Court File No: **38663 and 38781**

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

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

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

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

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

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(Title of Proceeding Continued on p. 2)

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(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

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

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

BETWEEN:

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-and-

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PART I – OVERVIEW AND FACTS

1. This case is not about whether action needs to be taken to reduce greenhouse gas emissions or the relative effectiveness of particular policy alternatives.[1] It is about (1) whether the federal *Greenhouse Gas Pollution Pricing Act* (the "Act") can be supported under the national concern branch of the POGG power; and (2) whether the "charges" imposed by the Act are valid as regulatory charges or as taxes. The answer to both questions should be no.

2. The provinces are fully capable of regulating greenhouse gas emissions themselves, have already done so, and continue to do so. Ontario has already decreased its greenhouse gas emissions by 22% below 2005 levels and has committed to a 30% reduction below 2005 levels by 2030 – the same target to which Canada has committed itself in the *Paris Agreement*.

3. The Act should not be upheld under the national concern doctrine. The regulation of greenhouse gas emissions lacks the necessary singleness, distinctiveness and indivisibility. Virtually every activity regulated by the provinces generates greenhouse gas emissions. Every provincial head of power could be impacted by granting Parliament the power to impose minimum (pricing) standards for greenhouse gas emissions. Giving Parliament so broad a power would seriously disrupt the balance of powers set out in the Constitution.

4. The "charges" the Act imposes are neither valid regulatory charges nor valid taxation. The Act and its legislative history make it clear that Parliament intended to regulate greenhouse gases, not authorize taxation. However, the funds raised by the "charges" lack the required nexus with the Act's regulatory purpose to be properly considered regulatory charges.

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[1] As the Ontario Court made clear, all parties agree that climate change is a real and pressing problem that must be addressed and that it is for governments and legislatures, not the courts, to decide how best to address that problem. Ontario Reasons at paras. 7, 55, and 109 (*per* Strathy CJO), 190 (*per* Hoy ACJO), and 192 (*per* Huscroft JA)

A. Greenhouse Gas Emissions Arise from Virtually Every Human Activity

5. "[Greenhouse gas] emissions come from virtually all aspects of Ontario's society and economy."[2] As Canada has publicly acknowledged, there are a wide range of activities in Ontario that produce greenhouse gas emissions, including: transportation; industry; buildings; land use, land use change and forestry; electricity; waste; and agriculture.[3]

6. Within each sector of the Ontario economy, there are a myriad of activities that generate greenhouse gas emissions. Within the transportation sector, the burning of diesel, gasoline, and propane by passenger and commercial vehicles, trains, vessels, and aircraft generate emissions. Greenhouse gas emissions from the transportation sector are influenced by the kinds of vehicles on the roads and the types of fuel those vehicles burn. Other factors can also influence emissions. The design and implementation of new infrastructure projects such as highway extensions, road and rail reconstruction, high speed rail, and mass transit projects also affect the greenhouse gas emissions emitted by Ontario's transportation sector.[4]

7. Within the industrial sector, many facilities produce greenhouse gas emissions from fuel combustion and industrial processes at those facilities. The production of cement, steel, chemicals, paper and wood products, ammonia, coal storage, lime production, and petroleum refining, and many other manufacturing processes all emit greenhouse gases.[5]

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[2] Ontario, *Ontario's Climate Change Update 2014* (2014)
[3] Canada, *Clean Growth and Climate Change* (26 October 2018)
[4] *Ontario's Climate Change Update 2014*, *supra*; Ontario, *Long Combination Vehicle (LCV) Program* (2009); Ontario, *Greener diesel regulation* (14 October 2015); Infrastructure Ontario, *Highway 401 Expansion Project* (2018); Ontario, *Ministry review of the Gardiner Expressway and Lake Shore Boulevard East reconfiguration environmental assessment* (22 June 2017); Infrastructure Ontario, *Regional Express Rail – Davenport Diamond Rail Grade Separation* (2018); Ontario, *High speed rail* (23 October 2017); Infrastructure Ontario, *Hurontario Light Rail Transit* (2017)
[5] *Ontario's Climate Change Update 2014*, *supra*; Ontario, *Report greenhouse gas (GHG) emissions* (20 March 2014; 13 September 2018)

8. Within the building sector, there are multiple sources of greenhouse gas emissions. Greenhouse gases are emitted when residential, commercial and institutional buildings burn fossil fuels to heat space and water. For example, residential buildings, schools, courthouses, laboratories, hospitals, museums, offices and warehouses all use fuels that lead to greenhouse gas emissions, including natural gas, fuel oil, and propane. Various other building systems, such as air conditioning, heating, ventilation, lighting, and operation of office equipment, use electricity which may have greenhouse gas emissions associated with generation.[6]

9. The building sector offers many regulatory opportunities to reduce greenhouse gas emissions. The deployment of existing and emerging technologies can affect building emissions from heating, including solar air and water heating, ground-source heat pumps, and district energy systems. How buildings are constructed, both in terms of materials and methods of construction, affect greenhouse gas emissions. For example, repurposing an existing building instead of building a new one can reduce emissions. Building with wood can reduce greenhouse gas emissions by avoiding the use of energy-intensive materials. Even the proper management, tracking, and reuse of excess soil produced during construction projects can reduce greenhouse gas emissions. The density of new building and the compactness of land use can affect the amount of greenhouse gas emissions produced in newly developed or in redeveloped areas.[7]

10. The land use, land use change, and forestry sector produce greenhouse gas emissions. Forests and other lands can absorb and store carbon for long periods, acting as carbon sinks. If those lands are changed to agricultural or other uses, there can be climate impacts. Reforesting

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[6] *Ontario's Climate Change Update 2014*, *supra*; Ontario, *2014 Energy consumption and greenhouse gas emission report* (15 March 2016)

[7] Ontario, *Responding to the Challenge of Climate Change* (2017); Ontario, *The Ontario Culture Strategy: Telling our stories, growing our economy* (20 July 2016); Ontario, *Building with wood* (1 November 2017); Ontario, *Handling excess soil* (16 April 2018)

areas can increase the amount of carbon absorbed and stored. The forestry industry can reduce its significant greenhouse gas emissions by using, for example, waste-wood biomass from the wood manufacturing process and black liquor from chemical pulping to generate electricity and heat.[8]

11. Ontario's electricity sector has greatly reduced its greenhouse gas emissions due to waterpower and nuclear generation and the phasing out of coal-fired generation.[9]

12. The waste sector can also contribute significantly to greenhouse gas emissions. If food and organic waste breaks down in an oxygen-deprived environment, it creates methane, a greenhouse gas. Thus, the regulation of landfill sites affects greenhouse gas emissions. Keeping food and organic waste out of landfills can reduce emissions. Similarly, producing renewable natural gas from such waste can reduce emissions by reducing reliance on more energy-intensive fossil fuels. The production (including packaging), distribution and consumption of food, and the collection and processing of food and organic waste can all affect greenhouse gas emissions. Production standards for other goods can also affect greenhouse gas emissions from waste, as long-lasting, reusable and easily recyclable products can produce less waste.[10]

B. <u>There Are a Wide Range of Approaches to Reducing Greenhouse Gas Emissions</u>

13. Contrary to the findings of the Saskatchewan majority, carbon pricing is not essential to reducing greenhouse gas emissions.[11] Rather, as Canada acknowledges, there are a wide variety of non-pricing-based policy measures that can be used to reduce greenhouse gas emissions.[12] The Working Group on Specific Mitigation Opportunities, a federal-provincial-territorial

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[8] *Ontario's Climate Change Update 2014*, *supra*; Ontario, *Afforestation* (16 June 2017); Ontario, *Forest sector's use of fossil fuels* (16 June 2017)
[9] *National Inventory Report 2018, Table A13-7, Electricity Generation and GHG Emission Details for Ontario*
[10] Ontario, *Landfill gas capture: a guideline on the regulatory and approval requirements for landfill gas* (18 May 2016); Ontario, *Food and Organic Waste Framework* (30 April 2018); Ontario, *Waste management* (28 November 2014)
[11] Saskatchewan Reasons at para. 147 (*per* Richards CJS)
[12] Canada, *Actions to reduce emissions* (23 October 2018)

working group mandated with "developing a broad menu of policy options to reduce emissions across all sectors of Canada's economy," set out a wide variety of non-pricing-based policy options that can reduce greenhouse gas emissions over all major economic sectors.[13] These non-carbon pricing policy options are being used in Ontario and elsewhere throughout Canada.[14]

14. Internationally, while there is broad consensus about the importance of urgently addressing climate change, parties to the *Paris Agreement* are ***not*** required to implement carbon pricing as part of their efforts to reduce greenhouse gas emissions. Article 6.8 of the *Paris Agreement* specifies that the Parties "recognize the importance of integrated, holistic and balanced non-market approaches being available to the Parties."[15] The Act therefore imposes standards that are more stringent than the requirements of the *Paris Agreement*.

C. Ontario Has Taken and Will Continue to Take Strong Actions Across Its Economy and Society to Address Greenhouse Gas Emissions

15. Ontario agrees with Canada that climate change is real and needs to be addressed. That is why Ontario has taken steps to implement a made-in-Ontario plan to protect the environment, reduce greenhouse gas emissions, and fight climate change. Ontario has set itself the goal of reducing Ontario's emissions by 30% below 2005 levels by 2030.[16]

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[13] Specific Mitigation Opportunities Working Group, *Final Report* (2016) at 5 and 10-11
[14] Ontario, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan* (29 November 2018) ("Environment Plan"); British Columbia, *Climate Leadership Plan* (August 2016) at 6; Alberta, *Climate Leadership Plan: Progress Report* (2017) at 2; Saskatchewan, *Prairie Resilience* (4 December 2017) at 6; Manitoba, *Climate and Green Plan* (2017) at 20; Quebec, *Québec in Action: Greener by 2020* (2012) at 23; New Brunswick, *Transitioning to a Low-Carbon Economy* (December 2016) at 12; Prince Edward Island, *Taking Action* (11 May 2018) at 13; Nova Scotia, *Towards a Greener Future* (January 2009) at 26; Newfoundland and Labrador, *Charting our Course* (2011) at 43; Yukon, *Climate Change Action Plan* (February 2009); Northwest Territories, *2030 NWT Climate Change Strategic Framework* (1 June 2018); Nunavut, *Climate Change Adaptation Planning: A Nunavut Toolkit* (March 2011)
[15] *Paris Agreement*, Article 6.8
[16] Environment Plan, *supra*

16. Ontario has already made significant progress towards this target. Indeed, Ontario was the first province to shut down coal-fired power plants, which led to the single largest reduction of greenhouse gas emissions anywhere across Canada (up to 30 Mt annually – the equivalent of taking seven million vehicles off the roads). As a result of this and other significant steps Ontario has already taken, Ontario's emissions have already fallen 22% below 2005 levels.[17]

17. Ontario is using a wide variety of regulatory tools to address greenhouse gas emissions. In the transportation sector, it is reducing emissions from heavy-duty vehicles and mandating greater use of clean fuels like ethanol.[18] In the building sector, it is taking further action to require more environmentally-friendly building standards and land use planning.[19] In the waste sector, it has enacted the *Resource Recovery and Circular Economy Act, 2016* to create a system of resource recovery and waste reduction that, among other things, will minimize greenhouse gas emissions. Ontario is also committed to working with residents and businesses to waste less food and divert food waste to beneficial reuse.[20]

18. In the industrial sector, Ontario has enacted its own emissions performance standards scheme which establishes total annual emissions limits for "covered facilities." The sectors governed by the Regulations are predominantly the same sectors covered by Part 2 of the Act.[21]

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[17] Environment and Climate Change Canada, *National Inventory Report 2018*, Table A11-12: 1990-2016 GHG Emission Summary for Ontario (2018)
[18] Environment Plan, *supra* at 7, 10, 21, 23-24, and 33; *Greener diesel regulation*, *supra*; *LCV Program*, *supra*
[19] Environment Plan, *supra* at 32; *Building Code Act, 1992*, SO 1992, c. 23; *Building Code*, O.Reg. 332/12; *Planning Act*, RSO 1990, c. P.13, ss. 2(s) and 16(14)
[20] *Resource Recovery and Circular Economy Act, 2016*, SO 2016, c. 12, Sched. 1, ss. 2(c); Environment Plan, *supra* at 39-44
[21] *Greenhouse Gas Emissions Performance Standards*, O Reg 241/19, s. 2(1)3 and Sch. 2 ("EPS Regulation"); *Greenhouse Gas Emissions: Quantification, Reporting and Verification*, O Reg 390/18, s. 1(1) ("Reporting Regulation"); *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, s. 3

19. Covered facilities that exceed their allowable emissions limit must either reduce their emissions or obtain compliance instruments for their excess emissions. Compliance instruments may be purchased from the government or facilities who have emitted less than their limit. Unlike the federal Act at issue in this appeal, under Ontario's regime, the funds collected will have to be deposited in a special purpose account and spent in a manner that has a nexus with greenhouse gas reduction.[22]

20. The emission limits under Ontario's scheme include a stringency factor to encourage Ontario industries to be energy efficient. The factor varies in its application to account for certain industries being trade-exposed, having particular practical difficulties in reducing emissions, or using significant shares of biomass as energy. For most of the covered sectors, the stringency factor will increase each year by 2% to 2022.

21. To avoid duplicate regulation, only the registration provisions of the scheme currently apply. The remainder will not apply until Canada removes Ontario from Part 2 of the Act.

D. The *Greenhouse Gas Pollution Pricing Act*

22. Despite recognizing that there are many non-pricing-based policy options available to combat climate change, the federal government insists that every jurisdiction in the Canadian federation put a price on carbon. The Act imposes a number of "charges" intended to place a federal price on greenhouse gas emissions in "listed provinces" the federal Governor in Council decides have not sufficiently priced greenhouse gas emissions.[23]

23. In deciding which provinces (or areas within provinces) to list, the Governor in Council must take into account, as the primary factor, the stringency of provincial ***pricing*** mechanisms for greenhouse gas emissions. The Act allows the Governor in Council to list provinces "for the

[22] EPS Regulation, *supra*, ss. 9-19; *Environmental Protection Act*, RSO 1990, c. E.19, s. 176.1
[23] *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12, Parts 1, 2, 3, and 5; *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186, ss. 3, 169, and 172(1) and Sch. 1

purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate."[24]

(1) Fuel Charges

24. Ontario already imposes a tax on fuels (as does Canada). Nonetheless, Part 1 of the Act imposes additional "charges" on fuels. Part 1 imposes "charges" on the delivery, use, bringing in, importation, production, or diversion of "fuel" and burning of "combustible waste" in "listed provinces." The Governor in Council can prescribe any substance, material, or thing as a "fuel" or "combustible waste" by regulation. The Act gives the Governor in Council virtually unfettered discretion to impose other "charges" on "fuel" and "combustible waste" by regulation.[25]

25. The Minister of National Revenue is required to distribute all fuel "charges" collected under Part 1 of the Act in respect of a listed province to the province itself, prescribed persons, persons of a prescribed class, persons meeting prescribed conditions, or a combination thereof.[26]

(2) Industrial Greenhouse Gas Emissions

26. Ontario's EPS Regulation creates emissions standards designed to achieve greenhouse gas emission reductions for certain industrial emitters. Despite the ability of the provinces to impose emissions standards themselves, Part 2 of the Act imposes "charges" on industrial greenhouse gas emitters. The Governor in Council has prescribed criteria for determining which facilities in listed provinces are "covered facilities" subject to Part 2 (the federal Minister of the Environment can also designate facilities that opt-in to the Act). The Governor in Council can also determine what gases are "greenhouse gases."[27]

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[24] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 166(2)-(3) and 189(1)-(2)
[25] *Fuel Tax Act*, RSO 1990, c. F.35; *Excise Tax Act*, RSC 1985, c. E-15, Parts III and VI and Schs. I and II.1; *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 3, 17-27, and 166 and Sch. 2
[26] *Greenhouse Gas Pollution Pricing Act*, *supra*, s. 165
[27] *Environment Plan*, *supra* at 23-26; *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 169, 172, 190, and 192 and Sch. 3; *Output-Based Pricing System Regulations*, SOR/2019-266

27. Persons responsible for covered facilities must register with and submit regular reports to the federal Minister of the Environment. A covered facility that emits (or is deemed by the regulations to have emitted) more greenhouse gases than permitted by the "emissions limit" that applies to it during a particular compliance period established by the Governor in Council must remit "compliance units" to the Minister or pay an "excess emissions charge" to Her Majesty in right of Canada. A covered facility that emits less greenhouse gases than permitted must be issued "surplus credits" by the Minister which can be used as compliance units. The Governor in Council can create other means of acquiring, trading, or recognizing compliance units.[28]

28. The Governor in Council may set emissions limits and increase excess emissions charges beyond the levels set out in the Act by regulation.[29] The Minister of National Revenue is required to distribute all "excess emissions charge" payments collected under Part 1 of the Act in respect of a listed province to the province itself, prescribed persons, persons of a prescribed class, persons meeting prescribed conditions, or a combination thereof.[30]

29. The Act attempts to force all provinces to adopt the federal government's preferred policy approach to combatting greenhouse gases – putting a price on carbon. Alternative approaches that do not involve carbon pricing are not acceptable to Canada, even if they meet or exceed Canada's own stated reduction targets. The Governor in Council has listed Ontario as a "listed province" under both Parts 1 and 2 of the Act.

30. Canada plans to use over 90% of the revenues raised by Part 1 of the Act to pay *per capita* flat-rate refundable tax credits to individuals in listed provinces. The *Budget Implementation Act, 2018, No. 2* amended the *Income Tax Act* to provide a refundable "Climate

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[28] *Greenhouse Gas Pollution Pricing Act, supra*, ss. 169, 171, and 173-75
[29] *Greenhouse Gas Pollution Pricing Act, supra*, ss. 191 and 192 and Sch. 4
[30] *Greenhouse Gas Pollution Pricing Act, supra*, s. 188

Action Incentive" credit individuals can claim on their 2018 and subsequent tax returns. Despite its name, the credit amount is not based on whether an individual has taken any action to mitigate climate change and need not be spent on such mitigation. The amount of the credit is based solely on an individual's province of residence, number of dependents, and whether the individual lives in a census metropolitan (i.e., urban) or rural area.[31]

31. The remainder of the revenues raised by Part 1 will be paid out to small and medium-sized businesses, municipalities, educational institutions, hospitals, non-profit organizations, and Indigenous communities under yet-to-be-decided formulae. The federal government has not yet stated how it intends to spend the revenues raised by Part 2.[32]

PART II – QUESTIONS IN ISSUE

32. The questions in issue are:

1) Does the Act fall within the national concern branch of the peace, order and good government ("POGG") power?
2) Does the Act impose valid regulatory charges or valid taxation?

Ontario submits that the answer to both of these questions is no.

PART III – ARGUMENT

A. The Pith and Substance of the Act is to Regulate Greenhouse Gas Emissions

33. In determining whether a law is a valid exercise of Parliament's legislative power, a reviewing court must first examine the law's purpose and effect to identify its true subject matter or pith and substance. Having determined the true nature of the law, the court then examines

[31] *Budget Implementation Act, 2018, No. 2*, 2018, c. 27, s. 13
[32] Canada, Department of Finance, "Backgrounder: Ensuring Transparency" (23 October 2018); Canada, *Ontario and pollution pricing* (11 November 2018)

whether the challenged legislation can be supported by any of the enacting jurisdiction's constitutional heads of power.[33]

34. The Ontario Court unanimously found that Canada's proposed definition of the Act's pith and substance as the "cumulative dimensions of greenhouse gas emissions" was "too vague and confusing, since GHGs are inherently cumulative and the 'cumulative dimensions' are undefined." Instead, the majority held the Act's pith and substance was "establishing minimum national standards to reduce greenhouse gas emissions" while the concurring judge held it was "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."[34] The majority in Saskatchewan held it was "the establishment of minimum national standards of price stringency for GHG emissions."[35]

35. As Justice Huscroft pointed out in dissent in Ontario, however, both definitions beg the question. The majority's definition leaves unanswered the key question for classification purposes – minimum standards of what? Canada can of course set minimum standards for matters that fall within its jurisdiction but the very question at issue is ***whether*** the Act falls within federal jurisdiction. The concurring judge, on the other hand, like the Saskatchewan majority, conflates the ***means*** Parliament has adopted to achieve its goal with the ultimate purpose Parliament seeks to achieve.[36]

36. Both definitions also fail to take into account the breadth of the Act. The Act's Preamble sets out the breadth of its purpose – Parliament intended to take "***comprehensive*** action to reduce

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[33] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 86, [2018] 3 SCR 189; *Reference re Securities Act*, 2011 SCC 66 at paras. 63-65, [2011] 3 SCR 837; *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 15, [2000] 1 SCR 783

[34] Ontario Reasons at paras. 74 and 77 (*per* Strathy CJO), 165-66 and 187 (*per* Hoy ACJO), and 209-10 and 227 (*per* Huscroft JA dissenting)

[35] Saskatchewan Reasons at para. 125 (*per* Richards CJS)

[36] Ontario Reasons at paras. 211-12 and 224-26 (*per* Huscroft JA dissenting)

emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change."[37] The Act's proposed effects are similarly comprehensive. All "fuels" (i.e., any "substance, material, or thing" prescribed by the Governor in Council) sold, consumed, produced, or imported into Canada can be subject to the "charges" imposed by Part 1. Any facility that meets prescribed criteria can be required to participate in the emissions trading scheme imposed by Part 2, including having to purchase or acquire compliance certificates for any "greenhouse gases" it emits (i.e., any gas prescribed by the Governor in Council), report regularly whatever information the Governor in Council prescribes to the federal Minister, and subject itself to detailed compliance requirements.[38]

37. Parliament's decision that provinces must regulate greenhouse gas emissions in the way Parliament thinks best (no matter how effective other, non-price-based mechanisms might be) or risk having Canada impose charges on virtually every activity that takes place in those provinces belies the narrow definitions of the Act's pith and substance in the Courts below. The Act is not limited to setting minimum standards for greenhouse gas reductions. Nor does it only establish minimum pricing standards to the extent they are ***necessary*** to reduce greenhouse gas emissions. A province that, like Ontario, achieves significant greenhouse gas reductions through non-pricing-based mechanisms would not satisfy the requirements of the Act even if it achieved greater reductions than provinces that do adopt carbon pricing.

38. The Act's pith and substance is simpler: the regulation of greenhouse gas emissions.[39]

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[37] *Greenhouse Gas Pollution Pricing Act*, *supra*, Preamble [Emphasis added]
[38] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 3, 166(1)(a), 169, 171-74, 190-92, 197-98, and 203. See e.g. SOR/2018-213 (listing 38 different industries that can be required to participate in the output-based emissions trading scheme); and *Greenhouse Gas Emissions Information Production Order*, SOR/2018-214 (listing 19 different industries that must report a wide range of information to the federal Minister).
[39] Ontario Reasons at para. 213 (*per* Huscroft JA dissenting)

39. Canada itself initially argued that the "regulation of greenhouse gas emissions" was the matter that should be found to be a matter of federal jurisdiction under the national concern doctrine. It added the qualifier "cumulative" to attempt to limit the scope of its proposed new power in response to Saskatchewan and Ontario's criticisms of it but, as both Courts below held, that qualifier does nothing to substantively limit the scope of the claimed new federal head of power.[40]

40. Regardless of how the Act's pith and substance is characterized, it cannot be supported by the national concern doctrine because the regulation of greenhouse gas emissions is not a matter suitable for federal regulation under that doctrine.

B. Regulating Greenhouse Gas Emissions is Not an Appropriate Matter to Add to the List of Enumerated Federal Powers Through the National Concern Doctrine

41. Reliance on the national concern doctrine to support federal legislation has "the effect of adding by judicial process new matters or new classes of matters to the federal list of power."[41] In effect, recognizing a new matter of national concern ***permanently*** expands s. 91 of the *Constitution Act, 1867*. As a result, great care must be taken to ensure the proposed new matter is one that is appropriate to assign to exclusive federal jurisdiction on a permanent basis. It is not sufficient to demonstrate that a matter is of national concern in the colloquial sense – in our federation, many matters of the highest public importance (health care, education, social assistance, etc.) fall within provincial, not federal, jurisdiction.[42]

42. Regulating greenhouse gas emissions, however formulated, is not a matter suitable for permanent federal regulation as a matter of national concern. It lacks the necessary singleness,

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[40] Ontario Reasons at para. 74 (*per* Strathy CJO) and 196 (*per* Huscroft JA dissenting); Saskatchewan Reasons at paras. 133-38 (*per* Richards CJS) and 424-26 (*per* Ottenbreit and Caldwell JJA dissenting)
[41] *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 458
[42] Ontario Reasons at paras. 217-23 (*per* Huscroft JA dissenting)

distinctiveness, and indivisibility. Conferring Parliament jurisdiction over it would radically alter the balance of the Canadian federation.

(1) The Proper Test for Determining When a Matter Is Appropriate to be Assigned to Federal Jurisdiction Under the National Concern Doctrine

43. This Court and the Privy Council have repeatedly cautioned that the national concern doctrine presents a serious threat to the federal structure of the Constitution, if not carefully circumscribed.[43] In the present day, with the increasingly interconnected nature of modern life, the national concern doctrine should be applied with even greater caution. The criteria articulated by this Court to determine whether a matter is suitable for federal regulation as a matter of national concern should be interpreted in light of their purpose – limiting the scope of the national concern branch rather than expanding it.[44]

44. As set out in greater detail below, none of the various proposed formulations of a new matter meet the existing *Crown Zellerbach* test. This reference, however, provides the Court an opportunity to modernize the test. Drawing on developments in the analogous general trade and commerce power (which this Court has considered more recently than the national concern doctrine), Ontario submits that this Court should refine the national concern test in the following two ways: (1) by having regard to whether the matter at issue is ***qualitatively*** distinct from provincial matters; and (2) by restricting the "provincial inability" factor to matters of ***jurisdictional*** inability.

45. Our Constitution is a federal one. Under the Constitution, Parliament and the provinces are coequal in their respective spheres. Neither is subordinate to the other. The powers of the Legislature of Ontario are not granted by the Parliament of Canada, and they cannot be taken

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[43] *Ontario (AG) v. Canada (AG) (Local Prohibition)*, [1896] AC 348 at 360-61 (PC); *Anti-Inflation Reference*, *supra* at 443-45 and 458; *R. v. Hydro-Québec*, [1997] 3 SCR 213 at para. 67

[44] Ontario Reasons at para. 223 (*per* Huscroft JA dissenting); Saskatchewan Reasons at para. 420 (*per* Ottenbreit and Caldwell JJA dissenting)

away, altered or controlled by the Parliament of Canada.[45] Only a constitutional amendment passed with the consent of at least seven provinces with at least fifty percent of the aggregate provincial population can do so.[46] Courts should therefore show great caution before recognizing a permanent new head of federal power under the national concern doctrine.

(i) The National Concern Doctrine Should Only Apply to Matters that are ***Qualitatively*** Distinct from Matters of Provincial Jurisdiction:

46. The third *Crown Zellerbach* factor asks, drawing on Justice Beetz's analysis in the *Anti-Inflation Reference*, whether the matter a court is considering transferring to federal jurisdiction under the national concern doctrine has attained the required degree of "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[47] When considering whether a proposed matter of national concern is sufficiently distinct from provincial matters to warrant transfer to exclusive federal jurisdiction, a Court should consider whether the matter is ***qualitatively*** distinct from provincial heads of power.

47. The importance of qualitative distinctiveness has been repeatedly recognized by this Court in delineating the scope of the s. 91(2) general trade and commerce power given the need to ensure that power is not interpreted so broadly as to eviscerate provincial jurisdiction.[48]

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[45] Saskatchewan Reasons at para. 216 (*per* Ottenbreit and Caldwell JJA dissenting); Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed. (Toronto: Carswell, 2007) at s. 5.1(a), "Federalism"; *Hodge v The Queen* (1883), 9 App Cas 117 at 132 (PC); *St Catherine's Milling and Lumber Co v R* (1888), 14 App. Cas. 46 at 57-60 (PC); *Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General),* [1892] AC 437 at 441-44 (PC); *Re Initiative and Referendum Act*, [1919] AC 935 at 941-42; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 55-60

[46] *Constitution Act, 1982,* Part V, s. 38(1)

[47] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 432 ; *Anti-Inflation Reference, supra* at 458

[48] *Canada (AG) v. Canadian National Transportation, Ltd.*, [1983] 2 SCR 206 at 266-67; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641 at 661-62; *Securities Reference, supra* at paras. 70-90; *Pan-Canadian Securities Reference*, *supra* at paras. 100-02

48. The concerns that led this Court to require there to be a ***qualitative*** difference between matters suitable for regulation under the general trade and commerce power and matters that fall within provincial jurisdiction apply with even greater force to the national concern power.[49] Unlike the general trade and commerce power which s. 91(2) expressly confers on Parliament and which therefore must have at least some minimum content, the POGG power (including the national concern doctrine) is a residual and exceptional power. Unlike Parliament's enumerated powers which apply "notwithstanding" the powers conferred on the provinces, the POGG power only applies "in relation to all Matters ***not coming within*** the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[50] The national concern doctrine therefore should be more, rather than less, carefully circumscribed than the general trade and commerce power.

49. Making it clear that the reference to distinctiveness in the third *Crown Zellerbach* factor refers to a ***qualitative*** difference would ensure that courts will not find a matter has become distinct from provincial matters simply because the ***quantitative*** nature of the matter – its scale or level of importance – has increased. Important matters are not by definition federal matters under our Constitution. On the contrary, some of the most important matters facing previous generations such as industrial regulation in the Great Depression and inflation in the 1970s have been found ***not*** to be suitable for federal regulation as matters of national concern.[51]

50. The kinds of matters that have been held to fall under the national concern branch of POGG have been qualitatively distinct from matters regulated by the provinces. They often have

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[49] Saskatchewan Reasons at paras. 407-08 (*per* Ottenbreit and Caldwell JJA dissenting)
[50] See K Lysyk, "The Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531 [Emphasis added]
[51] *Canada (AG) v. Ontario (AG) (Labour Conventions)*, [1937] AC 326 at 350-53; *Anti-Inflation Reference*, *supra* at 443-45 and 458

a close link to other, pre-existing federal powers. For example, the National Capital Region is the administrative centre for all federal governmental matters.[52] Nuclear power is closely tied to matters of national defence and can cause fundamentally different kinds of harm than other sources of power.[53] The regulation of marine pollution, a narrow and well-defined activity of "dumping […] waste in waters, other than fresh waters, within a province," is closely tied to Parliament's existing jurisdiction over offshore and international waters, navigation, and fisheries.[54] Aeronautics as a whole is inextricably bound up with international and interprovincial transport.[55]

51. In contrast, matters that have been rejected under the national concern doctrine tend to be ***qualitatively*** indistinguishable from existing provincial matters, even though they may have reached a ***quantitative*** scale of importance such that Parliament wishes to impose its will on the provinces. For example, in the *Anti-Inflation Reference*, the federal Act purported to implement wage and price controls across businesses and individuals in the provinces, to curb inflation. This

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[52] Moreover, s. 16 of the *Constitution Act, 1867* gives the power of selecting the site of the capital to the Queen, a power which this Court in *Munro* held "would now be exercisable by Her Majesty in the Right of Canada," and could be exercised by means of an Act of Parliament "in which Her Majesty acts with the advice and consent of the Senate and House of Commons of Canada": *Munro v. National Capital Commission*, [1966] SCR 663 at 669-71

[53] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 340 (*per* Lamer CJC), 379-80 (*per* LaForest J), and 425-27 (*per* Iacobucci J dissenting)

[54] Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 L. & Contemp. Probs. 121 at 136. Temperance does not fit so easily into this proposed "qualitatively federal" trend, but the *Russell* case is an anomaly, aptly characterized by Beetz J. in the *Anti-Inflation Reference* as a case with a "chequered" history, one that was "not easy to reconcile with the *Local Prohibition* case": *Anti-Inflation Reference*, *supra* at 453-57

[55] *Johannesson v. West St. Paul (Municipality)*, [1952] 1 SCR 292 at 318-19 (*per* Estey J) and 326-27 (*per* Locke J)

Court held it could not do so because inflation was not qualitatively distinct from matters that fall within provincial jurisdiction: "It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction."[56] Similarly, "toxic substances" and "the environment" have been found to be too broad and amorphous to be recognized as matters of national concern. There is nothing that qualitatively separates them from matters the provinces can regulate.[57]

(ii) "Provincial Inability" Should be Limited to Provincial ***Jurisdictional*** Inability:

52. The fourth *Crown Zellerbach* factor (the "provincial inability" test) looks at whether the provinces are unable to effectively regulate a matter as evidence of whether it has become a matter of national concern. It is important to note that the provincial inability test is not itself determinative of whether a matter is suitable for federal regulation under the national concern doctrine. It is only one factor to consider in determining "whether a matter has attained the required degree of singleness, distinctiveness, and indivisibility" required to satisfy the first half of the national concern test. Even if that part of the test is met, it is still necessary to show that the proposed new matter of national concern has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[58]

53. The provincial inability test cannot mean that there is "provincial inability" whenever a province's decision not to exercise its undoubted jurisdiction may have an impact on other provinces. Interpreting the test so broadly would unduly fetter provincial sovereignty – the power to act must also include the power to choose not to act or to act in a different manner.

54. Instead, Ontario submits that the "provincial inability" test should be seen as referring to provincial ***jurisdictional*** inability. Drawing again on this Court's jurisprudence under the general

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[56] *Anti-Inflation Reference*, *supra* at 437 (*per* Ritchie J.) and 459-59 (*per* Beetz J.)
[57] *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J dissenting) and 115-16 (*per* La Forest J)*; Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63-65
[58] *Crown Zellerbach*, *supra* at 432

trade and commerce power, the provincial inability test should ask "whether [the matter] is of such a nature that provinces, acting alone or in concert, would be ***constitutionally incapable*** of enacting it."[59] To demonstrate that a matter "is genuinely national in importance and scope," rather than merely an aggregation of provincial jurisdiction, "the situation must be such that if the federal government were not able to legislate, there would be a constitutional gap." As "such a gap is constitutional anathema in a federation," the incapacity of the provinces to act legitimizes the transfer of jurisdiction to the federal government.[60]

55. Systemic risk in the securities industry presents a good example of a matter the provinces are ***incapable*** of regulating without federal assistance. Regulating systemic risk ***requires*** simultaneously monitoring the actions of financial actors across multiple provinces in order to detect, identify and mitigate risk to national capital markets. Systemic risks are not merely an accumulation of local risks which the provinces working together could regulate. Rather, they are ***qualitatively*** different. Systemic risks are "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system." Systemic risks are risks to the market itself and addressing them requires the ability to issue orders that can quickly take effect in multiple jurisdictions across Canada.[61]

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[59] *Securities Reference*, *supra* at para. 80; Saskatchewan Reasons at paras. 413-14 (*per* Ottenbreit and Caldwell JJA dissenting)

[60] *Securities Reference*, *supra* at para. 83

[61] *Securities Reference*, *supra* at paras. 102-05, 112-17, and 123-25; *Pan-Canadian Securities Reference*, *supra* at paras. 106-07, 111-12, and 115-16; Steven L. Schwarcz, "Systemic Risk" (2008) 97 Georgetown LJ 193 at 198-204 and 207; David Johnston, Kathleen Rockwell & Cristie Ford, "National and Coordinated Approaches to Securities Regulation" in David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation* (Markham: LexisNexis, 2014) at 681

56. Where, however, the provinces acting together can regulate a matter without assistance from the federal government, there is no provincial ***incapacity***. Whether the provinces should exercise their jurisdiction in a particular way is a policy question, not a legal one. The provincial inability test cannot mean that there is provincial inability whenever Parliament believes a national standard is desirable. By definition, no individual province can establish a national standard. Otherwise, any matter could be transformed into a matter of national concern by attempting to regulate it as a national standard.[62]

57. The fact that the inaction of one province (because of, for example, a difference in policy or practical constraints) could impact another province's interests cannot be determinative of jurisdiction under the division of powers. Following that logic to its natural conclusion would lead to absurd results in other areas of the law. For example, one province's decision not to increase its minimum wage could lead to greater job creation than other provinces and even lead to businesses relocating to the first province. This potential negative impact on other provinces does not transform the matter into one of national concern.

58. Inflation presents another example. At the time of the *Anti-Inflation Reference*, provinces facing low employment and reduced industrial demand would have had no ability, practically speaking, to take measures to reduce inflation, which was primarily driven by events and policy decisions in other provinces and outside Canada. But this did not render measures to control "inflation" (i.e., wage and price controls) a matter of national concern. Nor should it do the same for greenhouse gas emissions.

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[62] Ontario Reasons at paras. 228-32 (*per* Huscroft JA dissenting); Saskatchewan Reasons at paras. 439-40 (*per* Ottenbreit and Caldwell JJA dissenting)

(2) Greenhouse Gas Emissions are Not a Single, Distinct and Indivisible Matter Suitable for Federal Regulation Under the National Concern Doctrine

59. Even under the existing *Crown Zellerbach* test, greenhouse gas emissions (however formulated) are not a single, distinct, and indivisible matter suitable for federal regulation. The Courts below erred in finding that they were.

60. Marine pollution was recognized as a matter of national concern by the majority in *Crown Zellerbach*. But this was understood to be a narrow category of pollution closely tied to Parliament's existing jurisdiction over offshore and international waters, navigation, and fisheries. By contrast, greenhouse gas emissions encompass a wide variety of pollutants (to which the Governor in Council can add at any time) and are not closely tied to Parliament's existing heads of jurisdiction. More importantly, even if the list of substances which can act as greenhouse gases is distinct, the wide range of human activities that produce them is not. Unlike the well-defined and relatively narrow activity of "dumping […] waste in waters, other than fresh waters, within a province" at issue in *Crown Zellerbach*, Canada in the present case seeks jurisdiction to regulate all activities that give rise to greenhouse gas emissions.[63]

61. Justice La Forest, at that point writing for a minority of the Court, held that regulating pollution or the environment as a whole lacked the singleness, distinctiveness and indivisibility needed to be considered a matter of national concern. Trying to treat broad social, economic, and political issues like pollution or inflation as a single matter that only Parliament can regulate would have disrupted the federal/provincial balance of power. Nor were pollution and inflation novel issues uncontemplated at the time of Confederation, even if their scale has increased.[64]

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[63] *Crown Zellerbach*, *supra* at 417

[64] *Crown Zellerbach*, *supra* at 452 and 455; Gerald LeDain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall LJ 261 at 293; W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Cdn Bar Rev 597 at 604-06, 610-11, and 614

62. Justice La Forest's view that the environment was too diffuse a subject matter for Parliament to regulate under the national concern doctrine was adopted by the entire court in *Oldman River*. The entire Court again held that the environment was not a matter suitable for exclusive federal jurisdiction in *Hydro-Québec*. Finding the environment as a whole (or even just certain aspects of it such as pollution) to be an exclusively federal matter of national concern would pose too high a risk to the Constitution's carefully calibrated division of powers.[65]

63. *Hydro-Québec* found the definition of "toxic substances" in the *Canadian Environmental Protection Act* too broad for Parliament to regulate under the national concern doctrine. Here, the fuel charge imposed under Part 1 of the Act can apply to any "prescribed substance, material or thing" while the output-based emissions trading scheme in Part 2 of the Act can apply to emissions of any "gas" the Governor in Council decides is a "greenhouse gas." As in *Hydro-Québec*, these definitions are all-encompassing and have no clear limits. They do not define a single, distinct, and indivisible matter suitable for regulation as a matter of national concern.[66]

64. The consequences of recognizing a new matter of national concern are sweeping. For example, the recognition that aeronautics falls within exclusive federal jurisdiction in *Johannesson* arose out of a single factual situation – the building of a private aerodrome on land where a municipal by-law prohibited such activity. So too did the recognition of radiocommunications in the *Radio Reference* – an attempt to implement an international radiotelegraph convention into domestic law. But the seed that grew from those narrow factual situations has expanded to support thousands of pages of federal aeronautics and broadcasting

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[65] *Oldman River*, *supra* at 63-65; *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J. dissenting) and 115-16 (*per* La Forest J)

[66] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 3, 166(1)(a), 169, and 190; *Hydro-Québec*, *supra* at paras. 69-73

legislation. Even when Parliament has not legislated, those new federal powers have been held to oust the application of valid provincial legislation (including environmental legislation).[67]

65. In the present case, the consequences of recognizing exclusive federal jurisdiction over minimum national standards (or pricing standards) to regulate greenhouse gases would be even more sweeping, given that greenhouse gases are not qualitatively distinct from matters of provincial concern and are produced by virtually every activity that takes place in the provinces.

66. As Justice Huscroft recognized in the Ontario Court, recognizing federal jurisdiction over "minimum national standards to regulate greenhouse gas emissions" provides no intelligible limits on federal jurisdiction. Minimum national standards could be established concerning home heating and cooling; land use zoning; public transit; road design and use; and any other matter that impacts greenhouse gas emissions. Minimum national standards could be set for the quality of insulation used in homes. Minimum national standards could be established for the fuel efficiency of cars for sale within the province.[68]

67. The ubiquity of the activities that generate greenhouse gases means that granting the federal government exclusive jurisdiction to set minimum national standards for greenhouse gas emissions would eviscerate provincial jurisdiction over local undertakings, property and civil rights, and matters of a local concern within the province.

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[67] *Johannesson, supra*; *Canada (AG) v. Ontario (AG) (Radiocommunications)*, [1937] AC 326; *Québec (AG) v. Canadian Owners and Pilots Assn.*, 2010 SCC 39 at paras. 25-61, [2010] 2 SCR 536; *Québec (AG) v. Lacombe*, 2010 SCC 38 at para. 66, [2010] 2 SCR 453; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 at paras. 37-61 (CA), leave to appeal to SCC dismissed [2001] SCCA No. 83; *Bell Canada v. Québec (Commission de santé et de la sécurité du travail)*, [1988] 1 SCR 749; *Rogers Communication Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras. 57-74, [2016] 1 SCR 467; *Procureure générale du Québec c. IMTT-Québec inc.*, 2019 QCCA 1598

[68] Ontario Reasons at paras. 235-37 (*per* Huscroft JA dissenting)

68. The narrower characterization of "minimum national ***pricing*** standards to regulate greenhouse gas emissions," adopted by the concurring judge in the Ontario Court and the majority of the Saskatchewan Court, does not avoid this problem. It merely requires more creativity on the part of legislative drafters. Almost any regulatory goal can be achieved through a pricing mechanism. If Canada is given jurisdiction to establish minimum national pricing standards for greenhouse gas emissions, it could put a price on energy-inefficient building materials; on air conditioners and home heating; on automobiles with higher emissions; or even on which days an automobile is used or the density of housing.

69. This is precisely the concern Justice Beetz raised in the *Anti-Inflation Reference* as a reason why the control of inflation should not be recognized as a matter of national concern:

> Parliament could control all inventories in the largest as in the smallest undertakings, industries and trades. Parliament could ration not only food but practically everything else in order to prevent hoarding and unfair profits. One could even go farther and argue that since inflation and productivity are greatly interdependent, Parliament could regulate productivity, establish quotas and impose the output of goods or services which corporations, industries, factories, groups, areas, villages, farmers, workers, should produce in any given period. Indeed, since practically any activity or lack of activity affects the gross national product, the value of the Canadian dollar and, therefore, inflation, it is difficult to see what would be beyond the reach of Parliament. Furthermore, all those powers would belong to Parliament permanently; only a constitutional amendment could reduce them. …
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> 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.[69]

70. A similar concern is present here. Greenhouse gases are a product of all we do. As such, recognizing federal jurisdiction over the establishment of minimum national standards (or pricing standards) to regulate greenhouse gases would expand federal jurisdiction beyond limit.

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[69] *Anti-Inflation Reference*, *supra*, at 437 (Ritchie J) and 443-45 and 458-59 (Beetz J)

The regulation of greenhouse gases (however formulated) is therefore not a single, indivisible, and distinct matter suitable for recognition as a matter of national concern.

(3) There is No Provincial Inability to Combat Greenhouse Gas Emissions

71. As noted above, the provincial inability test is only evidence of whether a proposed matter of national concern is single, indivisible, and distinct, not an independent criterion for establishing that the matter is appropriate for federal regulation. To the degree it is relevant to determining whether greenhouse gases are a single, indivisible, and distinct subject matter, the provinces are not ***incapable*** of regulating greenhouse gases.

72. Unlike the regulation of aeronautics, the regulation of greenhouse gases would not be unworkable if different provinces imposed their own rules.[70] Unlike the regulation of systemic risk in the securities industry, the regulation of greenhouse gases does not require the simultaneous monitoring of the cumulative impact of greenhouse gas levels across multiple provinces or the ability to issue orders across multiple jurisdictions.

73. While the gases themselves cross provincial borders, the ***regulation*** of greenhouse gases is fully accomplishable at the provincial level because the activities that produce greenhouse gas largely fall within provincial jurisdiction (with the exception of greenhouse gases produced by federally-regulated industries which Ontario agrees Canada has jurisdiction to regulate under its enumerated powers).[71] The decisions of different provinces to reduce greenhouse gases in different ways and on different timelines to account for their different circumstances do not preclude other provinces from reducing greenhouse gases in their own preferred manner.

74. The present debate regarding the relative merits of the preferred federal approach to reducing greenhouse gases (applying a carbon price to fuels and industrial emitters) and the

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[70] *Johannesson, supra* at 318-19 (*per* Estey J) and 326-27 (*per* Locke J)
[71] See e.g. Part 3 of the Act.

preferred approaches of the various provinces (which include not only carbon pricing, but also non-pricing-based regulatory and incentive approaches) is a debate about policy effectiveness, not constitutional capacity.[72] Policy effectiveness has no place in the division of powers analysis. As this Court held in the *Securities Reference* (2011):

> Efficaciousness is not a relevant consideration in a division of powers analysis. … Canada must identify a federal aspect distinct from that on which the provincial legislation is grounded. The courts do not have the power to declare legislation constitutional simply because they conclude it may be the best option from the point of view of policy. The test is not which jurisdiction – federal or provincial – is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.[73]

75. There is no jurisdictional or constitutional gap that requires federal regulation. The provinces have full jurisdictional capacity to regulate greenhouse gases, in their preferred manner. The fact that one province's efforts to regulate greenhouse gases might be affected by the different policy choices of another does not mean that the provinces are ***unable*** to regulate them, in a constitutional sense. As noted above, while a single federal law to control inflation or imposing a nationwide minimum wage might be more economically efficient than a diversity of provincial approaches, that does not mean that the provinces are unable to regulate these matters. Economic efficiency is not a constitutional principle. Federalism is.

76. Moreover, as in *Hydro-Québec*, the Act itself "implicitly undermines any contention that the provinces are incapable of regulating" greenhouse gas emissions. In that case, the minority, without dispute from the majority, held that the Governor in Council's power to exempt a province from the application of federal regulations if the province already had equivalent

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[72] Saskatchewan Reasons at paras. 440-51 (*per* Ottenbreit and Caldwell JJA dissenting)
[73] *Securities Reference, supra* at para. 90 [Emphasis added]; *Pan-Canadian Securities Regulation Reference, supra* at para. 82; *Firearms Reference, supra* at paras. 18 and 57

regulations in force demonstrated that "the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible."[74]

77. In the present case, ss. 166 and 189 of the Act go even further – they require the Governor in Council to "take into account, as the primary factor" whether a province has enacted a sufficiently stringent "provincial pricing mechanism" in determining whether to apply the Act to that province. Canada has implicitly, if not explicitly, acknowledged that the provincial legislatures ***can*** effectively regulate greenhouse gas emissions, including by way of carbon pricing if they so choose. Canada's concern is not that the provinces are unable to combat climate change; it is that they might choose to adopt a different way of doing so than the one mechanism Parliament believes is best. That is federal overreach, not provincial inability.[75]

(4) Giving Parliament Jurisdiction Over Greenhouse Gas Emissions Would Radically Alter the Constitutional Division of Powers

78. Even if greenhouse gas emissions could be seen as a single, qualitatively distinct, and indivisible matter, Canada must still satisfy the second branch of the *Crown Zellerbach* test: the proposed new federal matter must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[76]

79. It is important to remember that it is the impact of granting Parliament permanent and exclusive jurisdiction over a new "matter" that must be considered at this stage of the analysis, not just the impact of upholding the constitutionality of a particular Act. As discussed above, once a new matter of national concern has been recognized, it can be relied on in subsequent cases to uphold a wide range of legislation beyond the individual Act that gave rise to the initial constitutional challenge. The Ontario Court therefore erred in focusing its analysis on the impact

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[74] *Hydro-Québec, supra* at paras. 57 and 77
[75] *Greenhouse Gas Pollution Pricing Act, supra*, ss. 166(2)-(3) and 189
[76] *Crown Zellerbach, supra* at 432

of the Act on provincial jurisdiction, rather than the impact of a new federal head of power over "national (pricing) standards for greenhouse gas emissions."[77]

80. Giving Parliament jurisdiction over the vast range of activities that could potentially generate greenhouse gas emissions would radically alter the balance of the Canadian federation. Parliament would have near-plenary power to regulate almost all aspects of Canadian society and economy. So broad an impact on provincial jurisdiction is not reconcilable with the Constitution's intention to divide legislative power between Parliament and the provincial legislatures.[78] As Professor Hogg has noted:

> If in a nation paramount central power completely overlapped regional power, then that nation would not be federal […] It is only where overlapping of power is incomplete, or the scope of central control is limited, that we have a federal system.[79]

81. In *Crown Zellerbach*, Justice La Forest for the minority considered how the dangers identified by Justice Beetz in the *Anti-Inflation Reference* could arise equally well in the environmental context. As discussed above, the unanimous Court adopted Justice La Forest's reasoning on this point in *Oldman River* and *Hydro-Québec*. Even if, as the majority in *Crown Zellerbach* found, marine pollution is a valid matter of national concern, allowing Parliament to regulate pollution more broadly "would effectively gut provincial legislative jurisdiction" because "all physical activities have some environmental impact":

> To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. As Professor R. Lederman has indicated …, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications." If, he adds, it "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 powers." … Indeed, as Beetz J. in [the *Anti-Inflation*

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[77] Ontario Reasons at paras. 128-38 (*per* Strathy CJO) and 190 (*per* Hoy ACJO)
[78] Saskatchewan Reasons at paras. 456-61 (*per* Ottenbreit and Caldwell JJA dissenting)
[79] Hogg, *supra*, s. 5.1(a), "Federalism"

> *Reference*] stated of the proposed power over inflation, there would not be much left of the distribution of power if Parliament had exclusive jurisdiction over this subject.[80]

82. In *Oldman River*, Justice La Forest, speaking for the Court, made it clear that giving the federal government plenary power over the environment would be irreconcilable with the federal division of powers:

> I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. … Professor Gibson put it succinctly several years ago…:
>
> > … "environmental management" does not, under the existing situation, constitute a homogenous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one level of government in any constitution that claimed to be federal, ***because no system in which one government was so powerful would be federal.*** …[81]

83. These cases demonstrate that the national concern doctrine must be applied in a manner that reflects the federal nature of Canada's constitution and does not disrupt the division of powers between Parliament and the provincial legislatures, transferring broad swathes of provincial jurisdiction to the federal level by allowing diffuse agglomerations of local matters to be considered a single matter of national concern. Rather, as the Court held in *Oldman River*:

> In my view the solution to this case can more readily be found by looking first at the catalogue of [enumerated] powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.[82]

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[80] *Crown Zellerbach*, *supra* at 447-48 and 453-56; *Oldman River*, *supra* at 63; *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J dissenting) and 115-16 (*per* La Forest J)
[81] *Oldman River*, *supra* at 63-64 [Emphasis added]; Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 UTLJ 54 at 85
[82] *Oldman River*, *supra* at 65-69

84. Parliament can regulate many aspects of the environment under its enumerated powers over interprovincial undertakings, navigation and shipping, fisheries, public lands, and the criminal law. As an example, the federal government could invest further in interprovincial railways, the greater use of which could significantly contribute to the reduction of greenhouse gases in Canada.[83] But Parliament should not be given a plenary power over all aspects of a matter so broad as regulating greenhouse gas emissions. Given the range of provincially-regulated activities that generate greenhouse gases, granting Parliament such a power would dramatically and impermissibly alter the division of powers.

85. In the *Securities Reference*, this Court warned of the dangers of interpreting one level of government's powers so broadly that they "erode the constitutional balance inherent in the Canadian federal state." It did so in the context of interpreting whether the s. 91(2) general trade and commerce power – a power that like the national concern doctrine "has the potential to permit federal duplication (and, in cases of conflict, evisceration) of the provincial powers over large aspects of property and civil rights and local matters" – gave Canada the power to enact a nation-wide securities regime:

> It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. Accepting Canada's interpretation of the general trade and commerce power would disrupt rather than maintain that balance. Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension.[84]

86. The need to interpret federal heads of power to leave continued space for the operation of provincial heads of power reflects the co-equal sovereignty of the federal and provincial

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[83] Alexis Belanger, "Canadian Federalism in the Context of Combating Climate Change" (2011) 20:1 Constitutional Forum 21 at 25

[84] *Securities Reference, supra* at paras. 7, 61-62, and 70

governments in Canada and the importance of allowing continued space for provincial experimentation and diversity:

> In the delineation of the scope of the general trade and commerce power, courts have been guided by fundamental underlying constitutional principles. The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlies the Constitution. …
>
> The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism – the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction.[85]

87. Ultimately, this Court concluded, "as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry which is the ultimate consequence of the federal legislation." So too with the regulation of greenhouse gas emissions. As important as the reduction of greenhouse gas emissions is, it does not justify the wholesale takeover of the vast array of provincially-regulated activities, such as home and office heating, land use planning, electricity generation, transportation, industrial processes, manufacturing, and waste management, that would be the consequence of this Court recognizing "national (pricing) standards to reduce greenhouse gases" as a matter of national concern.[86]

88. Unlike the Draft Federal Act to regulate national systemic risk in the capital markets, upheld under the general trade and commerce power in the recent *Pan-Canadian Securities Regulation Reference,* the Act at issue here is not carefully limited to only deal with matters of truly national concern. On the contrary, the broad, undefined powers it grants to the Governor in

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[85] *Securities Reference, supra* at paras. 71 and 73
[86] *Securities Reference, supra* at para. 128

Council allow the federal government to impose charges on any "fuel" (a term the Governor in Council can define as it sees fit) produced, consumed, or imported into Canada. The carbon-based energy inputs to every human activity are made subject to federal price regulation. The Governor in Council can also require virtually any facility that emits any kind of gas to comply with whatever emissions-trading regime it prescribes, make whatever reports the federal government desires, and be subjected to whatever onerous compliance requirements the federal government considers appropriate.[87]

89. The Act is not a carefully limited and defined federal regime intended to apply only to a single, distinct, and indivisible matter without unduly interfering with provincial regulatory powers. It does not provide any flexibility to a province that adopts alternative measures to reduce greenhouse gas emissions that are as, if not more, effective than carbon pricing. Rather, it is gives the federal Executive broad, uncontrolled powers to take measures to reduce greenhouse gas emissions throughout Canada, regardless of the impact of those emissions on national climate change targets and regardless of the impact on provincial heads of power.

90. "National concern" should not be interpreted as granting Parliament the plenary power over greenhouse gas emissions that would be required to uphold the Act, much less whatever future measures the federal government believes are necessary to combat climate change. Doing so would result in a massive transfer of regulatory power from the provincial to the federal level and is incompatible with the federal nature of Canada's constitution.

C. The "Charges" the Act Imposes are Neither Valid Regulatory Charges Nor Valid Taxation

91. Even if the Act can be supported by the national concern doctrine, the "charges" it imposes are neither valid regulatory charges nor valid taxation. The Act does not require the

[87] *Pan-Canadian Securities Reference, supra* at paras. 87-88, 100, 106-07, 111 and 115

revenues it raises to be spent on reducing greenhouse gas emissions; the "charges" it imposes therefore lack the nexus with the Act's regulatory purpose required to be valid regulatory charges. The Act and its legislative history also make it clear that Parliament intended to regulate greenhouse gases, not authorize the imposition of taxation.

(1) The Act Does Not Impose Valid Regulatory Charges

92. Section 53 of the *Constitution Act, 1867* provides that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." To ensure that Parliamentary oversight of taxation is not circumvented, the power to tax must be exercised "expressly and unambiguously." The Act contains no express and unambiguous authorization of taxation. To be constitutionally valid under s. 53, therefore, the charges it imposes must meet the constitutional criteria for a valid non-tax charge.[88]

93. This is a distinct constitutional requirement from the division of powers. If a federal law imposing charges is not a valid exercise of s. 91(3), to be constitutionally valid, (1) the law must regulate a matter that falls within federal jurisdiction (which, as set out above, Ontario denies regulating greenhouse gas emissions does); ***and*** (2) have a sufficient nexus between the charges and the regulatory scheme in order to not run afoul of s. 53.[89]

94. Canada argued in both Courts below that the charges imposed by the Act are regulatory charges, not taxes, and therefore s. 53 does not apply. Canada and Ontario joined issue on the question of whether a regulatory charge serving a behavior modification purpose can raise revenues for general purposes without being constitutionally classified as a tax.

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[88] *Constitution Act, 1867,* ss. 53 and 91(3); *620 Connaught Ltd. v. Canada (Attorney General),* 2008 SCC 7 at para. 4, [2008] 1 SCR 131; *Confédération des syndicats nationaux v. Canada (AG),* 2008 SCC 68 at paras. 70-82 and 92-93, [2008] 3 SCR 511

[89] *Connaught*, *supra* at para. 27

95. Canada and Ontario agreed that the revenues raised under Parts 1 and 2 of the Act are not required to be expended in a manner connected to the regulatory purpose of the Act. Instead, they are provided either to provincial governments or to persons specified by regulations, and the Act does not require that either governments or specified persons use the money for purposes related to greenhouse gas emission reductions.[90]

96. The Ontario Court correctly observed that this Court left open this question in *620 Connaught*.[91] This Court has never authorized the use of revenue from a regulatory charge for general purposes. In each of the cases cited in the Court's discussion of this point in *Westbank*, for example, the issue either did not need to be decided on the facts or was not the basis on which the Court decided the appeal.[92]

97. Ontario submits that this Court should now answer the question in the negative. To allow the nexus requirement to be met ***solely*** by showing that a charge discourages undesirable behaviour while leaving the government imposing the charge free to spend the funds raised in a manner unconnected to any particular regulatory purpose would severely undermine the "no taxation without representation" principle which underlies s. 53.

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[90] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 165 and 188

[91] The Saskatchewan majority did not address Ontario's argument that there had to be a nexus between the use of the funds raised and the regulatory purpose in its reasons. It simply assumed the fourth *Westbank* factor was satisfied where "the charge itself is the instrument by which the regulatory purpose is realized." Saskatchewan Reasons at paras. 83 and 94 (*per* Richards CJS).

[92] *Connaught*, *supra* at para. 48; *British Columbia (AG) v. Canada (AG) (Johnnie Walker)*, [1924] AC 222 (PC); *Cape Breton Beverages v. Nova Scotia (AG)* (1997), 144 DLR (4th) 536 at paras. 8-9 (NS SC), aff'd (1997), 151 DLR (4th) 575 (NS CA), leave to appeal to SCC dismissed [1997] SCCA No. 403; *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] OMBD No. 553 at paras. 71 and 76-78. See also Gérard La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, Canadian Tax Paper No. 65, 2nd ed. (Toronto: Canadian Tax Foundation, 1981) at 185; *Reference re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1068-69; Ontario Reasons at para. 154 (*per* Strathy CJO)

98. If such a weak nexus were sufficient to uphold a regulatory charge, governments could raise funds for general purposes (i.e., tax) by levying any number of purportedly non-tax charges on behaviours they wish to discourage (e.g. smoking, drinking alcohol, consuming unhealthy food, any activity which pollutes, etc.) without ever having to seek express and unambiguous legislative authorization to impose a tax. Neither Court below addressed this argument.

99. Interpreting s. 53 to require a nexus between the use of the funds raised and a regulatory purpose follows from this Court's holding in *Allard*, where the argument was made that all that was needed to avoid classification of a tax was a valid regulatory ***purpose*** for the imposition of a charge, and not evidence of the actual use of the funds for the regulatory purpose.

100. This Court rejected that argument on the basis that "a power of indirect taxation in s. 92(9) [the provincial licensing power] extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) [the limitation of provincial taxation to direct taxes] meaningless." In the same way, allowing Parliament to levy regulatory charges without any link to the cost of achieving the regulatory purpose or any requirement that funds raised be used to further that purpose could render s. 53 meaningless.[93]

101. Ontario makes this argument even though it is the provinces who are most affected by how restrictively or broadly non-tax charges are defined, due to their constitutional inability to levy indirect taxes. The constitutional distinction between a regulatory charge and a tax is the same whether the analysis is done under s. 92(2), s. 53, or any other constitutional provision making reference to taxation. The fundamental constitutional principle of democratic

[93] *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 SCR 371 at 404-05

accountability for taxation requires that exceptions to the general rule that coercive exactions imposed by the state are taxes be construed narrowly in all constitutional contexts.[94]

102. Nor can the Act be found constitutional on the alternative theory that the minimal constraints the Act imposes on the distribution of funds raised by the charges are sufficient to distinguish it from a levy raising revenue for general purposes (i.e., purposes completely unconstrained by statute). It is not sufficient under the s. 53 jurisprudence for a charge to avoid classification as a tax simply because the same statute raises the revenue and directs its expenditure, since that structure could be equally true of an explicit taxing statute. Instead, a nexus is required between the charge and the regulatory scheme; the fact that expenditures are directed or authorized by the regulatory statute does not in itself establish a nexus.

103. In *Connaught*, for example, this Court considered business licence revenues collected and expended under federal statutes governing national parks. The Court upheld the impugned licence fee on the basis that the applicants had all paid the fee in relation to businesses located in a single park, Jasper National Park, and there was evidence that the quantum collected was less than the federal government expended on that particular park. The Court expressed doubt, however, that fees paid in one park could be used to fund the operation of another:

> However, I would note that if the fee revenues generated in Jasper National Park are not expended entirely within, or for the benefit of that park, the fees may well be "unconnected" and not in pith and substance a regulatory charge, but rather, a tax.[95]

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[94] *Constitution Act, 1867*, ss. 53-54, 91(3), 92(2), 92A(4), and 125-26; *Connaught*, *supra*; *Confédération des syndicats nationaux, supra*; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134; *Eurig Estate (Re)*, [1998] 2 SCR 565; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 SCR 929

[95] *Connaught*, *supra* at para. 45

104. The Court provided this caution despite the fact that the relevant statutes did not constrain the expenditure of park fee revenues in such a way. The ***constitution*** required a tighter nexus between the fee and the regulatory scheme than was provided by the ***statutory*** authorization for the Parks Canada Agency to spend revenues from park fees anywhere in the national park system. A tighter connection between who paid the fee and how it was spent was needed.

105. Similarly, in this appeal the minimal ***statutory*** requirement that the Act's revenues be provided to persons designated by regulation does not provide the necessary ***constitutional*** nexus. On the contrary, the federal government itself claims that over 90 per cent of the funds raised by Part 1 of the Act will be distributed to individuals as flat-rate, *per capita* refundable income tax credits, of the same kind that are often funded out of general revenues. There is no requirement that the proposed tax credits be spent on actions that would mitigate climate change. Taxpayers are completely free to spend their tax refunds on anything, including activities that cause greenhouse gas emissions. No regulations have yet been made specifying how Part 2 revenues will be expended.[96]

106. The Ontario Court erred in describing these funds as a "reward" for behaviour modification, given that the Act does not require that a provincial government or specified person engage in such behaviour in order to receive the funds. Similarly, unconditional monetary transfers do not "encourage shifts to cleaner fuels" or "foster innovation," and Canada did not defend the validity of these charges on that basis.[97]

107. If the constitutional validity of the charges were upheld based on the Act's minimal constraints on expenditure, it would be open to governments to fund their general operations by

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[96] Saskatchewan Reasons at paras. 316 and 324-28 (*per* Ottenbreit and Caldwell JJA dissenting); *Budget Implementation Act, 2018, No. 2*, *supra*, s. 13. *Cf. Climate Change Mitigation and Low-carbon Economy Act, 2016*, SO 2016, c. 7, s. 71

[97] Ontario Reasons at para. 162 (*per* Strathy CJO)

imposing any number of similarly structured "non-tax" charges combined with a series of annual regulations prescribing the persons to whom the revenues would be paid to allow the government to carry out its annual budget. As with Canada's general argument that there should be no constraints on the use of such revenues at all, creating a constitutional standard based on the Act's spending provisions would be contrary to s. 53's purpose of requiring explicit legislative authorization for taxation.

(2) Parliament Intended to Regulate Greenhouse Gases, Not Impose Taxation

108. The Ontario Court correctly rejected Canada's alternative argument that the Act is a valid exercise of Parliament's s. 91(3) power to make laws regarding "the raising of Money by any Mode or System of Taxation." As is clear from Canada's own primary arguments, the Act is a regulatory statute that Parliament never intended to treat as a taxation statute.

109. As this Court and the Privy Council have held, the taxation power does not permit Parliament to enact legislation which in pith and substance purports to regulate matters that would otherwise fall within provincial jurisdiction – such as the employment relationship – just because those regulatory provisions have been framed as a tax. Parliament cannot use its taxation power to regulate the employment relationship and the provision of insurance and thus needed constitutional amendments to create unemployment insurance and the Canada Pension Plan.[98] It similarly cannot rely on its taxation power to allow it to regulate greenhouse gas emissions.

110. In any event, to be a constitutionally valid taxing statute, the Act must ***both*** fall within Parliament's s. 91(3) power to enact taxes and comply with s. 53's requirement, discussed above, that taxation be authorized "expressly and unambiguously" by Parliament. An examination of the

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[98] *Re Insurance Act of Canada*, [1932] AC 41 at 53 (PC); *Canada (AG) v. Ontario (AG) (Unemployment Insurance)*, [1937] AC 355 at 367 (PC); *Reference re Goods and Services Act*, [1992] 2 SCR 445 at paras. 30-32; *Constitution Act, 1867*, ss. 91(2A) and 94A, as enacted by *Constitution Act, 1940*; *Constitution Act, 1951*; and *Constitution Act, 1964*

text and legislative history of the Act demonstrates that Parliament did not authorize the Governor in Council to collect carbon charges as general taxes, just as this Court found in *Confédération des syndicats* that Parliament had not authorized the Governor in Council to collect surplus employment insurance premiums as general taxes.[99]

111. The Act does not purport to authorize taxation. It was enacted as part of the *Budget Implementation Act, 2018, No. 1*. Other parts of that Act clearly impose taxation by amending the *Income Tax Act*, the *Excise Act, 2001*, and the *Excise Tax Act*. Part 5, which enacted the Act, is careful to always use the term "charge" rather than "tax."[100]

112. Although there is no constitutional requirement that Parliament enact taxation using the word "tax," where portions of the same Act use different words to describe "taxes" as distinct from "charges," it is presumed that Parliament meant the different words to embody different concepts, absent strong evidence to the contrary.[101]

113. That evidence is lacking here. On the contrary, when it was directly put to the Parliamentary Secretary to the Minister of Finance that the Act would impose a tax, the Parliamentary Secretary denied that it would do any such thing:

> **Mr. Joël Lightbound:** … Here is where I disagree with my esteemed colleague: we see this as a price on carbon pollution. My colleague calls it a tax, but it is actually a price on carbon pollution.[102]

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[99] *Constitution Act, 1867*, ss. 53 and 91(3); *Connaught*, *supra* at para. 4; *Confédération des syndicats nationaux*, *supra* at paras. 70-82 and 92-93

[100] *Budget Implementation Act, 2018, No. 1*, *supra*, Parts 1, 2, 3, and 5

[101] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at §§8.32 and 8.36-8.37; *Frank v. The Queen*, [1978] 1 SCR 95 at 100-02; *R. v. Barnier*, [1980] 1 SCR 1124 at 1135-36; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 81-82, [2013] 2 SCR 559; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 53, [2016] 2 SCR 555

[102] Canada, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 279 (16 April 2018) at 18317

114. When an Act's Preamble sets out regulatory purposes, the Act carefully avoids using the word "tax," and the sponsoring Parliamentary Secretary expressly denies the Act is intended to impose a tax, the Act should not be read as evidence that Parliament "clearly and unambiguously" authorized imposing a tax – especially when almost all of the key details of the charge are delegated to the Governor in Council.

115. By raising revenues that are not required to be spent on achieving regulatory purposes, the Act fails to impose a valid regulatory charge. As well, there can be no valid regulatory charge absent a valid regulatory scheme which falls under federal jurisdiction, which is also not the case here. To impose a valid tax, on the other hand, the primary purpose of the scheme cannot be the regulation of behaviour. For the reasons set out above, the Act ***is*** in pith and substance intended to regulate greenhouse gases. It therefore cannot be supported under Parliament's taxation power. Furthermore, a valid tax requires Parliament's clear and unambiguous authorization of ***taxation***. Parliament's approval of the Act was based on an express denial that it was intended to impose taxation. Parts 1 and 2 of the Act are therefore unconstitutional in their entirety.

PART IV – COSTS

116. Ontario does not seek costs and requests that no costs be awarded against it.

PART V—ORDER SOUGHT

117. Ontario requests that its appeal be allowed and this Court answer the reference question as follows: "Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1,* SC 2018, c.12, are unconstitutional in their entirety."

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 16TH DAY OF OCTOBER, 2019

Josh Hunter	Padraic Ryan	Aud Ranalli

PART VII – AUTHORITIES

JURISPRUDENCE	**Paragraph(s) Referred to in Factum**
620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7, [2008] 1 SCR 131	92, 93, 96, 101, 103, 110
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Budget Implementation Act, 2018, No. 2, 2018, c. 27 (English): s. 13 (French): s. 13	30, 105
Building Code, O.Reg. 332/12	17
Building Code Act, 1992, SO 1992, c. 23	17
Climate Change Mitigation and Low-carbon Economy Act, 2016, SO 2016, c. 7	105

s. 71	
Constitution Act, 1940	109
Constitution Act, 1951	109
Constitution Act, 1964	109
Constitution Act, 1982 (English): s. 38(1) (French): s. 38(1)	45
Constitution Act, 1867 (English): ss. 53, 54, 91(2A), 91(3), 92(2), 92A(4), 94A, 125-126 (French): ss. 53, 91(3)	92, 101, 109, 110
Environmental Protection Act, RSO 1990, c. E.19 s. 176.1	19
Excise Tax Act, RSC 1985, c. E-15 (English): Part III, VI, Schs. I, II.1 (French): Partie III, VI, Annexe I, II.1	24
Fuel Tax Act, RSO 1990, c. F.35	24
Greenhouse Gas Emissions Information Production Order, SOR/2018-214 (English) (French)	36
Greenhouse Gas Emissions Performance Standards, O Reg 241/19 s. 2(1)3, Sch. 2	18
Greenhouse Gas Emissions: Quantification, Reporting and Verification, O Reg 390/18 s. 1(1)	18
Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12, s. 186 (English): Preamble, ss. 3, 17-27, 165, 166-166(3), 169, 171-175, 188, 189, 190-192, 197-198, 203, Sch. 1, 2, 3, 4 (French): Préambule, ss. 3, 17-27, 165, 166-166(3), 169, 171-175, 188, 189, 190-192, 197-198, 203, Annexe 1, 2, 3, 4	22-28, 36, 63, 73, 77, 95
Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures, SOR/2018-213 (English): s. 3 (French): s. 3	18, 36

Output-Based Pricing System Regulations, SOR/2019-266 (English) (French)	26
Planning Act, RSO 1990, c. P.13 ss. 2(s), 16(14)	17
Resource Recovery and Circular Economy Act, 2016, SO 2016, c. 12, Sched. 1 s. 2(c)	17

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APPENDIX - NOTICE OF CONSTITUTIONAL QUESTION

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

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

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c C.34, s 8

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

APPELLANT

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT

NOTICE OF CONSTITUTIONAL QUESTION
(FORM 33B)

TAKE NOTICE that we, Josh Hunter, Padraic Ryan and Aud Ranalli, counsel for the Appellant, the Attorney General of Ontario, assert that the appeal raises the following constitutional questions:

1. Whether the Court of Appeal for Ontario erred in finding that Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act* are a valid exercise of the national concern branch of the peace, order and good government power set out in the opening words of s 91 of the *Constitution Act, 1867*; and

2. Whether the Court of Appeal for Ontario erred in finding that the charges imposed by the *Greenhouse Gas Pollution Pricing Act* comply with s 53 of the *Constitution Act, 1867*.

AND TAKE NOTICE THAT an Attorney General who intends to intervene with respect to this Constitutional Question may do so by serving a Notice of Intervention in Form 33C on all other parties and filing the Notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this Notice is served.

Dated at Toronto, Ontario this 26th day of August, 2019

SIGNED BY

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