fuel delivered or used. It is anticipated that the producer or registered distributor will pass this charge on to the consumer.

[915] A registered distributor is exempt from the fuel charge for fuel delivered to other registered distributors, registered emitters, farmers, fishers, greenhouse operators, remote power plant operators and registered specified air, marine, or rail carriers. However, such registered carriers must pay a fuel charge themselves, and covered facilities are subject to Part 2 of the *Act*.

[916] The fuel charge for 2019-2020 is $20/tonne of CO_2 equivalence. Schedule 2 includes the corresponding charge rate for individual fuels. This fuel charge increases incrementally over the next three years to $50/tonne of CO_2 equivalence.

[917] As a result, some of the more common fuel charges for the period April 1, 2019 to March 31, 2020 are: 4.42¢/litre for gasoline; 3.10¢/litre for propane; 3.91¢/cubic metre for marketable natural gas; and $45.03/tonne for coal. The charges for the year ending March 31, 2021 are:

6.63¢/litre for gasoline; 4.64¢/litre for propane; 5.87¢/cubic metre for marketable natural gas; and $67.55/tonne for high heat value coal. For the year ending March 31, 2022 the charges are: 8.84¢/litre for gasoline; 6.19¢/litre for propane; 7.83¢/cubic metre for marketable natural gas; and $90.07/tonne for high heat value coal.

[918] Of note, aviation gasoline and turbo fuel used in Yukon and Nunavut are set at $0/litre in recognition of the high reliance on air transport in the north. The Northwest Territories is not a listed jurisdiction under Part 1 as its pricing system meets the federal benchmark stringency requirements.

b. Importing/Exporting Fuel or Bringing in and Removing Fuel from a Province

[919] Except for registered distributors, Canadian National Railway Company, Canadian Pacific Railway Company, and VIA Rail Canada Inc, everyone pays a fuel charge if they bring fuel into a province or import fuel from outside Canada. Fuel is deemed not to have been imported into a province if it is transported without being stored in that province.

c. Return of Fuel Charges to Consumers and Provinces

[920] If a jurisdiction voluntarily adopts Part 1, the federal government will return the proceeds to that jurisdiction which can use its discretion to distribute the proceeds.

[921] Otherwise, where the federal legislation applies as a backstop, the amount levied by the fuel charge is returned by the Minister of National Revenue to the province, consumers resident in the province, or both. To facilitate revenue being directly refunded to consumers, *Climate Action Incentive* provisions were added to the *Income Tax Act*, RSA 1985, c 1 (5th Supp). Canada announced that 90% of the proceeds of the fuel charge will be returned directly to residents of the province through the *Climate Action Incentive Fund* under the *Income Tax Act*.

[922] The maximum rebates for residents of each listed province are set out in tables appended to the *Climate Action Incentive Fund*. In Alberta, for example, the approximate refund for 2020 ($30/tonne of CO_2 equivalence) will be $444 for the first consumer, $222 for the spouse or common-law partner, and $111 for qualified dependants. Residents of small and rural communities are eligible for an additional 10% supplement.

[923] The federal government has publicly stated that the average cost impacts of the fuel charge per household will be less than the average *Climate Action Incentive Fund* payment for which households will be eligible.

[924] The federal government will then remit the remaining 10% to the provinces from which the fuel charge originated to support sectors expected to be particularly affected by additional

consumption costs resulting from implementation of the *Act*: universities, colleges, hospitals, schools, municipalities, non-profit organizations, and Indigenous communities.

3. Part 2: Output Based Pricing System

[925] In Part 2 of the *Act*, a covered facility is defined as a large industrial emitter of greenhouse gases, emitting a quantity of greenhouse gases equal to 50 kilotonnes or more of CO_2 equivalence, in industries involving oil and gas, cement, chemical production, vaccines, metal tubing, mining and ore processing, nitrogen-based fertilizers, food processing of potatoes or sugars, pulp and paper, automotives, and electricity generation.

[926] A covered facility is exempt from paying fuel charges under Part 1 of the *Act*.

[927] The Minister must register a covered facility upon application. A non-covered facility may apply to be designated as a covered facility if it has annual emissions of at least 10 kilotonnes of CO_2 equivalence, and if its primary activity is listed in Schedule 2, or is in a sector at risk of significant carbon leakage. A non-covered facility may wish to register for the purpose of selling its earned compliance units to other covered facilities which need credits.

[928] All covered facilities must calculate the greenhouse gas emission limit specific to their industry and their facility, and calculate whether their CO_2 equivalent emissions exceed that limit. They must report their yearly total quantity of greenhouse gas emissions, production for each industrial activity, and total greenhouse gases minus stored greenhouse gases. Electricity generation facilities and coal mining facilities have reporting requirements specific to their industry.

[929] If a covered facility emits greenhouse gases in a quantity below the emissions limit, the Minister must issue compliance units to the person responsible for the covered facility. Compliance units may be bought and sold between covered facilities, and seventy-five percent of excess emissions compensation may be paid by compliance units.

[930] A covered facility must compensate for emissions over the limit at the rate of $20/tonne in 2019; $30/tonne in 2020; $40/tonne in 2021; and $50/tonne in 2022. Compensation may be made by payment of an "excess emissions charge" or by remitting earned compliance units.

[931] Additionally, the Governor in Council may make regulations "establishing an offset credit system for projects that prevent greenhouse gases from being emitted or that remove greenhouse gases from the atmosphere," s 195.

[932] Where a province or territory voluntarily opts in to Part 2, revenue from its output-based pricing system remains in the province or territory, with no restriction on how the province may use those proceeds.

[933] For provinces involuntarily listed as subject to Part 2, the federal government has committed to "return all direct proceeds from the federal system to the province or territory where they were collected". The federal government is currently seeking input to inform its approach to remitting those revenues generated from Part 2 to the jurisdictions where they were collected.

IV. The Purpose and Effect of the *Act*: Pith and Substance, Essential Subject Matter

[934] There are two distinct steps in a division of powers analysis: the characterization of the "matter" or pith and substance of the legislation, and the classification of that "matter" into either federal or provincial jurisdiction, or both: ***Reference re Environmental Management Act (British Columbia)***, 2019 BCCA 181 at para 5, 434 DLR (4th) 213, aff'd 2020 SCC 1. Characterization must always precede classification.

[935] Unlike enumerated heads of power where the subject matter is already specified in the constitutional text, analyzing jurisdiction under peace, order and good government national concern requires identifying and defining the purpose and effect of the legislation, to identify the essential subject matter or pith and substance of the legislation. This may involve finding that a matter previously considered a purely local matter, subject to provincial jurisdiction, has evolved into a matter of federal jurisdiction. To this end, the minority in ***R v Hydro-Québec***, [1997] 3 SCR 213, para 67, 151 DLR (4th) 32, emphasized "it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise, 'national concern' could rapidly expand to absorb all areas of provincial authority."

[936] The lack of sufficient precision in describing the subject matter of the legislation was the basis of the dissents in ***R v Crown Zellerbach Canada Ltd***, [1988] 1 SCR 401, 49 DLR (4th) 161, and ***Hydro-Québec*** as to the applicability of federal jurisdiction under peace, order and good government national concern. In ***Crown Zellerbach***, La Forest J agreed, 445, that had the federal regime focused precisely on regulating deposits that had the potential to pollute inter-provincial waters, it would likely have met the requirement for national concern. In ***Hydro-Québec***, Lamer CJC and Iacobucci J similarly concluded, para 76, that had the impugned regime been restricted to chemical substances whose effects were not merely temporary or local, instead of "toxic substances" more generally, it would likely have satisfied the national concern test.

[937] Readers of the *Act* have adopted a wide variety of characterizations for the "matter" or pith and substance of this legislation. Previous ***Greenhouse Gas Reference*** decisions from the Courts of Appeal for Saskatchewan and Ontario have determined the following, from broadest to narrowest characterization:

a) Ontario minority (Huscroft, JA): "regulat(ing) GHG emissions" (para 213);

b) Ontario majority (Strathy, CJO, MacPherson and Sharpe, JJA): "establishing minimum national standards to reduce greenhouse gas emissions," and setting as the means "a minimum national standard of stringency for the pricing of GHG emissions" (para 77);

c) Ontario concurrence (Hoy, ACJO): "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (para 166);

d) Saskatchewan minority (Ottenbreit and Caldwell, JJA): "to establish a benchmark GHG emissions price with the aim of modifying behavior and incentivising industry to mitigate anthropogenic GHG emissions" (para 245); and

e) Saskatchewan majority (Richards, CJS, Jackson and Schwann, JJA): "the establishment of minimum national standards of price stringency for GHG emissions" (para 123).

[938] The parties and intervenors before this Court have proposed equally divergent characterizations of the *Act*, again set out from broadest to narrowest characterization:

a) Ontario: "the regulation of greenhouse gas emissions";

b) Alberta: "to regulate GHG emissions across the country";

c) Canadian Public Health Association: "to establish minimum national standards to reduce greenhouse gas emissions";

d) British Columbia: "establishing minimum national standards to allocate part of Canada's overall targets for greenhouse gas emissions reduction";

e) Saskatchewan: Part 1: "to create a system of intra-provincial pricing disincentives to incrementally affect demand through different mechanisms across Canada in such a way as to reduce the use of certain fuels in favour of other forms of energy or power"; Part 2: "the regulation of industries within the province";

f) Canada: "to establish minimum national standards of stringency for GHG emissions pricing integral to reducing Canada's nationwide GHG emissions";

g) Athabasca Chipewyan First Nation: "establishing minimum national standards to reduce GHG emissions, by means of pricing that applies with comparable stringency throughout Canada";

h) Climate Justice Saskatoon: "agree[s] with the opinion of Richards CJ in Saskatchewan's *Reference re Greenhouse Gas Pollution Pricing Act*, and the opinion of Hoy ACJ in Ontario's *Reference re Greenhouse Gas Pollution Pricing Act*";

i) Assembly of First Nations: "the establishment of a price on GHG emissions throughout Canada...[acting as] a "backstop" [which] sets a minimum standard...to create incentives to change the behavior of consumers"; and

j) International Emissions Trading Association: "a GHG emissions pricing and trading regime that establishes minimum national stringency standards in order to reduce Canada's GHG emissions in accordance with the *Paris Agreement*."

[939] New Brunswick did not propose a characterization of the *Act* but warns against the "risk of ultimately classifying this matter within the p.o.g.g. power [when]...a host of eminent legal thinkers cannot agree on the fundamental constitutional nature of the GGPPA despite roughly a year of trying."

[940] None of The David Suzuki Foundation, Canadian Taxpayers Federation, nor SaskEnergy/ SaskPower specifically provides a characterization of the *Act*. The David Suzuki Foundation submitted that the *Act* fell under the national emergency branch of the federal government's jurisdiction over peace, order and good government, and the Canadian Taxpayers Federation and SaskEnergy/SaskPower submitted that the legislation imposed a tax falling within s 91(3) of the federal division of powers in the *Constitution Act, 1867*.

[941] On the purpose of the *Act*, MP Joël Lightbound, Parliamentary Secretary to the Minister of Finance, said the *Act*: "put[s] a price on carbon pollution...central to the government's plan to fight climate change and grow the economy" to "reduce emissions [and create] incentives for businesses and households to innovate and pollute less": 2nd Reading, House of Commons Debates, 42-1, No 279, vol 148, 18291 (16 April 2018).

[942] MP Jonathan Wilkinson, Parliamentary Secretary to the Minister of Environment and Climate Change, said: "A core element of our approach to lowering emissions and ensuring a healthier environment is the polluter pays principle. When pollution has a price polluting less saves money," and "[t]o ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon": Gov't Orders,

House of Commons Debates, 42-1, No 294, vol 148, 19212-3 (1 May 2018). See also Alberta Senator Grant Mitchell, 2nd Reading, Debates of the Senate, 42-1, vol 150, No 218, 5981-2 (11 June 2018).

[943] Following the requirement in ***Hydro-Québec*** and ***Crown Zellerbach*** for specificity and precision; Professor Lederman's explanation in "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," (1975) 53 Can B Rev 597, 606; review of the Preamble and detailed provisions of the *Act*; and taking into consideration the various "matters" as proposed by the earlier Reference Courts and the parties and intervenors above, I have determined that the most determinate and least general formulation should be chosen as the dominant characterization. Therefore, I identify the pith and substance or essential subject matter of the *Act* as:

> To effect behavioral change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions.

[944] In this formulation, the dominant "purpose" of the *Act* is the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions. The proposed "effect" of the *Act* is to bring about behavioural change throughout Canada leading to increased energy efficiencies and to incentivize large emitters to innovate and adopt cleaner production methods.

[945] This specific and precise description of purpose and effect is different from the "means" set out in the *Act* and regulations. For example, the means by which the stated purpose of the *Act* is achieved to bring about the desired effect includes: the detailed specific formula-based fuel charges and rates, the amount and methods of rebates, registration and reporting requirements for covered facilities, amounts of and rates of excess emission charges and compliance units, the distribution of revenues from industrial emitters and the addition or deletion of gases, fuels or CO_2 equivalence in the schedules.

V. The Constitutional Scheme

[946] Canada is a federal state, although often referred to as a confederation, where legislative power is distributed between two levels of government: the central government and the provinces. Each level of government remains autonomous, neither is subordinate to the other, and each has exclusive authority within its own enumerated areas of jurisdiction.

[947] The division of powers is primarily set forth in sections 91 and 92 of the *Constitution Act, 1867*, although further powers are addressed in sections 92A through 95 and elsewhere in that *Act*.

[948] There are 16 enumerated provincial powers in the *Constitution Act, 1867* in section 92. Section 92(16) also grants a residual power to the provinces over "all Matters of a merely local or

private Nature in the Province". To avoid overlap between this residual power and federal powers, the concluding paragraph of Parliament's powers specifies that any matter coming within any of the classes enumerated in s 92 "of a local or private Nature" shall not be deemed to come within Parliament's enumerated classes.

[949] There are 31 enumerated federal powers in the *Constitution Act, 1867* plus residual powers. Additionally, the combination of ss 91(29) and 92(10)(c) create the federal declaratory power where a unilateral act of Parliament can assign federal jurisdiction to "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Section 92(10)(c) states local provincial works are exempt from provincial powers if declared under 91(29) to be "for the general Advantage of Canada or for the general Advantage of Two or more of the Provinces."

[950] Finally, the overriding federal residual power is set out in the preamble to section 91, granting Parliament the right to "make Laws for the Peace, Order and good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

[951] Both the enumerated provincial and federal powers are said to be exclusive to the level of government to which they are assigned, but there is nothing in the wording of those sections which says those jurisdictions are also plenary. This is an important distinction.

[952] It is the classification of the current *Act* as between these divisions of legislative authority and jurisdiction which is the second subject, after characterization of the *Act*, of this reference.

VI. Provincial Jurisdiction

1. Section 92

[953] The provinces' exclusive jurisdiction is set out in subsections 92(10), local works and undertakings; (13) property and civil rights in the province; (16) matters of a merely local or private nature in the province; 92A(1)(b) development, conservation and management of non-renewable resources, and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

[954] It is not contested that provincial legislatures have authority to enact laws with respect to greenhouse gas emissions. The *Act* explicitly confirms that power. The preliminary right to make laws with respect to greenhouse gas emissions is exercised by the provincial and territorial legislatures, which may implement an explicit price-based carbon tax or carbon levy such as in British Columbia, cap and trade provisions such as in Quebec, or performance-based emission systems such as in Alberta. While the provincial power is broad, this power is not absolute or plenary: ***Reference re Environmental Management Act (British Columbia)***, para 93.

[955] The issue in this reference is whether the federal government also has authority to put into place "backstop" legislation for provinces or territories that do not have greenhouse gas carbon pricing legislation priced to consumers at set minimum rates under Part 1, or as will meet Canada's target to reduce emissions 30% below 2005 levels by 2030, pursuant to Part 2.

2. *Section 92A*

[956] Alberta, Saskatchewan and SaskEnergy/SaskPower submit that s 92A of the *Constitution Act, 1867*, adopted as part of the *Constitution Act, 1982* (UK), Schedule B to the *Canada Act 1982* (UK), c 11, provides important constitutional and historical context for, or solidifies provincial jurisdiction over, the development and management of non-renewable natural resources.

[957] Alberta was not given ownership of its natural resources when it became a province in 1905 pursuant to the *Alberta Act* (UK), 4 & 5 Edw VII, c 3, as s 21 continued to vest all Crown lands, including mines and minerals, in the federal Crown. This changed with the *Constitution Act, 1930* (UK), 20-21 Geo V, c 26, which confirmed the *Natural Resources Transfer Agreements* signed between Alberta, Saskatchewan, Manitoba and Canada on December 14, 1929, transferring ownership of all natural resources in those provinces previously owned by Canada.

[958] This new right of ownership carried with it many powers for Alberta, including limiting production for conservation purposes, its primary concern in the early 1930s: ***Spooner Oils Ltd v Turner Valley Gas Conservation***, [1933] SCR 629, [1933] 4 DLR 595. However, these ownership rights were subject to federal legislation, which could affect property owned by a province without, for that reason alone, being rendered unconstitutional: ***Reference re Waters and Water-Powers***, [1929] SCR 200, 212, 219, [1929] 2 DLR 481; ***Attorney General for Canada v Attorney General for Ontario***, [1898] AC 700, 712-713 (PC); ***Attorney General of Quebec v Nipissing Central Railway***, [1926] AC 715, 723-724 (PC). Provinces remained unable to immunize their natural resources from the negative effects of federal legislation unless the latter involved a "tax" under s 91(3) such that s 125 of the *Constitution Act, 1867* was triggered: ***Exported Natural Gas Tax***, [1982] 1 SCR 1004, 1053-1054, 1068, 136 DLR (3d) 385. Ownership rights alone were insufficient to determine jurisdiction: Dale Gibson, "*Constitutional Jurisdiction Over Environmental Management in Canada*," (1973) 23 UTLJ 54, 60.

[959] Beginning in 1973, the federal government enacted a series of measures which affected the provinces' natural resources, including an oil export tax, a national market for oil, and passage of the *Petroleum Administration Act*, SC 1974-75-76, c 47, giving Canada authority to unilaterally set oil and gas prices. This prompted negotiations on the subject of jurisdiction over natural resources, leading to a number of First Ministers' conferences between 1978 and 1980, driven in large part by litigation in Saskatchewan culminating in ***Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al***, [1978] 2 SCR 545, 80 DLR (3d) 449; and ***Central Canada Potash Co Ltd et al v Government of Saskatchewan***, [1979] 1 SCR 42, 88 DLR (3d) 609: J Peter

Meekison & Roy J Romanow, "Western Advocacy and Section 92A of the Constitution" in *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985, 3).

[960] In light of these Supreme Court of Canada decisions, provincial negotiations seeking to clarify jurisdiction over natural resources focused on obtaining greater authority over taxation and inter-provincial trade. The compromise reached was enacted as s 92A of the *Constitution Act, 1982*, part of the patriation package signed April 17, 1982. Section 92A addressed three main issues of provincial jurisdiction: 92A(1), provincial regulatory powers over resources; 92A(2), legislative powers over the export of resources from the province and 92A(4), taxing powers over resources.

[961] Relevant to this reference, provinces were granted exclusive jurisdiction over the exploration, development, conservation, and management of non-renewable resources. This is largely thought to be a confirmation of pre-existing rights already enjoyed by the provinces, though it may also be said to have clarified the provinces' legislative, as opposed to proprietary, authority over resources by doing away with any distinction between Crown-owned and freehold resources: William D Moull, "The Legal Effect of the Resource Amendment – What's New in Section 92A?" in *Origins and Meaning;* Marsha A Chandler *et al*, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism," (1985) 23:2 Osgoode Hall LJ 253 at 270-271.

[962] Whatever the exact parameters of s 92A, there is general consensus that the provision was not intended to limit any pre-existing powers of Parliament: ***Westcoast Energy Inc v Canada (National Energy Board)***, [1998] 1 SCR 322, paras 80-84, 156 DLR (4th) 456; ***Ontario Hydro v Ontario (Labour Relations Board)***, [1993] 3 SCR 327, 376-378 (per La Forest J), 410 (per Iacobucci J), 107 DLR (4th) 457; Moull at 53; Robert D Cairns *et al, Constitutional Change and the Private Sector: The Case of the Resource Amendment*, (1986) 24: 2 Osgoode Hall LJ, 229-300; Chandler at 272. This includes the federal peace, order and good government residual power in the preamble to s 91 of the *Constitution Act, 1867*.

VII. Federal Jurisdiction

1. Peace, Order and Good Government

[963] Section 91 of the *Constitution Act, 1867* confers on the federal Parliament the power:

> ... to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces....

[964] The power to make laws under this provision "is residuary in its relationship to the enumerated provincial [and federal] heads of power": Peter W Hogg, *Constitutional Law of*

Canada, 2016 Student Edition (Toronto: Thomson Reuters, 2016), 17-1 and 2. There are three branches of federal legislative power stemming from peace, order and good government: the gap (residual) branch, the emergency branch, and the national concern branch. In this case, Canada relies only on the national concern branch.

2. *National Concern Branch* .

a. *Use of the Peace, Order and Good Government National Concern Doctrine pre-Crown Zellerbach*

[965] The peace, order and good government national concern doctrine was explicitly articulated by the courts in 1946, but the underlying concept emerged from decisions of the Judicial Committee of the Privy Council in the 1800s. The concept was that some matters of legislation, which would otherwise be local and provincial in nature, could acquire "national dimensions" or "national concern", and thereby come within Parliament's legislative jurisdiction under peace, order and good government.

[966] Sir Montague Smith in ***Russell v The Queen*** (1882), 7 App Cas 829, 841, held that the *Canada Temperance Act* of 1878 was *intra vires* the federal peace, order and good government residual powers, although impacting property and civil rights, as the promotion of temperance throughout Canada was "a subject of general concern to the Dominion.".

[967] Lord Watson in ***Ontario (AG) v Canada (AG) (Local Prohibition)***, [1896] AC 348, 361, stated more explicitly:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial...and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such a sense as to bring it within the jurisdiction of the Parliament of Canada.

[968] In 1946, Viscount Simon, LC set out the test for identifying whether a matter is of "inherent national importance," in ***Re Canada Temperance Act,*** [1946] AC 193, 206, [1946] 2 DLR 1:

> In their Lordships' opinion, the true test must be found in the real subject-matter of the legislation. If it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole... then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

[969] Of the Supreme Court cases addressing peace, order and good government prior to ***Crown Zellerbach***, two were decided solely on the basis of national concern:

a) in ***Johannesson v West St Paul (Rural Municipality)***, [1952] 1 SCR 292, [1951] 4 DLR 609, the Court held unanimously, in five concurring opinions, that "aeronautics" was a matter of national concern, falling outside the scope of the provincial power to regulate municipal institutions in the province under s 92(8); and

b) in ***Munro v National Capital Commission***, [1966] SCR 663, 671, 57 DLR (2d) 753, Cartwright J, writing for the Court, held that development of the National Capital Region, which straddled two municipalities, Ottawa and Gatineau, and two provinces, Ontario and Quebec, was a matter of national concern. While development of the National Capital Region undoubtedly affected property and civil rights in the province under s 92(13), the scope of these effects was reasonable in light of the clear national interest in coherent development of the seat of the government of Canada.

[970] Under a peace, order and good government analysis, the Privy Council and the Supreme Court of Canada have rejected the following matters as being of national concern:

a) the licensing of fish canning and curing establishments: ***AG Canada v AG British Columbia (Fish Canneries)***, [1930] AC 111, [1930] 1 DLR 194;

b) inflation: ***Reference re Anti-Inflation Act***, [1976] 2 SCR 373, 68 DLR (3d);

c) the labelling of light beers: ***Labatt Breweries v Canada (AG)***, [1980] 1 SCR 914, 110 DLR (3d) 594; and

d) local, compulsory treatment of BC residents addicted to heroin: ***Schneider v R***, [1982] 2 SCR 112, 139 DLR (3d) 417.

[971] Justice Beetz, writing in dissent in ***Anti-Inflation Act***, is generally considered to be the voice of the majority with regard to the applicability of the national concern doctrine, and his reasoning remains important in judicial and scholarly interpretation of the doctrine, including the reasoning of both the majority and the dissent in ***Crown Zellerbach***. In that decision, after reviewing ***Russell***, ***Local Prohibition***, ***Canada Temperance Act***, ***Johannesson***, and ***Munro***, amongst other cases, Justice Beetz said, 458, that "new matters or new classes of matters" may be added to the federal list of powers "where a new matter was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form." Additionally, one must consider the "scale upon which these new matters enabled Parliament to touch on provincial matters."

*b. The **Crown Zellerbach** Test*

[972] Writing for the majority in ***Crown Zellerbach***, Le Dain J identified four criteria for the application of the national concern doctrine, 431-432:

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 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; and
>
> 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.

[973] The third point can be separated into two elements: the need for singleness, distinctiveness and indivisibility that clearly distinguishes a matter 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 Act, 1867*. With regard to the latter element, Le Dain J subsequently emphasized, 438, that a matter "must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned".

[974] Justice Le Dain also elaborated on the nature of the "provincial inability" test set out in the fourth point, 434:

> [This] test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative

> treatment. The 'provincial inability' test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

[975] La Forest J's dissent (Beetz, Lamer JJ concurring) did not take issue with Le Dain J's characterization of the law as it relates to the national concern doctrine.

[976] In the majority decision, Le Dain J said, 436, that "[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole." He concluded that the distinction drawn in the federal Act between "the pollution of salt water and the pollution of fresh water" was "sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter falling within [the peace, order and good government national concern]," 436 & 438.

[977] Justice La Forest, writing in dissent, distinguished "ocean pollution" from the clearly indivisible nature of aeronautics (per ***Johannesson***) and the national capital region (per ***Munro***). He noted, 452, that neither of these matters "fit comfortably within provincial power", and their implications "have predominantly national dimensions." By contrast, "ocean pollution" was inherently divisible as a regulatory matter; it could be assigned to both federal and provincial heads of power depending on the nature and implications of the dumping in question. In this sense, La Forest J reasoned, 454, that the matter of marine dumping was more like the control of inflation, which in ***Anti-Inflation Act*** had been found by Beetz J to be merely "an aggregate of several subjects some of which form a substantial part of provincial jurisdiction."

c. New Matter or Constitutionally Significantly Transformation Affecting the Whole Nation

[978] The Supreme Court has been clear in a series of decisions post-***Crown Zellerbach*** that "the environment" is not subject to the exclusive jurisdiction of either level of government. In other words, the environment, as a total concept, is too broad to constitute matters of peace, order and good government. Writing for the majority in ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3, 88 DLR (4th) 1, La Forest J stressed, 63, that the majority decision in ***Crown Zellerbach*** should not be construed as granting exclusive federal jurisdiction over "the environment" or "environmental control" under peace, order and good government. He emphasized that the environment "encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government." In ***Hydro Québec***, para 116, the majority reaffirmed that "the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the

general structure of the Constitution". Similarly, in ***Reference re Environmental Management Act (British Columbia)***, para 12, the Court said that "'environmental protection' is not a head of power allocated to either level of government. Valid environmental protection legislation is on the books of all provinces *and* of Canada" [emphasis in original]. See also para 93.

[979] However, it is clear that sub-categories of environmental matters, if properly circumscribed, can constitute matters of national concern. This, for example, was the case for "marine pollution": ***Crown Zellerbach***, and presumably for chemical substances "whose effects are diffuse, persistent and serious": ***Hydro Québec***, per Lamer CJC (dissenting), para 76.

[980] I conclude that the characterization of the *Act*, as I have set it out above, is a new matter that did not exist at the time of Confederation, or is a matter which has since become of national concern.

d. Single, Distinct, Indivisible Subject Matter

[981] There is some ambiguity about whether each of the three terms used in the concept of "singleness, distinctiveness and indivisibility" must always be considered as part of the national concern analysis, and if so, to what degree. For instance, in his analysis of the "provincial inability" test in ***Crown Zellerbach***, Le Dain J said the test is "whether a matter has that character of singleness or indivisibility", but makes no reference to "distinctiveness." He emphasized, 434, that a matter must have both a "functional" and "conceptual" singleness or indivisibility to be of national concern, but did not explain what he meant by "functional" and "conceptual" indivisibility.

[982] Jean LeClair explains in "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 UBC L Rev 353, 361-63, that the majority in ***Crown Zellerbach*** focused primarily on the functional indivisibility of marine pollution, while the dissent took issue with its lack of conceptual indivisibility. The majority focused primarily on the physical indivisibility of waters falling within provincial and federal regulatory control, concluding that the federal government should have jurisdiction to regulate dumping in intra-provincial waters in order to prevent pollution of inter-provincial and international waters. The dissent emphasized that the focus should not be on the waters *per se*, but on the sources of pollution of inter-provincial and international waters specifically: Le Clair, 446. In the dissent's view, the majority should have considered what federal regulatory power was truly required to effectively control pollution at its source, in light of provincial regulatory jurisdiction over intra-provincial waters and local activities.

[983] According to LeClair's analysis, 364-65:

> [T]he 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.

[984] In ***Ontario Hydro***, neither the majority nor the dissent engaged directly with the concept of "singleness, distinctiveness and indivisibility" beyond listing it as one of Le Dain J's criteria in ***Crown Zellerbach***. Instead, the focus of both the majority and dissent was on whether the regulatory matter in question was sufficiently "distinguishable" or "distinct" from provincial heads of power to constitute a matter of national concern.

[985] In *Constitutional Law of Canada*, Hogg provides essentially no discussion of the "singleness, distinctiveness and indivisibility" concept, and instead focuses on the "distinctness" concept: ch 17-15, 17.3(c).

[986] In determining whether the *Act* is clearly distinguishable from matters of purely provincial concern, it is essential to consider: the purpose, effect, and means described; the degree of unity and identity of the essential subject matter; the limited scale of application; and the inter-provincial impact of any provinces' failure to effectively act.

[987] Taking into account all of the above, I find the characterization of the *Act*, set out above, demonstrates both functionally and conceptually, a singleness, indivisibility, and distinctiveness from provincial heads of power to constitute a matter of national concern.

e. Exclusive, Not Plenary Power, nor Current Jurisdiction

[988] There is scholarly debate over whether peace, order and good government national concern confers exclusive or plenary regulatory power on Parliament, or both, and if so, whether that power remains subject to the double aspect and ancillary powers doctrines.

[989] Exclusive authority is that authority which is within federal or provincial jurisdiction, but not diminishing nor negating the other's jurisdiction, on the principle that "subjects which in one aspect and for one purpose fall within sect 92, may in another aspect and for another purpose fall within sect 91": ***Hodge v The Queen***, [1883] 9 AC 117, 130 (PC).

[990] The traditional meaning of "exclusivity" is that only one level of government can legislate at one time with respect to the dominant aspect of a particular matter. Exclusive jurisdiction can be contrasted with concurrent jurisdiction, in which provincial and federal levels of government share simultaneous regulatory authority over a matter. Concurrent jurisdiction and the double aspect and ancillary powers doctrines are entrenched in the constitutional principle of "cooperative federalism," which favours degrees of overlapping provincial and federal jurisdiction: see ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, paras 17-19, [2018] 3 SCR 189.

[991] On the other hand, a government with plenary jurisdiction over a matter has largely unqualified regulatory authority to enact laws in relation to that matter. For example, the federal criminal law power confers plenary regulatory jurisdiction. The Supreme Court in ***Hydro-Québec***

noted, para 121, that apart from restrictions under the *Charter of Rights and Freedoms*, the only qualification on Parliament's exercise of its plenary criminal law jurisdiction is that it "not be employed colourably."

[992] In ***Canada Temperance Act***, Viscount Simon suggests that assigning a matter to federal jurisdiction under peace, order and good government does not necessarily confer either exclusive or plenary federal regulatory jurisdiction over that matter. In their Lordships' opinion, the true test was to be found in the real subject matter of the legislation: whether it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.

[993] In ***Johannesson***, three of the seven judges found that peace, order and good government national concern jurisdiction was exclusive, but did not comment on whether it was plenary, per Kellock, Cartwright JJ concurring, 312; per Locke J, 325. The idea that national concern confers exclusive regulatory jurisdiction over a matter also appears to have been implicitly accepted by the Court in ***Schneider***, 126.

[994] In ***Anti-Inflation Act***, Beetz J found that assigning a matter to federal jurisdiction under national concern would confer exclusive federal authority over that matter, 445 & 457, but offered no comment on whether that authority was also plenary in nature. In ***Crown Zellerbach***, Le Dain J cited Beetz J's opinion in ***Anti-Inflation Act*** as standing for the proposition that "where a matter falls within the national concern doctrine of the peace, order and good government power, ... Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects," 433, notwithstanding that Beetz J did not actually say that. Le Dain J, however, corrected himself one paragraph later when he rejected "the general notion...that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem."

[995] ***Ontario Hydro*** offers the most detailed consideration by the Supreme Court since ***Crown Zellerbach*** of the scope of regulatory jurisdiction under national concern. In ***Ontario Hydro***, the Supreme Court unanimously affirmed federal jurisdiction over nuclear power and atomic energy under national concern as previously held by the Ontario High Court in ***Pronto v Ontario Labour Relations Board***, 5 DLR (2d) 342, [1956] OR 862 (HC).

[996] The Court agreed that to the extent a specific regulatory power is integral to federal jurisdiction under national concern, that matter is subject to exclusive federal jurisdiction.

[997] It also agreed that federal regulatory power under the national concern branch is not plenary, but "must be carefully described to respect and give effect to" the constitutional division of powers. Justice Iacobucci described the limit on federal power as consistent with Le Dain J's

caution on behalf of the majority in ***Crown Zellerbach,*** para 35, that the provincial inability test does not require that there must be a plenary jurisdiction in one order of government or the other.

[998] I determine that the above characterization of the *Act* confers exclusive power, but neither plenary power nor concurrent jurisdiction, in the federal Parliament.

f. Small Scale of Impact on Provincial Jurisdiction

[999] In ***Anti-Inflation Act***, Beetz J, 458, warned that "[t]he scale upon which...new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters" lest they "destroy the equilibrium of the Constitution."

[1000] In ***Crown Zellerbach***, 432-433, Le Dain J for the majority quoted from Gibson, "Measuring 'National Dimensions'" (1976), 7 Man LJ 15, 34-35 for the proposition that "the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers." He said, 437-438, "in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned."

[1001] In the Ontario ***Greenhouse Gas Reference,*** paras 4, 131, the majority said it was necessary that "federal jurisdiction in this field is narrowly constrained" to leave "ample scope for provincial legislation." The *Act* must, without interfering with its basic intended result, have as small an impact on provincial jurisdiction as is reasonable.

[1002] Whether the scale of impact of the *Act* is reconcilable with the fundamental distribution of legislative power under the *Constitution Act, 1867* must be determined by examining not only the purpose, but also the effect and means of the legislation.

[1003] The *Act* is structured to recognize and support provincial jurisdiction over existing carbon pricing policies. It acknowledges that the provinces are the primary source of emission reduction legislation. The *Act*'s purpose is to ensure, however, a minimum floor to be met by provincial carbon pricing schemes; that is, the economy-wide target of reducing greenhouse gas emissions by stringency pricing methods to 30% below 2005 levels by 2030.

[1004] The federal backstop facilitates carbon pricing applied broadly across the country to as many goods and sectors in the economy as possible, with equivalent coverage and effect. It puts into place a level of carbon pricing policies across Canada reasonably comparable in price and stringency to mitigate adverse impacts between provinces and territories, considering international competitiveness and carbon leakage pressures.

[1005] Furthermore, the *Act* strikes a balance between the polluter pays principle and avoiding a disproportionate burden on vulnerable groups, such as emission-intensive but trade-exposed industries, northern and remote communities, and low-income households.
[1006] The *Act* does not enforce a one-size fits all formula on provinces. It accommodates various provincial or territorial systems: explicit price-based carbon taxes, carbon levies, cap and trade, and performance-based emission systems. Such provincial or territorial schemes underlie the federal backstop.

[1007] The federal backstop merely ensures equity as between provincial and territorial jurisdictions by setting minimum national standards. Every jurisdiction must meet the set national threshold for pricing carbon to effect behavioural change throughout Canada leading to increased energy efficiencies. Such minimum standards are limited to those necessary and integral to the stringency pricing of greenhouse gas emissions.

[1008] It is therefore the structure of the *Act* to exert as small a scale as possible of impact on or minimal impairment of provincial jurisdiction.

[1009] I find that the *Act* does accomplish the goal of having as small a scale as possible of impact on provincial jurisdiction. That is the foundational rationale of the *Act*.

g. Provincial Inability Test

[1010] The provincial inability test of the peace, order and good government national concern analysis considers whether the "provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests": ***Crown Zellerbach***, 434. It was also the subject of detailed discussion by the majority in ***Ontario Hydro***, 379. Constitutional scholars consider this to be an important element of the national concern analysis. Hogg notes that even if a matter is "distinct" from provincial heads of power, it "would also have to satisfy the provincial inability test (or other definition of national concern) in order to be admitted to the national concern branch of p.o.g.g.": Hogg, *Constitutional Law,* 2016, 17.3(d), 17-16. Monahan and Shaw go so far as to suggest that the "provincial inability" test is sufficient on its own for establishing that a matter is of national concern under peace, order and good government: Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2013), 279-384.

[1011] What is meant by provincial inability? Beatty says the Supreme Court's reasoning in ***Munro*** suggests that provincial "unwillingness" constitutes "inability" for the purposes of this test: David Beatty, "Polluting the Law to Protect the Environment," (1998), 9:2 Const Forum Const 55, 58, citing ***Munro***, and Katherine Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada," (1992) 55:1 Law & Contemp Probs 121.

[1012] Monahan says that in practice the focus of the test is on "the effects in other provinces of a failure by one province (as opposed to the inability of that province) to deal effectively with the control or regulation of the matter:" Monahan, *Constitutional Law* (Concord: Irwin Law, 1997), 240. Trebilcock similarly notes that "the focus of Le Dain J.'s comments is on whether a province can deal *effectively* with the issue of concern, not whether it is constitutionally capable of dealing with the issue": Michael Trebilcock, "The Supreme Court and Strengthening the Conditions for Effective Competition in the Canadian Economy," (2001) 80 Can Bar Rev 542, 548.

[1013] In developing the "provincial inability" test, the majority in ***Crown Zellerbach***, 428, made specific reference to the following statement by Hogg:

> [T]he most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.

[1014] The majority, 433, also referenced the statement by Gibson, "Measuring National Dimensions," 36:

> Where it would be possible to deal fully with the problem by co-operative action of two or more legislatures, the "national dimension" concerns only the risk of non-co-operation, and justifies only federal legislation addressed to that risk.

[1015] As provinces cannot bind one another, nor can Parliament bind the legislatures, there will always be a risk that one or more provinces will not cooperate in a national effort. If the effects of such non-cooperation would be to threaten inter-provincial interests outside of the non-cooperating province, such that cooperating provinces would be unable to protect their interests, this suggests the matter is of national concern under peace, order and good government.

[1016] I find that effective and stringent carbon pricing cannot be realistically satisfied by co-operative provincial action, due to the potential failure or unwillingness of a province to adequately address greenhouse gas emissions, with a resulting adverse effect on other provinces. This is clear by reviewing the efforts, or lack thereof, of those provinces listed in Schedule I of the *Act*, in meeting the goal of reducing emissions to 30% below 2005 levels by 2030.

h. A Matter Must be More than an Aggregate of Provincial Concerns or Interest

[1017] Justice Beetz' reasons, 458, in ***Anti-Inflation Act***, cited with approval by both the majority and the dissent in ***Crown Zellerbach***, suggests a matter must be more than simply "an aggregate of several subjects some of which form a substantial part of provincial jurisdiction" to amount to a matter of national concern.

[1018] Is the use of minimal national standards to stringency pricing of greenhouse gas emissions merely an aggregate of subjects of provincial jurisdiction? By definition it cannot be. It is the setting of a national backstop to apply equivalent thresholds across provincial boundaries. Provinces and territories may impose their own carbon pricing schemes, but only the federal government can examine, analyze, and compare the schemes for the purpose of applying equivalency. This is inter-provincial balancing of stringency pricing in the national interest.

[1019] I find that the *Act* does not simply aggregate subjects of provincial jurisdiction to amount to a national concern.

i. Carbon Leakage

[1020] Canada, Alberta, and British Columbia have all addressed concerns over carbon leakage. Carbon leakage is the incentive for industry, business or commerce to flee a jurisdiction with a high carbon pricing scheme to one with a lower carbon pricing scheme for economic reasons.

[1021] British Columbia cites for example the movement of its cement and concrete industry to Alberta over the past decade. Alberta cites concerns over movement of its oil and gas industry to the United States and other countries.

[1022] Canada says the *Act* can and does address the concern over carbon leakage within the country, inter-provincially. It says the *Act* cannot address carbon leakage internationally, but its efforts under the *Framework Convention*, the *Conference of the Parties*, the *Copenhagen Accord*, and the *Paris Agreement* seek to address this issue internationally. One addresses domestic competitiveness and the other international competitiveness. The two must work hand in glove.

[1023] Additionally, Canada says the *Act* mitigates international carbon leakage by its establishment of stringency levels ranging from 80 to 95%, dependent on industry risk factors, economic pressures, and support of at-risk sectors of the economy, small rural, northern and Indigenous communities.

[1024] It is the balance of efforts nationally and internationally which is essential in Canada's fight against extreme climate change.

3. Emergency Branch

[1025] The David Suzuki Foundation has submitted that federal jurisdiction is established with respect to the *Act* under the emergency branch of its residual peace, order and good government jurisdiction. It argues that climate change is a national emergency and the *Act* is emergency legislation. It sets out extensive examples of an emergency situation and the science behind climate change. It says we find ourselves in "an urgent and critical situation adversely affecting all

Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces and thus presenting an emergency which can only be effectively dealt with by Parliament": ***Anti-Inflation Act***, 436-437.

[1026] This argument flounders on the requirement that use of the emergency branch of the peace, order and good government residual jurisdiction must be temporary in nature. While it is true this *Act* only mandates actions until 2030 for the purpose of meeting Canada's commitments under the *Paris Agreement*, it cannot be said that controlling greenhouse gas emissions is a temporary issue. Climate change in general, including greenhouse gases emission controls, the need for behavioural change, increased energy efficiencies, minimum national standards and stringency pricing, by their very natures, are not temporary. They are issues which must be faced for generations. Although all of the parties and intervenors call these matters urgent and some say there is an "existential crisis", it is not reasonable to say they are temporary in nature. As such, it is not appropriate to rely upon the emergency branch of the peace, order and good government residual federal jurisdiction.

4. Taxation

[1027] The Canadian Taxpayers Federation and SaskEnergy/SaskPower submit the *Act* establishes a tax which falls under federal jurisdiction pursuant to s 91(3) of the *Constitution Act, 1867*, but then fails pursuant to ss 53 and 125 of that *Act*. The test as to whether proposed legislation is a tax, and therefore might fall under s 91(3), or a regulatory levy and therefore might fall under peace, order and good government, is set out in ***Westbank First Nation v British Columbia Hydro and Power Authority***, [1999] 3 SCR 134, 176 DLR (4th) 276.

[1028] The distinction between taxation and regulatory charges is that a tax is to be distinguished from a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme": ***Exported Natural Gas Tax***, 1070. Taxation raises funds as general revenue for the purpose of providing monies to government for the broad expenses of government. Regulatory levies are necessarily incidental to a broader regulatory scheme, which includes: ***Westbank First Nation***, 149:

> (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behavior of individuals; (3) actual or properly estimated costs of the regulations; (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it.

See also: ***620 Connaught Ltd v Canada (Attorney General)***, 2008 SCC 7, para 25, [2008] 1 SCR 131.

[1029] The *Act* is not a tax, as it is not intended to raise revenue for the general use of the federal government. In fact, it is intended to be revenue neutral, or revenue negative, to the federal

government, taking into account the return of fuel charges under Part 1 to consumers and provinces through the *Climate Action Incentive Fund* under the *Income Tax Act*, and the issuance of compliance units, the offset credit system and the remitting of revenues generated from Part 2 to the jurisdictions where they were collected.

[1030] On the other hand, the *Act* meets all of the requirements for a regulatory levy set out in ***Westbank First Nation***. I find that the *Act* establishes a regulatory levy and not a tax.

5. Other Doctrines and Principles

[1031] Many of the intervenors have asked this Court to take into account, in determining whether the federal government has jurisdiction with respect to the *Act*, other doctrines and principles including the double aspect doctrine, cooperative federalism, the existence of international agreements, the need for certainty, the living tree doctrine, the honour of the Crown and responsibilities to First Nations pursuant to s 35 of the *Constitution Act, 1982*. All of these doctrines and principles may be important to, although not determinative of, federal jurisdiction under the national concern doctrine. Each, however, must be considered and weighed in coming to a conclusion that the federal government does have jurisdiction with respect to the *Act* pursuant to the national concern doctrine.

a. *The Double Aspect Doctrine and Cooperative Federalism*

[1032] The Canadian Public Health Association, International Emissions Trading Association and Athabasca Chipewyan First Nation ask us to take into account the double aspect doctrine and principles of cooperative federalism.

[1033] Certain regulatory matters may have a "double aspect" in that the provincial and federal levels of government each have exclusive jurisdiction over different aspects of the matter. The Supreme Court in ***Reference re Securities Act***, 2011 SCC 66, para 66, [2011] 3 SCR 837 said that the double aspect doctrine "allows for the concurrent application of both federal and provincial legislation, but it does not create concurrent jurisdiction over a matter". In fact, the Supreme Court has repeatedly found that securities regulation, as a broad regulatory matter, has a double aspect: ***Multiple Access Ltd v McCutcheon***, [1982] 2 SCR 161, 193, 138 DLR (3d) 1; ***Reference re Securities Act; Reference re Pan-Canadian Securities Regulation***. In ***Multiple Access***, the majority of the Court upheld the applicability of both federal and provincial statutes addressing different aspects of insider trading. The federal legislation was upheld under peace, order and good government (although not the national concern doctrine specifically), while the provincial legislation was upheld under provincial jurisdiction over property and civil rights in the province.

[1034] While the Supreme Court has increasingly favoured the promotion of cooperative federalism over plenary jurisdiction, particularly in the area of environmental regulation, the Court still maintains a distinction between matters that are subject to concurrent jurisdiction, and those

subject to exclusive jurisdiction. Matters of exclusive jurisdiction may still be subject to "incidental effects" by another level of government, double aspect, or ancillary effect; for instance, a valid provincial law can have an incidental effect on federal powers, without being a law in relation to that federal power: ***Quebec (AG) v Canadian Owners and Pilots Association***, 2010 SCC 39, para 20, [2010] 2 SCR 536.

[1035] Aside from incidental effects, matters of exclusive federal jurisdiction will be protected from provincial encroachment under the doctrines of interjurisdictional immunity and federal paramountcy. While application of interjurisdictional immunity is rare in contemporary jurisprudence, in the past ten years the Supreme Court has applied interjurisdictional immunity to protect federal powers over aeronautics and aerodromes in ***Canadian Owners and Pilots Association***, and inter-provincial communications: ***Rogers Communications Inc v Châteauguay (City)***, 2016 SCC 23, [2016] 1 SCR 467. Federal paramountcy is favoured over interjurisdictional immunity to protect federal powers: ***Canadian Western Bank v Alberta***, 2007 SCC 22, para 4, [2007] 2 SCR 3, as it only applies where federal and provincial statutes come into legislative conflict, and not in the absence of federal jurisdiction: ***Orphan Well Association v Grant Thornton***, 2019 SCC 5, para 66, 430 DLR (4th) 1.

[1036] I have already found that the national concern doctrine engages exclusive jurisdiction in the federal government over a different aspect of the matter of carbon pricing than the provincial government: the use of minimum national standards, as a backstop to provincial legislation, necessary and integral to the stringency pricing of greenhouse gas emissions. That specifically engages the double aspect doctrine, allowing the application of both federal and provincial legislation. This does not create plenary nor concurrent jurisdiction. It is an example of cooperative federalism. (See: Andrew Leach & Eric M Adams, "Seeing Double: Peace, Order and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction," (2020) 29:1, Const Forum Const 1,6.

b. International Agreements

[1037] Canada, British Columbia, Assembly of First Nations, and Canadian Public Health Association submit that weight should be accorded to application of the national concern doctrine as a result of Canada's international agreements and commitments.

[1038] The Supreme Court has been clear that merely because a matter is the subject of an international agreement is not sufficient to find that matter of national concern under peace, order and good government. However, in both ***Crown Zellerbach*** and ***Ontario Hydro***, international agreements were relevant to the Court's national concern analysis. In particular, the Court considered whether the federal definition of the subject matter aligns with the definition generally accepted by the international community, as well as the obligations imposed on Canada by the agreements in relation to regulation of that matter.

[1039] International treaty obligations may be considered indicative of the inter-provincial or international nature of the matter in question, as well as provincial inability to regulate that matter. Numerous constitutional scholars have endorsed this approach to the role of international agreements in the peace, order and good government national concern analysis: see for example Elizabeth DeMarco, Robert Rouliffe and Heather Landymore, "Canadian Challenges in Implementing the *Kyoto Protocol*: A Cause for Harmonization," (2004) 42 Alta L Rev 209; Nigel D Bankes & Alastair R Lucas, "*Kyoto,* Constitutional Law and Alberta's Proposals," (2004) 42 Alta L Rev 355; and Peter W Hogg, "Constitutional Authority over Greenhouse Gas Emissions," (2009) 46: 2 Alta L Rev 507.

[1040] Although not expressly identified as a discrete indicator of singleness and indivisibility in ***Crown Zellerbach***, a common theme running through the national concern analyses in the leading Supreme Court decisions both before and after ***Crown Zellerbach*** is whether the matter is predominantly international or inter-provincial in its characteristics and implications. In earlier decisions, such as ***Johannesson*** and ***Munro***, the inherently "inter-provincial" nature of the matters in question: aeronautics and development of the National Capital Region was the central focus of the Court's national concern analysis.

[1041] Canada's international agreements and commitments favour, although do not determine, application of the national concern doctrine for federal jurisdiction.

c. Certainty

[1042] Although certainty is not expressly employed by any of the majority or dissenting judges in ***Crown Zellerbach***, ***Ontario Hydro***, or ***Hydro-Québec***, constitutional scholars Chris Rolfe, "Turning Down the Heat: Emissions Trading and Canadian Implementation of the *Kyoto Protocol"* (Vancouver: West Coast Environmental Law Research Foundation, 1998) and Philip Barton, "Economic Instruments and the *Kyoto Protocol:* Can Parliament Implement Emissions Trading Without Provincial Co-operation," (2002) 40: 2 Alta L Rev 417, have suggested that the certainty of a matter is relevant to the national concern analysis. Both advocate for recognition of greenhouse gas emissions as a matter of peace, order and good government national concern, in part on the basis that such emissions do not suffer from the same uncertainty as "toxic substances" with which the dissent took issue in ***Hydro-Québec***.

[1043] In ***Hydro-Québec***, the federal government retained broad discretion to add substances to the list of "toxic substances" over which it asserted regulatory control, such that there was considerable uncertainty as to what substances might ultimately fall within federal jurisdiction. By contrast, Rolfe and Barton argue that the sources of greenhouse gas emissions, while diverse, are well-established and precisely identifiable for regulatory purposes: Rolfe, 357; Barton, 429.

[1044] Barton's and Rolfe's view of the inherent "certainty" of greenhouse gas emissions as a candidate for federal jurisdiction under national concern is consistent with the importance of

"precision" and "specificity" in the analyses of both the majority and dissent in ***Crown Zellerbach*** and the dissent in ***Hydro-Québec***.

[1045] The certainty of specifically listing backstop jurisdictions in Schedule 1, 21 greenhouse gases in Schedules 2 and 3, CO_2 equivalence for each greenhouse gas, and stringency percentages for listed industries, favours the finding of national concern on this basis.

d. The Living Tree Doctrine

[1046] Climate Justice Saskatoon and Assembly of First Nations argue that the application of the living tree doctrine favours a broad interpretation of the national concern branch of peace, order and good government.

[1047] Assembly of First Nations says the "Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life": ***Reference re Same-Sex Marriage***, 2004 SCC 79, para 22, [2004] 3 SCR 698. It says reliance upon the doctrine is necessary to fully pursue the goal of reconciliation and the Crown's fiduciary duty to First Nations due to the disproportionate impact upon them of climate change and greenhouse gas emissions. It argues that these impacts on First Nations are unique and the *Act* should be interpreted generously so as to ameliorate the effect of greenhouse gas emissions on Indigenous peoples.

[1048] Climate Justice Saskatoon, referencing ***Re Residential Tenancies Act, 1979***, [1981] 1 SCR 714, 723, 123 DLR (3d) 554, submits:

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a 'living tree', in the expressive words of Lord Sankey in *Edwards and Others v Attorney-General for Canada and Others* [1930] AC 124, 136, [1930] 1 DLR 98, 106-107.

[1049] The Supreme Court of Canada in ***Hunter v Southam Inc***, [1984] 2 SCR 145, 155, 11 DLR (4th) 641 quoted Professor Paul Freund that courts should "not...read the provisions of the Constitution like a last will and testament lest it become one," and said that constitutional interpretations should be "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."

[1050] These intervenors submit the best interpretation of the living tree doctrine is that both Parliament and the provincial legislatures must have jurisdictional room to act in relation to the environment, and the present *Act* with its backstop provisions allowing provincial legislation to have primacy is the best application of this doctrine. I agree.

e. Honour of the Crown and Section 35

[1051] Both Assembly of First Nations and The Athabasca Chipewyan First Nation support the provisions of the *Act* on the basis of honour of the Crown and section 35(1) of the *Constitution Act, 1982*:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[1052] Assembly of First Nations submits that a constitutional onus exists, based on the honour of the Crown, for the federal government to make efforts to mitigate the effects of greenhouse gas emissions and climate change on First Nations in accordance with globally and nationally accepted standards. It argues that in implementing the *Act,* the federal government has attempted to ensure the constitutional obligation owed to First Nations to act honourably in all matters by attempting to mitigate the inter-provincial harms which would occur if any province imposes diminished standards in this area. The Crown's powers must be reconciled and understood according to the constitutionally protected rights of Indigenous peoples and the *Act* is essential to limit adverse impact on traditional aboriginal rights including but not limited to hunting, fishing and gathering.

[1053] The Athabasca Chipewyan First Nation says that greenhouse gas emissions and climate change imperil the natural environment in which many First Nations exist. It argues that but for the *Act*, emissions of greenhouse gases would be higher and infringe, or possibly extinguish, First Nations rights.

[1054] These intervenors submit that upholding the constitutionality of the *Act* is essential to enforcement of the honour of the Crown's duties pursuant to s 35 of the *Constitution Act, 1982.* While the undoubted importance of these constitutional duties and responsibilities is acknowledged, I query their direct impact on the quite specific issues to be resolved in this reference.

VIII. Conclusion

[1055] I have determined that the *Act* is constitutional and *intra vires* the government of Canada pursuant to the national concern branch of the federal government's residual peace, order and good government jurisdiction under the preamble to s 91 of the *Constitution Act, 1867.*

[1056] In coming to that conclusion, I have made the following findings:

1. the pith and substance or essential subject matter of the *Act* is:

   > To effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national

standards necessary and integral to the stringent pricing of greenhouse gas emissions;

2. provincial legislatures have the authority to enact laws with respect to greenhouse gas emissions pursuant to ss 92(10), (13) and (16) of the *Constitution Act, 1867*. The *Act* explicitly confirms that power;

3. section 92(A) of the *Constitution Act, 1867* does not limit any pre-existing powers of Parliament, including the federal peace, order and good government residual power;

4. the characterization of the *Act*, as I have set it out, is a new matter that did not exist at the time of Confederation, or is a matter that has since become of national concern;

5. the characterization of the *Act*, as I have set it out, demonstrates both functionally and conceptually a singleness, indivisibility, and distinctiveness from provincial heads of power to constitute a matter of national concern;

6. the characterization of the *Act*, as I have set it out, confers exclusive power, but neither plenary power nor concurrent jurisdiction, in the federal Parliament;

7. the *Act* accomplishes the goal of having as small a scale as possible of impact on provincial jurisdiction;

8. effective and stringent carbon pricing cannot be realistically satisfied by co-operative provincial action, due to the failure or unwillingness of a province to adequately address greenhouse gas emissions, with resulting adverse effect on other provinces;

9. the *Act* does not simply aggregate subjects of provincial jurisdiction to amount to a national concern;

10. the *Act* addresses carbon leakage within the country, inter-provincially, and it is the balance of efforts nationally and internationally which is essential to Canada's overall fight against significant climate change;

11. I have not relied upon the emergency branch of peace, order and good government, nor the taxation power vested in the federal government under s 91(3) of the *Constitution Act, 1867*, in arriving at my conclusion in this matter; and

12. I have taken into consideration and rely upon the double aspect doctrine, co-operative federalism, the effect of international agreements, the need for certainty, and the living tree doctrine in coming to my conclusion in this matter. I have also noted the duty and responsibility imposed by the honour of the Crown, and s 35 of the *Constitution Act, 1982*.

Special Hearing heard on December 16, 17 and 18, 2019

Opinion filed at Edmonton, Alberta
this 24 day of February, 2020

Feehan J.A.

Appearances:

PA Gall, QC/LC Enns, QC/RL Martin (no appearance)/SAA Dollansky
for the Appellant Her Majesty the Queen in right of Alberta

SM Telles-Langdon/CE Mohr/JN Goodridge/MC Matthews
for the Respondent Her Majesty the Queen in right of Canada

JM Hunter/O Ranalli
for the Intervenor Attorney General of Ontario

WE Gould (no appearance)
for the Intervenor Attorney General of New Brunswick

JG Morley/JD Hughes
for the Intervenor Attorney General of British Columbia

PM McAdam, QC/AF Jacobson, QC
for the Intervenor Attorney General of Saskatchewan

JL Ginsberg/ARN McIntosh
for the Intervenor The David Suzuki Foundation

A Attaran/MS Hulse (no appearance)
for the Intervenor Athabasca Chipewyan First Nation

RBE Hallsor, QC
for the Intervenor Canadian Taxpayers Federation

LE DeMarco/JEO McGillivray
for the Intervenor International Emissions Trading Association

SVA Wuttke/ASR Williamson
for the Intervenor Assembly of First Nations

DMA Stack, QC/CD Ouellette
for the Intervenors SaskEnergy Incorporated; Saskatchewan Power Corporation

RA Dean
for the Intervenor Canadian Public Health Association

J Stockdale/TL Yee/LW Kowalchuk (no appearance)

for the Intervenors Climate Justice Saskatoon; National Farmers Union; Saskatchewan Coalition for Sustainable Development; Saskatchewan Council for International Cooperation; Saskatchewan Electric Vehicle Club; The Council of Canadians: Prairie and Northwest Territories Region; The Council of Canadians: Regina Chapter; The Council of Canadians: Saskatoon Chapter; The New Brunswick Anti-Shale Gas Alliance; and Youth of the Earth

Corrigendum of the Opinion

Corrections have been made to the following:

- Page 1, footnote 1, the date of "2109" has been changed to "2019";
- Page 20, paragraph 77, line 3, the word "adopting" has been changed to "adaptation";
- Page 40, paragraph 162, line 2, "1878" has been changed to "1886";
- Page 70, paragraph 281, line 4, the word "sphere" has been changed to "spheres";
- Page 148, footnote 495, line 4, the word "reclassification" has been changed to "classification";
- Page 223, footnote 839, "[1958]" has been changed to "[1988]";
- Page 228, footnote 856. The last line has been removed: "I am aware that Climate Justice advanced a section 7 *Charter* argument not presented to the Court of Appeal for Saskatchewan";
- Page 241, paragraph 927, line 3, the words "per year" have been removed;
- Page 247, paragraph 957, line 2, "(UK)" has been added after "*Alberta Act*"; and
- Page 247, paragraph 957, line 3, "(UK)" has been added after "*Constitution Act, 1930*".