COURT OF APPEAL FOR ONTARIO

CITATION: Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544
DATE: 20190628
DOCKET: C65807

Strathy C.J.O., Hoy A.C.J.O., MacPherson, Sharpe and Huscroft JJ.A.

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12

Josh Hunter, Padraic Ryan and Thomas Lipton, for the Attorney General of Ontario

Sharlene Telles-Langdon, Christine Mohr, Mary Matthews and Neil Goodridge, for the Attorney General of Canada

William E. Gould, for the intervener Attorney General of New Brunswick

J. Gareth Morley, for the intervener Attorney General of British Columbia

P. Mitch McAdam, Q.C. and Alan Jacobson, for the intervener Attorney General of Saskatchewan

Stuart Wuttke and Adam S.R. Williamson, for the intervener Assembly of First Nations

Amir Attaran, for the intervener Athabasca Chipewyan First Nation

Stewart Elgie, for the intervener Canada's Ecofiscal Commission

Joseph F. Castrilli and Richard D. Lindgren, for the interveners Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul

Jennifer King, Michael Finley and Liane Langstaff, for the intervener Canadian Public Health Association

R. Bruce E. Hallsor, Q.C., Christine Van Geyn and Aaron Wudrick, for the intervener Canadian Taxpayers Federation

David Robitaille, for the interveners Centre québécois du droit de l'environnement and Équiterre

Randy Christensen and Joshua Ginsberg, for the intervener David Suzuki Foundation

Nathan Hume, for the intervener Intergenerational Climate Coalition

Lisa (Elisabeth) DeMarco and Jonathan McGillivray, for the intervener International Emissions Trading Association

Cynthia Westaway and Nathalie Chalifour, for the intervener United Chiefs and Councils of Mnidoo Mnising

Ryan Martin, for the intervener United Conservative Association

Heard: April 15-18, 2019

Strathy C.J.O.:

I. Introduction

[1] By Order in Council 1014/2018, the Lieutenant Governor in Council referred to this court, pursuant to s. 8 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the question whether the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12 (the "*Act*"), is unconstitutional in whole or in part.

[2] For the reasons that follow, it is my opinion that the *Act* is constitutional.

[3] The *Act* is within Parliament's jurisdiction to legislate in relation to matters of "national concern" under the "Peace, Order, and good Government" ("POGG") clause of s. 91 of the *Constitution Act, 1867*. Parliament has determined that atmospheric accumulation of greenhouse gases ("GHGs") causes climate changes that pose an existential threat to human civilization and the global

ecosystem. The impact on Canada, especially in coastal regions and in the north, is considered particularly acute.

[4] The need for a collective approach to a matter of national concern, and the risk of non-participation by one or more provinces, permits Canada to adopt minimum national standards to reduce GHG emissions. The *Act* does this and no more. It leaves ample scope for provincial legislation in relation to the environment, climate change and GHGs, while narrowly constraining federal jurisdiction to address the risk of provincial inaction.

[5] The charges imposed by the *Act* are themselves constitutional. They are regulatory in nature and connected to the purposes of the *Act*. They are not taxes.

II. Background

Greenhouse Gas Emissions and Climate Change

[6] Climate change was described in the *Paris Agreement* of 2015 as “an urgent and potentially irreversible threat to human societies and the planet”. It added that this “requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response”.

[7] There is no dispute that global climate change is taking place and that human activities are the primary cause. The combustion of fossil fuels, like coal, natural gas and oil and its derivatives, releases GHGs into the atmosphere. When incoming radiation from the Sun reaches Earth’s surface, it is absorbed and

converted into heat. GHGs act like the glass roof of a greenhouse, trapping some of this heat as it radiates back into the atmosphere, causing surface temperatures to increase. Carbon dioxide ("CO_2") is the most prevalent GHG emitted by human activities. This is why pricing for GHG emissions is referred to as carbon pricing, and why GHG emissions are typically referred to on a CO_2 equivalent basis. Other common GHGs include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and nitrogen trifluoride.

[8] At appropriate levels, GHGs are beneficial. They surround the planet like a blanket, keeping temperatures within limits at which humans, animals, plants and marine life can live in balance. The level of GHGs in the atmosphere was relatively stable for several million years. However, since the beginning of the industrial revolution in the 18th century, and more particularly since the 1950s, the level of GHGs in the atmosphere has been increasing at an alarming rate. Atmospheric concentrations of CO_2 are now more than 400 parts per million, a level not reached since the mid-Pliocene epoch, approximately 3-5 million years ago. Concentrations of other GHGs have also increased dramatically.

[9] As a result, the global average surface temperature has increased by approximately 1.0 degree Celsius above pre-industrial levels (i.e., prior to 1850). It is estimated that by 2040, the global average surface temperature will have increased by 1.5 degrees Celsius.

[10] Those temperature increases may seem small, but the results are not. The years 2014 to 2018 inclusive have been identified, globally, as the five hottest years ever recorded. Temperatures in Canada have been increasing at roughly double the global average rate. With the longest coastline in the world, high altitude areas where warming is amplified, and significant Arctic territory, Canada has been disproportionately impacted by global warming. In the Canadian Arctic, for instance, the rate of warming has been even higher than in southern parts of Canada, estimated at three times the global rate. It is predicted that temperatures in Canada will continue to increase at a rate greater than the rest of the world.

[11] This global warming is causing climate change and its associated impacts. The uncontested evidence before this court shows that climate change is causing or exacerbating: increased frequency and severity of extreme weather events (including droughts, floods, wildfires, and heat waves); degradation of soil and water resources; thawing of permafrost; rising sea levels; ocean acidification; decreased agricultural productivity and famine; species loss and extinction; and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus. Recent manifestations of the impacts of climate change in Canada include: major wildfires in Alberta in 2016 and in British Columbia in 2017 and 2018; and major flood events in Ontario and Québec in 2017, and in British Columbia, Ontario, Québec and New Brunswick in 2018. The

recent major flooding in Ontario, Québec and New Brunswick in 2019 was likely also fueled by climate change.

[12] Climate change has had a particularly serious impact on some Indigenous communities in Canada. The impact is greater in these communities because of the traditionally close relationship between Indigenous peoples and the land and waters on which they live.

[13] For example, members of the intervener Athabasca Chipewyan First Nation ("ACFN") – whose traditional territory extends from northeastern Alberta, northward into the Northwest Territories, and eastward to Hudson Bay – depend for their survival on hunting caribou, gathering food and medicinal plants, and trapping and fishing. The ACFN has adduced evidence that these traditional, survival-based practices are threatened by climate change. A declining barrenland caribou population, the reduction of surface water in lakes and rivers, and an increased risk of wildfires, each of which is caused or exacerbated by climate change, threaten the ACFN's ability to maintain its traditional way of life.

[14] The intervener the United Chiefs and Councils of Mnidoo Mnising (the "UCCMM") has also adduced evidence on the effects of climate change on its six member Nations. The traditional territories of the UCCMM Nations are primarily situated on and around Manitoulin Island and the north shore of Georgian Bay. According to the affidavit of Tribal Chair Patsy Corbiere, the UCCMM Nations' intimate relationship with their traditional lands and waters has allowed them to

observe the impacts of climate change firsthand. Over recent decades, they have noted a decrease in moose populations and native whitefish stocks, less frequent, but more intense bouts of precipitation, shorter and thinner ice cover in the winter, and diminishing water quality due to increased green algae blooms spurred by warmer temperatures. These changes to the environment impair the UCCMM Nations' ability to sustain themselves by observing traditional practices, and threaten their continued existence as a self-determining people.

[15] Both nationally and globally, the economic and human costs of climate change are considerable. Canada's Minister of Finance has estimated that climate change will cost Canada's economy $5 billion per year by 2020, and up to $43 billion per year by 2050 if no action is taken to mitigate its effects. The World Health Organization has estimated that climate change is currently causing the deaths of 150,000 people worldwide each year. Rising sea levels threaten the safety and lives of tens of millions of people in vulnerable regions.

[16] The United Nations Intergovernmental Panel on Climate Change recently reported that global net anthropogenic CO_2 emissions must be reduced by approximately 45 percent below 2010 levels by 2030, and must reach "net zero" by 2050 in order to limit global average surface warming to 1.5 degrees Celsius and to avoid the significantly more deleterious impacts of climate change. "Anthropogenic" emissions are those resulting from human activities. "Net zero" CO_2 emissions are achieved when anthropogenic CO_2 emissions are balanced

globally by CO_2 removed from the atmosphere over a specified period. Deep reductions in other GHG emissions will also need to occur in order to limit global average surface warming to 1.5 degrees Celsius.

[17] Of particular concern to a federal state like Canada is that the principal effect of GHG emissions – climate change – often bears no relationship to the location of the source of the emissions. Provinces and territories that have very low emissions, and are far removed geographically from the source of emissions, often experience impacts of climate change that are grossly disproportionate to their individual contributions to Canada's total GHG emissions.

[18] In 2016, for example, Canada's total GHG emissions, measured in tonnes of CO_2 equivalent, were 704 megatonnes (1 megatonne is equal to 1,000,000 tonnes, and 1 tonne is equal to 1,000 kilograms). The individual provincial and territorial totals were as follows (Record of Canada, Vol. 3, p. 979):

NL	10.8
PE	1.8
NS	15.6
NB	15.3
QC	77.3
ON	160.6
MB	20.9
SK	76.3

AB	262.9
BC	60.1
YT	0.4
NT	1.6
NU	0.7
Total	**704**

[19] As this chart demonstrates, in 2016, the three territories collectively contributed 2.7 megatonnes or approximately 0.4 percent of Canada's total GHG emissions. The four Atlantic provinces contributed 43.5 megatonnes or approximately 6.2 percent of Canada's emissions. Yet these regions will experience the effects of climate change caused by Canada's total emissions – the destruction of permafrost, the loss of ice cover and rising sea levels in particular – in a manner that is out of proportion to their regions' contributions to atmospheric levels of GHGs.

[20] Moreover, as a practical matter and indeed as a legislative matter, there is nothing these provinces and territories can do to address the emission of GHGs by their geographic neighbours and constitutional partners. Without a collective national response, all they can do is prepare for the worst.

[21] Of course, the problem of climate change caused by GHG emissions is not unique to these provinces and territories. The entire country experiences the effects of climate change and every province and territory is affected by the failure

of others to reduce their own GHG emissions. Indeed, the international community has recognized that the solution to climate change is not within the capacity of any one country and has, therefore, sought to address the issue through global cooperation, a topic addressed in the next section.

International Commitments to Mitigating Climate Change

[22] In 1992, growing international concern regarding the potential impacts of climate change led to the "Rio Earth Summit" and adoption of the *United Nations Framework Convention on Climate Change* (the "*UNFCCC*"). The objective of the *UNFCCC* is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Canada ratified the *UNFCCC* in December 1992, and it came into force on March 21, 1994. The *UNFCCC* has been ratified by 196 other countries.

[23] In December 1997, the parties to the *UNFCCC* adopted the *Kyoto Protocol*, which established GHG emissions reduction commitments for developed country parties. Canada ratified the *Kyoto Protocol* on December 17, 2002 and committed to reducing its GHG emissions for the years 2008-2012 to an average of six percent below 1990 levels. Canada did not fulfill its commitment, and ultimately withdrew from the *Kyoto Protocol* in December 2012.

[24] In December 2009, most of the parties to the *UNFCCC* adopted the *Copenhagen Accord*. The accord recognized that "climate change is one of the greatest challenges of our time." Parties to the accord recognized the need to hold

global warming below 2 degrees Celsius above pre-industrial levels and to consider the need to limit it to 1.5 degrees. Under the accord, Canada committed to reducing its GHG emissions by 17 percent below 2005 levels by 2020. Canada is currently not on track to fulfill this commitment.

[25] In December 2015, the parties to the *UNFCCC* adopted the *Paris Agreement*. The Preamble to that agreement recognizes that climate change represents “an urgent and potentially irreversible threat to human societies and the planet”. Parties to the agreement committed to holding global warming to “well below” 2 degrees Celsius above pre-industrial levels and to make efforts to limit it to 1.5 degrees above pre-industrial levels. Canada ratified the *Paris Agreement* on October 5, 2016 and committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030. Canada’s commitments under the *Paris Agreement* were part of the impetus for the *Act*.

Canadian Efforts to Address Climate Change

[26] Following the adoption of the *Paris Agreement* in 2015, the Prime Minister of Canada met in March 2016 with all provincial and territorial Premiers to discuss, among other things, strategies to mitigate climate change. The First Ministers adopted the *Vancouver Declaration on Clean Growth and Climate Change*. The *Vancouver Declaration* recognized the need to mitigate climate change by reducing GHG emissions and included a commitment to implement GHG mitigation policies in order to meet or exceed Canada’s commitments under the

Paris Agreement. It led to the formation of a Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, tasked with reporting on the role and effectiveness of carbon pricing in meeting Canada's emissions reduction commitments.

[27] The Working Group produced a *Final Report*, on a consensus basis, which noted that "[m]any experts regard carbon pricing as a necessary policy tool for efficiently reducing GHG emissions". Based on this report, the federal government announced the *Pan-Canadian Approach to Pricing Carbon Pollution* (the "*Pan-Canadian Approach*"). This stated that economy-wide carbon pricing is the most efficient way to reduce emissions and that carbon pricing would be a foundational element of Canada's response to climate change. The *Pan-Canadian Approach* included a national benchmark for carbon pricing (the "Benchmark"). The stated goal of the Benchmark is to ensure that carbon pricing mechanisms of gradually increasing stringency apply in all Canadian jurisdictions by 2018, either in the form of an explicit price-based system (e.g., a "carbon tax") or a "cap-and-trade" system. It also stated that the federal government would introduce "backstop" carbon pricing legislation to apply in jurisdictions that do not meet the Benchmark.

[28] Shortly after announcing the *Pan-Canadian Approach*, and after extensive discussions with the provinces, Canada ratified the *Paris Agreement*. Canada is required to report and account for progress towards achieving a "nationally

determined contribution", which Canada stated at 30 percent below 2005 levels by 2030.

[29] On December 9, 2016, eight provinces, including Ontario, and the three territories adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "*Pan-Canadian Framework*"), which explicitly incorporated the Benchmark. At that time, British Columbia, Alberta and Québec already had carbon pricing mechanisms, and Ontario had announced its intention to join the Québec/California cap-and-trade system. Manitoba subsequently adopted the *Pan-Canadian Framework* on February 23, 2018. Saskatchewan did not adopt it. The *Pan-Canadian Framework* emphasized the significant risks posed by climate change to human health, security and economic growth and recognized carbon pricing as "one of the most effective, transparent, and efficient policy approaches to reduce GHG emissions", promote innovation and encourage individuals and industries to pollute less.

[30] On March 27, 2018, the *Act* was introduced in Parliament as part of the *Budget Implementation Act, 2018, No. 1*. On June 21, 2018, it received Royal Assent. The *Act* gives effect to the principles expressed in the *Pan-Canadian Framework* and fulfills the federal government's Benchmark commitment to introduce "backstop" legislation.

[31] As will be explained later in these reasons, in July 2018, Ontario announced its withdrawal from the national carbon pricing program, revoked its cap-and-trade

regulation and prohibited trading of emissions allowances. It introduced the *Cap and Trade Cancellation Act, 2018*, S.O. 2018, c. 13, and cancelled seven programs that the federal government had agreed to co-fund, through the Low Carbon Economy Fund.

[32] Ontario's legislative response, and its own climate change policies, are discussed later in these reasons. The next section explains the substantive provisions of the *Act* and its operation.

III. The *Greenhouse Gas Pollution Pricing Act*

[33] The *Act*'s long title is: "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts". The Preamble of the *Act* includes, among other observations:

> [R]ecent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity.
>
> …
>
> [T]he United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries.
>
> …
>
> [A]s recognized in the Pan-Canadian Framework … climate change is a national problem that requires immediate action by all governments in Canada as well

> as by industry, non-governmental organizations and individual Canadians.

[34] The *Act* puts a price on carbon pollution in order to reduce GHG emissions and to encourage innovation and the use of clean technologies. It does so in two ways. First, it places a regulatory charge on carbon-based fuels. This charge is imposed on certain producers, distributors and importers and will increase annually from 2019 through to 2022. Second, it establishes a regulatory trading system applicable to large industrial emitters of GHGs. This is referred to as an Output-Based Pricing System (the "OBPS"). It includes limits on emissions, a "credit" to those who operate within their limit, and a "charge" on those who exceed it. Net revenues from the fuel charge and excess emissions charge are returned to the province of origin, or to other prescribed persons.

[35] The *Act* does not apply in all provinces. Rather, the *Act* and its regulations serve as the "backstop" contemplated by the *Pan-Canadian Framework* in those provinces that have not adopted sufficiently "stringent" carbon pricing mechanisms. Many provinces have enacted legislation establishing their own carbon pricing mechanisms. Some provinces have not and are, therefore, "listed provinces" and subject to the backstop regime. The fuel charge applies in Ontario, New Brunswick, Manitoba and Saskatchewan and will apply in Yukon and Nunavut. The OBPS applies in Ontario, New Brunswick, Manitoba, Prince Edward Island and partially in Saskatchewan and will also apply in Yukon and Nunavut. Canada also recently announced its intent to apply the fuel charge in Alberta

starting on January 1, 2020 and indicated that it will monitor any proposed changes to Alberta's large industrial emitter system.

[36] The *Act* has 272 sections and is divided into four parts:

- Part 1 establishes the fuel charge;
- Part 2 sets out the mechanism for pricing industrial GHG emissions by establishing the OBPS;
- Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial laws concerning GHG emissions to federal works and undertakings, federal lands, Indigenous lands and waters within a province; and
- Part 4 requires the Minister of the Environment to prepare and table before Parliament an annual report on the administration of the *Act*.

[37] Parts 1 and 2 of the *Act* are described below in more detail. Ontario admits that Parts 3 and 4 are constitutional.

Part 1: Fuel Charge

[38] Part 1 of the *Act* (ss. 3-168) establishes the "charge" on carbon-based fuels. Subject to a number of exceptions, the charge applies to fuels that are produced, delivered or used in a "listed province", brought into a "listed province" from another place in Canada, or imported into Canada at a location in a "listed province" (ss. 17-39).

[39] The fuel charge currently applies to some 21 fuels that emit GHGs when burned, including gasoline, diesel fuel and natural gas. It also applies to "combustible waste". The fuels and the applicable rates of charge are set out in Schedule 2 to the *Act*. The rates for 2019 represent a price of $20 per tonne of CO_2 equivalent emitted by the combustion of each fuel. The rates will increase annually by $10 per tonne, up to $50 per tonne in 2022.

[40] While the fuel charge is paid by fuel producers, distributors and importers, and not directly by consumers, it is anticipated that the charge will be passed on to consumers. In the case of gasoline, the charge will generally be embedded in the price paid by the consumer at the pump. In Ontario, the initial fuel charge for gasoline, for 2019, will be 4.42 cents per litre. This will rise annually until it reaches 11.05 cents per litre for 2022 and thereafter.

[41] Pursuant to s. 165 of the *Act*, the Minister of National Revenue must distribute the net amount of charges levied under Part 1 to the provinces in which they were paid or to other prescribed persons or classes of persons. On October 23, 2018, Canada announced that charges levied in provinces that have voluntarily adopted the federal system will be returned directly to the province of origin. In the case of backstop jurisdictions that have not voluntarily adopted the federal system, approximately 90 percent of the proceeds of the fuel charge will be returned to residents of the province of origin as "Climate Action Incentive" payments. Canada has said that the balance will provide support to schools, hospitals, colleges and

universities, municipalities, not-for-profit enterprises, Indigenous communities, and small and medium-sized businesses in the province of origin.

[42] Other provisions in Part 1 of the *Act* address a rebate regime (ss. 42-54), registration and reporting requirements (ss. 55-73), the administration and enforcement of the fuel charge (ss. 84-164), and other miscellaneous matters (ss. 74-83).

[43] Finally, ss. 166-168 give authority to the Governor in Council to make regulations to carry out Part 1. Section 166 provides that for "the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" the Governor in Council may designate the "listed provinces" in which the fuel charge regime will apply, taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor.

[44] Part 1 of the *Act* has applied in Ontario, New Brunswick, Manitoba and Saskatchewan since April 1, 2019, and will apply in Yukon and Nunavut effective July 1, 2019: see *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act*, SOR/2019-79, ss. 1-2, 5.

Part 2: Industrial Greenhouse Gas Emissions

[45] Part 2 of the *Act* (ss. 169-261), entitled "Industrial Greenhouse Gas Emissions" sets out the mechanism for pricing industrial GHG emissions by emission-intense industrial facilities: the OBPS.

[46] Section 169 defines “greenhouse gas” as any of the gases set out in Schedule 3 to the *Act*, including CO_2 and the other GHGs referred to earlier. A “covered facility” is a facility located in a backstop jurisdiction (i.e. a province or area listed in Part 2 of Schedule 1) that either meets the criteria set out in the regulations or is designated by the Minister of the Environment. Covered facilities subject to the OBPS are exempt from paying the fuel charge, but are required to pay compensation for the portion, if any, of their GHG emissions that exceed their applicable emissions limit, based on a sector specific output-based standard.

[47] Section 171 requires covered facilities to register with the Minister of the Environment. Section 172 permits an industrial facility located in a backstop jurisdiction and not covered by the federal pricing regime to request voluntary designation as a covered facility. Pursuant to s. 173, facilities covered by the federal regime are subject to periodic compliance reporting requirements.

[48] Sections 174 to 187 set out two mechanisms for pricing industrial GHG emissions. First, if a facility’s emissions fall below its prescribed limit, the facility will be issued surplus credits called “compliance units”. Second, if a facility’s emissions exceed its prescribed limit, the facility must pay compensation for its excess emissions. Compensation may be made by remitting compliance units, paying an excess emissions “charge payment” to Canada, or doing a combination of both. The legislation contemplates the possibility of creating an emissions trading system for compliance units: s. 192(l).

[49] Section 188 (similar to s. 165 in relation to the fuel charge) empowers the Minister of National Revenue to distribute the revenues from excess emissions charge payments to the provinces in which they were paid or to other prescribed persons. Canada has indicated that these revenues will be used to support carbon-pollution reduction in the jurisdiction in which they were raised, but has not yet provided details.

[50] Subsections 189(1) and (2) (similar to ss. 166(2) and (3) in relation to the fuel charge) provide the Governor in Council with the authority to designate the backstop jurisdictions in which Part 2 will apply, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor.

[51] The Governor in Council also has a variety of other order and regulation-making powers (ss. 190-195), including the power to set GHG emission limits (s. 192(g)).

[52] The other provisions in Part 2 of the *Act* address the collection of information and samples (ss. 197-199), administration and enforcement (ss. 200-231), and offences and punishment (ss. 232-252). There are also a number of miscellaneous provisions (ss. 253-261).

[53] Part 2 of the *Act* has applied in Ontario, New Brunswick, Manitoba, Prince Edward Island and partially in Saskatchewan since January 1, 2019, and will apply in Yukon and Nunavut effective July 1, 2019: *Order Amending Part 2 of Schedule 1 to the Greenhouse Gas Pollution Pricing Act*, SOR/2018-212, s. 1; and *Greenhouse Gas Emissions Information Production Order*, SOR/2018-214, s. 107.

IV. The Positions of the Parties

[54] The Attorney General of Ontario submits that Part 1 (fuel charge) and Part 2 (OBPS) of the *Act* are unconstitutional. Ontario submits that Parliament is not entitled to regulate all activities that produce GHG emissions and that the jurisdiction Canada asserts under the *Act* would radically alter the constitutional balance between federal and provincial powers.

[55] Ontario agrees that climate change is real, is caused by human activities producing GHG emissions, is having serious effects, particularly in the north, and requires proactive measures to address it. Ontario does not agree, however, that what it labels a “carbon tax” is the right way to do so. It says that Ontario will continue to take its own approach to meet the challenge of reducing GHG emissions.

[56] Ontario points to the success of its own efforts to reduce GHG emissions, the most significant of which has been the closure of all five of Ontario’s coal-fired electricity generation plants, which has reduced Ontario’s annual GHG emissions by approximately 22 percent below 2005 levels as of 2016.

[57] Ontario's environmental plan ("Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan"), released in November 2018, proposes to find ways to "slow down climate change and build more resilient communities to prepare for its effects", but it will do this in a "balanced and responsible" way, without placing additional burdens on Ontario families and businesses.

[58] Ontario has committed to reducing its emissions by 30 percent below 2005 levels by 2030, which aligns with Canada's target under the *Paris Agreement*. It will do so, for example, by updating its *Building Code*, O. Reg. 332/12, increasing the renewable content of gasoline, establishing emissions standards for large emitters, and reducing food waste and organic waste.

[59] Ontario submits that the fuel charge and excess emissions charge are unconstitutional because they cannot be supported under any federal head of power. It further argues that the charges are not legislatively authorized as taxes and do not have a sufficient nexus to the purposes of the *Act* to be considered valid regulatory charges.

[60] The Attorney General of Canada submits that the *Act* is constitutional under the national concern branch of the POGG power contained in s. 91 of the *Constitution Act, 1867*. The "pith and substance" of the *Act* is the "cumulative dimensions of GHG emissions", which Canada says is a matter of national concern that the provinces are constitutionally incapable of addressing.

[61] In Canada's reply factum and in oral submissions, counsel for the Attorney General of Canada adopted an alternative submission advanced principally by the intervener the David Suzuki Foundation, that the *Act* can be supported under the "emergency" branch of the POGG power. Canada also submits that it would be willing to accept any of the alternative heads of power suggested by the interveners.

[62] In response to Ontario's argument that the charges themselves are constitutionally infirm, Canada submits that the fuel charge and the excess emissions charge are constitutionally valid regulatory charges which advance the objects of the *Act*.

[63] The court had the benefit of submissions from 18 interveners. These included 3 provincial attorneys general (New Brunswick, British Columbia and Saskatchewan) and the 15 organizations set out in the Preamble to these reasons.

[64] The Attorneys General of New Brunswick and Saskatchewan and the United Conservative Association support Ontario's position that the *Act* is unconstitutional and cannot be upheld under the POGG power. Saskatchewan and the Canadian Taxpayers Federation also argue that the *Act* imposes unconstitutional taxes.

[65] The Attorney General of British Columbia supports Canada's submission that Canada is entitled to address GHG emissions as a matter of national concern, given the inability of the provinces to agree upon or execute a collective response to the issue.

[66] The remaining interveners support the constitutionality of the *Act* on other grounds. They argue, variously: the emergency branch of the POGG power (s. 91); trade and commerce (s. 91(2)); taxation (s. 91(3)); and criminal law (s. 91(27)). Some interveners who align themselves with Canada's jurisdiction support their submissions by reference to: the federal treaty-making power; a proposed federal treaty implementation power; respect for Indigenous and minority rights; federalism principles; and s. 35 of the *Constitution Act, 1982*, Canada's duty to consult with Indigenous people and the honour of the Crown.

V. Analysis

[67] The analytical approach to the constitutionality of legislation on federalism grounds is well-established. In the first step, referred to as "characterization", the court determines the true subject matter or "pith and substance" of the challenged law. In the second step, "classification", the court determines whether that subject matter falls within the head of power relied upon to support the validity of the legislation: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, at para. 86.

[68] The analysis that follows begins with the first step of the federalism analysis, characterization, by explaining the method of analysis and applying that method to determine the "pith and substance" of the *Act*.

[69] Next, the analysis addresses the classification of the *Act*, explaining the national concern branch of the POGG power, as described in the leading cases,

particularly *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, and *R. v. Crown Zellerbach Canada Ltd*., [1988] 1 S.C.R. 401. It then applies the methodology set out in those authorities to the *Act* to determine whether it properly falls within the national concern branch of the POGG power.

Characterization – the "pith and substance" of the *Act*

[70] This step of the analysis requires an examination of the purpose and effects of the law to identify its "main thrust": *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 63. The purpose of a law is determined by examining both intrinsic evidence, such as the preamble of the law, and extrinsic evidence, such as the circumstances in which the law was enacted: *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 36. The effects of the law include both its legal effects and the practical consequences of the law's application: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at paras. 18, 24.

[71] Professor Peter Hogg suggests that "[t]he general idea … is that it is necessary to identify the dominant or most important characteristic of the challenged law": *Constitutional Law of Canada*, loose-leaf (revision 2018-1), 5th ed. (Toronto: Thomson Reuters Canada Ltd., 2007), at para. 15.5(a). He adds that the characterization exercise – determining the "matter" – can sometimes be conclusive of the law's classification (the class of subject into which it falls) and, therefore, its constitutionality. The determination of the pith and substance of the

law is critical to the national concern analysis because it will impact whether the matter has the requisite “singleness, distinctiveness and indivisibility” required by the cases, or whether it is simply an agglomeration of matters falling within provincial jurisdiction.

[72] In some cases, the pith and substance of a law has been expressed by the court in broad terms, such as: “the control or regulation of marine pollution” (*Crown Zellerbach*, at pp. 419-420); “public safety” (*Firearms Reference*, at para. 24); and “to regulate, on an exclusive basis, all aspects of securities trading in Canada” (*Securities Reference (2011)*, at para. 106). However, the Supreme Court has also held that “the environment” is too broad to constitute a matter: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63-64. A matter must not be so “lacking in specificity” or “so pervasive that it knows no bounds”: *Re: Anti-Inflation Act*, at p. 458. In other cases, the pith and substance has been defined more narrowly, for example: “to control systemic risks having the potential to create material adverse effects on the Canadian economy” (*Pan-Canadian Securities Reference*, at para. 87); “the siting of a radiocommunication antenna system” (*Rogers Communications*, at paras. 5, 57, 66); and “replac[ing] the employment income of insured women whose earnings are interrupted when they are pregnant” and “providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child” (*Reference re*

Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at paras. 34, 75).

[73] Not surprisingly, the parties characterize the pith and substance of the *Act* in different ways. Ontario puts it broadly: “a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all sources in Canada.” Canada describes it more narrowly, as the “cumulative dimensions of GHG emissions”. During oral argument, Canada indicated that it would, if necessary, accept some of the characterizations proposed by the interveners, such as Canada’s Ecofiscal Commission, which defined the matter as “the control of extra-provincial and international pollution caused by GHG emissions”.

[74] Neither Ontario’s nor Canada’s proposed characterization is persuasive. Ontario’s description is too broad and is designed to support its submission that the law effectively gives Canada sweeping authority to legislate in relation to “local” provincial matters, thereby excluding any provincial jurisdiction in relation to GHGs. Canada’s definition is too vague and confusing, since GHGs are inherently cumulative and the “cumulative dimensions” are undefined.

[75] The Preamble to the *Act* provides insight into its purpose:

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

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

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

…

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

Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians;

…

Whereas some provinces are developing or have implemented greenhouse gas emissions pricing systems;

Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;

And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure

> that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada… [Emphasis added.]

[76] The purpose of the *Act*, as reflected in its Preamble and in Canada's international commitments and domestic initiatives, discussed earlier, is to reduce GHG emissions on a nation-wide basis. It does so by establishing national minimum prices for GHG emissions, through both the fuel charge and the OBPS excess emissions charge. Its effect is to put a price on carbon pollution, thereby limiting access to a scarce resource: the atmosphere's capacity to absorb GHGs. The pricing mechanisms also incentivize behavioural changes.

[77] The *Act*'s purpose and effects demonstrate that the pith and substance of the *Act* can be distilled as: "establishing minimum national standards to reduce greenhouse gas emissions." The means chosen by the *Act* is a minimum national standard of stringency for the pricing of GHG emissions.

Classification

[78] The second step in the federalism analysis is the classification of the *Act* based on its pith and substance so characterized. Where does it "come within" the constitutional division of powers? The following brief outline of federal and provincial jurisdiction over the environment provides a backdrop to this issue.

(1) The Environment

[79] The environment was not expressly identified as a head of power in 1867. What we would today call "environmental" concerns certainly existed at

Confederation: smoke from factories; human waste and other noxious effluent escaping from inadequate sewage systems and polluting water supplies; industrial waste causing odours and disease; and horse manure in the streets. But the framers of the Constitution did not think that the environment required a separate "Class of Subject" of its own. They likely anticipated that legislation pertaining to these matters would come within s. 92(16), which gives the provinces jurisdiction over "all Matters of a merely local or private Nature in the Province." They probably also anticipated that major "environmental" events that threatened the entire Dominion, like the oft-used examples of "pestilence" or "famine", would fall within Canada's POGG power.

[80] It is fair to say that there is today a greater appreciation that environmental pollution can transcend national and international boundaries and it is no longer thought of as a purely local concern. It is also fair to say, as the Supreme Court has, that in the intervening 150 years since Confederation, the protection of "the environment" has become a matter of "superordinate importance, and one in which all levels of government and numerous organs of the international community have become increasingly engaged": *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paras. 85, 123, per La Forest J. Quoting *Oldman River*, La Forest J. observed: "The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations

have been engaged in the creation of a wide variety of legislative schemes and administrative structures" (para. 85).

[81] The environment as such is not a "matter" of exclusive jurisdiction, resting with one or other level of government. Legislatures and the courts have treated it as an area of shared jurisdiction: see *Oldman River*, at pp. 63-65; *Crown Zellerbach*, at pp. 455-456; and *Hydro-Québec,* at para. 59. In so doing, they have said that courts must ensure an appropriate balance between federal and provincial jurisdiction in relation to the environment in order to be responsive to the "emerging realities and to the nature of the subject matter sought to be regulated": *Hydro-Québec*, at para. 86, per La Forest J. At the same time, as Lamer C.J. and Iacobucci J. observed in their dissent in *Hydro-Québec*, at para. 62: "Environmental protection must be achieved in accordance with the Constitution, not in spite of it."

[82] This issue will be picked up later, in the context of the discussion of the national concern branch of the POGG power, relied upon by Canada.

(2) The National Concern Branch of the POGG Power

[83] The source of the POGG power is s. 91 of the *Constitution Act, 1867*, which provides that Parliament may "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". For

"greater Certainty", Parliament is given exclusive legislative jurisdiction with respect to 30 classes of subject.

[84] Section 92 gives the provinces exclusive legislative jurisdiction in relation to 15 classes of subject, the last of which is "[g]enerally all Matters of a merely local or private Nature in the Province."

[85] Professor Hogg suggests that the POGG power is residuary, in the sense that it is confined to matters not assigned exclusively either to Parliament or to the provincial legislatures: *Constitutional Law of Canada*, at para. 17.1. He identifies three "branches" of that power: the "gap" branch (for example, the incorporation of federal companies and jurisdiction in relation to offshore mineral resources); the emergency branch (for example, war measures legislation); and the national concern branch.

[86] It is unnecessary to trace the evolution of the national concern branch, as much of that work was done by Beetz J. in *Re: Anti-Inflation Act*, and by Le Dain J. in *Crown Zellerbach*, which both parties agree is the governing authority: see also Hogg, *Constitutional Law of Canada*, at para. 17.3. In the application of this branch of the POGG power, courts have been concerned to strike a balance between Canada's ability to pass laws that affect the "body politic of the Dominion" and the provinces' exclusive jurisdiction to enact legislation under their s. 92 heads of power. This concern was reflected over a century ago in the 1896 decision of the Judicial Committee of the Privy Council in the "*Local Prohibition* case"

(*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348), a reference concerning the constitutionality of a provincial temperance scheme. The Judicial Committee observed, at p. 361:

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

[87] In a subsequent case, *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.), which considered the constitutionality of Parts I, II and III of the federal *Canada Temperance Act*, R.S.C. 1927, c. 196, Viscount Simon set out the scope of the national concern branch and gave some illustrative examples, at pp. 205-206:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an

> instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province. [Emphasis added, footnotes omitted.]

[88] This brings the analysis to the decisions of the Supreme Court of Canada in *Re: Anti-Inflation Act* and *Crown Zellerbach*.

(a) *Re: Anti-Inflation Act*

[89] The dissenting judgment of Beetz J. in *Re: Anti-Inflation Act* is an important starting point for the discussion of the national concern branch of the POGG power as it formed the basis of the test in *Crown Zellerbach*. The majority upheld the federal anti-inflation legislation on the basis of the emergency branch of the POGG power. Justice Beetz (with Grandpré J. concurring) dissented and, therefore, found it necessary to consider the national concern branch. In his view, the anti-inflation legislation did not come within that branch. The "containment and reduction of inflation" was far too broad a matter. It threatened to upset the equilibrium of the Constitution by arrogating to Parliament matters that were within provincial legislative jurisdiction.

[90] Justice Beetz observed that a new matter added to Parliament's legislative jurisdiction under the POGG power had to be defined in such a way that it "was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the

bounds of form": p. 458 (emphasis added). The scale of the new matter and the extent to which it permitted Parliament to touch on provincial matters had to be taken into consideration as well.

[91] The "containment and reduction of inflation" did not pass muster (p. 458):

> 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.

[92] Although Beetz J. was in dissent, his views on the national concern branch of the POGG power attracted the support of a majority of judges: see p. 437. His views were, therefore, influential in *Crown Zellerbach*, decided 12 years later.

(b) *Crown Zellerbach*

[93] In *Crown Zellerbach*, the issue before the Supreme Court was whether s. 4(1) of the federal *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, was constitutional in its application to the dumping of waste in waters, other than fresh waters, within the boundaries of British Columbia. Crown Zellerbach Canada Limited, a logging company, was charged with two counts of contravening s. 4(1) of the statute, which prohibited the dumping of any substance at sea (defined as including the internal waters of Canada, other than fresh waters) without a permit. There was no evidence that Crown Zellerbach's dumping had any effect on either navigation or marine life, thus precluding reliance on either the federal navigation and shipping power (s. 91(10)) or the fisheries power (s. 91(12)). An appeal from

the dismissal of the charges by a provincial court judge was dismissed by the British Columbia Court of Appeal, which held that the statute was *ultra vires*.

[94] On appeal to the Supreme Court, Canada's submission was that in the exercise of its jurisdiction over ocean pollution it was entitled to prohibit the dumping of any substance, whether a pollutant or not, in all areas of the sea, including areas within the internal limits of the province.

[95] The Supreme Court (Dickson C.J., McIntyre, Wilson and Le Dain JJ.; Beetz, Lamer and La Forest JJ. dissenting) allowed the appeal. It was not disputed that Parliament could regulate dumping in waters outside the territorial limits of a province, or that it could regulate dumping in provincial waters to prevent pollution harmful to fisheries. It was also conceded that Parliament could regulate dumping in provincial waters of substances that could be shown to cause pollution of extra-provincial waters. What was challenged, however, was Parliament's jurisdiction to control dumping in provincial waters of substances that were not shown to have a pollutant effect in extra-provincial waters: p. 417. Canada's central argument was that the "matter" of "the prevention of ocean or marine pollution" was a matter of national concern: p. 418.

[96] The majority found that "[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole": p. 436. This, however, did not end the analysis of whether the matter fell within the national concern branch. Rather, the

question was whether “the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters”: p. 436 (emphasis added). More specifically, because the *Ocean Dumping Control Act* distinguished between the pollution of fresh water and the pollution of salt water, the question was whether this distinction was sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter to bring it within the POGG power.

[97] Justice Le Dain, writing for the majority, traced the evolution of the national concern branch in the *Local Prohibition* case and *Canada Temperance Federation*, through the subsequent cases of *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics); *Munro v. National Capital Commission*, [1966] S.C.R. 663 (development, conservation and improvement of the National Capital Region); *Re: Anti-Inflation Act* (containment and reduction of inflation); *R. v. Hauser*, [1979] 1 S.C.R. 984 (control of narcotic drugs); *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914 (provisions of the *Food and Drugs Act*, R.S.C. 1970, c. F-27, and associated regulations); *Schneider v. The Queen*, [1982] 2 S.C.R. 112 (medical treatment of heroin addicts); and *R. v. Wetmore*, [1983] 2 S.C.R. 284 (provisions of the *Food and Drugs Act*).

[98] From this survey, Le Dain J. expressed the following conclusions about the "national concern doctrine", which he considered to be "firmly established" (pp. 431-432):

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

[99] The consideration identified in the fourth paragraph has sometimes been referred to as the "provincial inability" component of the test. Professor Hogg has described it as follows in a paragraph that has been cited in several of the Supreme Court's decisions on the subject (*Constitutional Law of Canada*, para. 17.3(b)):

> It seems, therefore, that the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces. A subject-matter of legislation which has this characteristic has the necessary national concern to justify invocation of the p.o.g.g. power.

[100] The majority noted that marine pollution was recognized by the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* as "a distinct and separate form of water pollution having its own characteristics and scientific considerations": p. 436. Although the convention was concerned with dumping in the territorial sea and the open sea and not internal waters, the difficulty in drawing a dividing line in practice, and not simply the possibility that pollution could move from the internal waters to the territorial sea, explained the "essential indivisibility of the matter": p. 437. The distinction between salt water and fresh water gave s. 4(1) of the *Ocean Dumping Control Act* ascertainable and reasonable limits in its impact on provincial jurisdiction.

[101] Justice La Forest, in dissent, with whom Beetz and Lamer JJ. concurred, was particularly concerned by the fact that "what is sought to be regulated in the present case is an activity wholly within the province, taking place on provincially owned land … and there is no evidence that the substance made subject to the prohibition in s. 4(1) is either deleterious in any way or has any impact beyond the limits of the province": p. 444. He acknowledged, however, at pp. 445-446, that

Parliament could, under the POGG power, legislate to prevent activities in one province from polluting another province:

> In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. It may take steps to prevent activities in a province, such as dumping substances in provincial waters that pollute or have the potential to pollute the sea outside the province. Indeed, the exercise of such jurisdiction, it would seem to me, is not limited to coastal and internal waters but extends to the control of deposits in fresh water that have the effect of polluting outside a province. Reference may be made here to *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477, where a majority of this Court upheld the view that the federal Parliament had exclusive legislative jurisdiction to deal with a problem that resulted from the depositing of a pollutant in a river in one province that had injurious effects in another province. This is but an application of the doctrine of national dimensions triggering the operation of the peace, order and good government clause.

[102] To summarize the principles that emerge from *Crown Zellerbach*, the court considers first whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In this regard, the court considers the effect on extra-provincial interests of a provincial failure to regulate the “matter”. Second, the court considers whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power.

(c) Application of *Crown Zellerbach*

[103] This brings me to the application of the principles expressed in *Crown Zellerbach*.

(i) New Matter

[104] Establishing minimum national standards to reduce GHG emissions is a new matter that was not recognized at Confederation. The record demonstrates that global warming and climate change and, in particular, the role played by anthropogenic GHG emissions in those processes, were not widely understood by the scientific community until well after Confederation. The existential threat to human civilization posed by anthropogenic climate change was discovered even more recently. Accordingly, it cannot be said that establishing minimum national standards to reduce GHG emissions, as distinct from efforts to reduce local air pollution, was a matter in existence in 1867.

[105] Nevertheless, whether it is regarded as a new matter that did not exist at Confederation or as a matter that, originally of a local or private nature, has become a matter of national concern, the need for minimum national standards to reduce GHG emissions is a matter of national concern in the commonly-understood sense, given the consequences of climate change.

[106] In considering whether, the matter is both “national” and a “concern” in the constitutional sense, it is appropriate to consider two contextual factors. First, the *Act* was enacted, as its Preamble demonstrates, to give effect to Canada’s

international obligations. While it has been held that Parliament cannot implement treaties or international agreements that fall outside its constitutional powers (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at pp. 351-354), the fact that a challenged law is related to Canada's international obligations is pertinent to its importance to Canada as a whole: see *Crown Zellerbach*, at pp. 436-437; and Hogg, *Constitutional Law of Canada*, at para. 11.5(c). The existence of a treaty or international agreement in relation to the matter also speaks to its singularity and distinctiveness.

[107] Second, the *Act* is the product of extensive efforts – efforts originally endorsed by almost all provinces, including Ontario – to develop a pan-Canadian approach to reducing GHG emissions and mitigating climate change. This, too, reflects the fact that minimum national standards to reduce GHG emissions are of concern to Canada as a whole. The failure of those efforts reflects the reality that one or more dissenting provinces can defeat a national solution to a matter of national concern.

[108] *Munro v. National Capital Commission* offers a parallel. Prior to the enactment of the *National Capital Act*, 1958 (Can.), c. 37, Canada had attempted to regulate the zoning of lands in the National Capital Region by cooperation between a federal Commission established by Parliament and the local municipalities. It was only after the failure of extensive efforts to effect the desired result that Parliament gave the National Capital Commission the authority to

regulate zoning in the National Capital Region: see p. 667. In the case before us, Canada's unsuccessful efforts to achieve a national cooperative solution, which was supported at one time by most provinces, is a factor to be considered in assessing the national nature of the concern.

[109] A further, but unrelated, preliminary observation is warranted. The court's task on this reference is to pronounce on the constitutionality of the *Act*. The issue is not whether GHG emissions pricing is good or bad policy, or whether Canada has chosen the correct policy to address climate change. Nor is it about whether the policy will be effective in accomplishing its objectives. The sole issue for us is legislative competence: *Securities Reference (2011)*, at para. 90; and *Firearms Reference*, at para. 18. "[P]olicy considerations and practical effects are irrelevant to the question": *Pan-Canadian Securities Reference*, at para. 82.

(ii) Singleness, Distinctiveness and Indivisibility

[110] The requirement of *Crown Zellerbach* that a matter be single, distinct and indivisible is designed to limit the national concern branch to discrete matters with contained boundaries. It is aimed at preventing provincial jurisdiction from being overwhelmed with broad characterization of areas of national concern, such as "environmental protection", "inflation" or "preservation of national identity": see *Crown Zellerbach*, at pp. 452-453, per La Forest J., citing Gerald Le Dain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261, at p. 293; and Hogg, *Constitutional Law of Canada*, at para. 17.3(c).

[111] In *Hydro-Québec*, the minority described the test as a demanding one (para. 67):

> The test for singleness, distinctiveness and indivisibility is a demanding one. Because of the high potential risk to the Constitution's division of powers presented by the broad notion of "national concern", it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise, "national concern" could rapidly expand to absorb all areas of provincial authority. As Le Dain J. noted in *Crown Zellerbach* … once a subject matter is qualified of national concern, "Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects".

[112] Nonetheless, La Forest J., writing for the majority in *Hydro-Québec*, acknowledged, at para. 115: "A discrete area of environmental legislative power can fall within [the national concern] doctrine, provided it meets the criteria … set forth in *Crown Zellerbach*".

[113] Counsel for the Attorney General of British Columbia proposes a useful summary of the "singleness, distinctiveness and indivisibility" requirements: (1) singleness requires that the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute; (2) distinctiveness requires that the matter be one beyond the practical or legal capacity of the provinces because of the constitutional limitation on their jurisdiction to matters "in the Province"; and (3) indivisibility means that the matter must not be an aggregate of matters within provincial competence, but must have its own integrity – this normally occurs

where the failure of one province to take action primarily affects extra-provincial interests, including the interests of other provinces, other countries and Indigenous and treaty rights. This summary is a helpful guide.

[114] Establishing minimum national standards to reduce GHG emissions meets these requirements. GHGs are a distinct form of pollution, identified with precision in Schedule 3 to the *Act*. They have known and chemically distinct scientific characteristics. They combine in the atmosphere to become persistent and indivisible in their contribution to anthropogenic climate change. They have no concern for provincial or national boundaries. Emitted anywhere, they cause climate change everywhere, with potentially catastrophic effects on the natural environment and on all forms of life. They are exactly the type of pollutant that both the majority and the minority in *Crown Zellerbach* contemplated would fall within the national concern branch of the POGG power.

[115] It bears noting that the *Act* establishes only a <u>minimum</u> national standard – a minimum standard of stringency for the pricing of GHG emissions. It leaves it open to the individual provinces to legislate more stringent standards, it permits other provinces to adopt the federal minimum standard as their own and it applies the minimum standard to provinces that fail to do either.

[116] The international and interprovincial impacts of GHG emissions inform not only the “national” nature of the concern, but the singleness, distinctiveness and indivisibility of the matter of establishing minimum national standards to reduce

GHG emissions. Like the production, use and application of atomic energy, which was considered in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, the matter of establishing minimum national standards to reduce GHG emissions is "predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power": *Ontario Hydro*, at p. 379. Moreover, like the strategic and security aspects of atomic energy, the connection between minimum national standards to reduce GHG emissions and global climate change "bespeak[s] its national character and uniqueness": *Ontario Hydro*, at p. 379.

[117] The application of the "provincial inability" test leaves no doubt that establishing minimum national standards to reduce GHG emissions is a single, distinct and indivisible matter. While a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces – emissions that cause climate change across all provinces and territories. However stringent a province's GHG emissions reduction measures, they cannot, on their own, reduce Canada's net emissions. To use the example mentioned earlier in these reasons, the territories and the Atlantic provinces can do nothing, practically or legislatively, to address the approximately 93.2 percent of national GHG emissions that are produced by the rest of Canada.

[118] The matter is itself indivisible. No one province acting alone or group of provinces acting together can establish minimum national standards to reduce GHG emissions. Their efforts can be undermined by the action or by the inaction of other provinces. Thus, the reduction of GHG emissions cannot be dealt with in a piecemeal manner. It must be addressed as a single matter to ensure its efficacy. The establishment of minimum national standards does precisely that.

[119] The inability of one province to control the deleterious effects of GHGs emitted in others, or to require other provinces to take steps to do so, means that one province's failure to address the issue would endanger the interests of other provinces: *cf. Schneider v. The Queen*, at p. 131. This speaks to the singleness, distinctiveness and indivisibility of the matter.

[120] The evidence establishes that a cooperative national carbon pricing system would be undermined by carbon "leakage" in jurisdictions that do not adopt appropriately stringent carbon pricing measures. This is the quintessential case in which the failure of a province to cooperate would undermine the actions of other provinces, and would place unfair burdens on other provinces, potentially subverting a cooperative national scheme.

[121] As Professor Hogg notes, "the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces": *Constitutional Law*

of Canada, at para. 17.3(b). Moreover, as Le Dain J. observed in *Crown Zellerbach*, at p. 434: “It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment.”

[122] In *Hydro-Québec*, where only the minority opinion materially considered the national concern branch, it was suggested that the “provincial inability” test could have played an important role, had the legislation been restricted to a discrete set of chemicals, like polychlorinated biphenyls (“PCBs”). The minority observed, at para. 76, that its views might have been different had the scope of the act not encompassed substances whose effects were only “temporary and localized”:

> If the impugned provisions of the Act were indeed restricted to chemical substances, like PCBs, whose effects are diffuse, persistent and serious, then a *prima facie* case could be made out as to the grave consequences of any one province failing to regulate effectively their emissions into the environment. However, the s. 11(*a*) threshold of “immediate or long-term harmful effect on the environment” also encompasses substances whose effects may only be temporary or local. Therefore, the notion of “toxic substances” as defined in the Act is inherently divisible. Those substances whose harmful effects are only temporary and localized would appear to be well within provincial ability to regulate. To the extent that Part II of the Act includes the regulation of “toxic substances” that may only affect the particular province within which they originate, the appellant bears a heavy burden to demonstrate that provinces themselves would be incapable of regulating such toxic emissions. It has not discharged this burden before this Court. [Emphasis added.]

[123] The distinction between the substances referred to in *Hydro-Québec* and GHGs is self-evident. GHGs are neither temporary nor localized in their effects. Their harmful effects are “diffuse, persistent and serious” and of virtually infinite duration. Unlike the substances at issue in *Hydro-Québec*, GHGs are not inherently divisible. On the contrary, they cause climate change by combining together to become indistinguishable in the atmosphere.

[124] Establishing minimum national standards to reduce GHG emissions meets the requirements of “singleness, distinctiveness and indivisibility” articulated in *Crown Zellerbach*.

[125] I turn to the second inquiry mandated by *Crown Zellerbach*.

(iii) The Scale of Impact on Provincial Jurisdiction

[126] It will be recalled that Le Dain J. in *Crown Zellerbach* stated that a matter of national concern must have not only singleness, distinctiveness and indivisibility, but also a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

[127] Although not expressed in precisely these terms, this aspect of the test for matters of national concern is a recognition of federalism as an applicable constitutional principle, which, as the Supreme Court said in *Securities Reference (2011)*, at para. 61, “demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.” As counsel for the Attorney General of British Columbia put it, “assigning

the matter to the federal Parliament must not disrupt the fundamental distribution of power that characterizes Canadian federalism."

[128] Relying on the observations of Beetz J. in *Re: Anti-Inflation Act*, at pp. 443-445 and 458-459, Ontario says that Canada's assertion of jurisdiction in relation to the "cumulative dimensions of GHG emissions" would trench upon and severely limit provincial autonomy and would displace broad swaths of exclusive provincial jurisdiction.

[129] I would not accept this submission, for several reasons.

[130] First, it results from a mischaracterization of the *Act*. Properly characterized as set out above, the *Act* deals only with the establishment of minimum national standards to reduce GHG emissions. It operates on a nation-wide basis and leaves scope for provincial standards that meet or exceed that minimum. It also leaves ample provincial legislative opportunity for other aspects of GHG regulation, including laws aimed at the causes and effects of GHG emissions within the province. As was the case in *Pan-Canadian Securities Reference*, the proper characterization of the *Act* demonstrates its narrow objective and constrains its operation to an aspect of a threat to Canada as a whole.

[131] Second, the characterization of the *Act* and its classification as falling within the national concern branch of the POGG power do not have the effect of drawing all regulation of GHG emissions into federal jurisdiction. On the contrary, federal

jurisdiction in this field is narrowly constrained to address the risk of provincial inaction regarding a problem that requires cooperative action.

[132] The *Act* recognizes and respects the jurisdiction of individual provinces to enact their own legislation in relation to GHG emissions, including the ability of provinces to legislate fuel charges, to set emissions limits and to participate in output based pricing systems, provided that they are sufficiently stringent. A number of provinces have done so.

[133] Confining Canada's jurisdiction to the establishment of minimum national standards to reduce GHG emissions does not result in a massive transfer of broad swaths of provincial jurisdiction to Canada, as Ontario claims. The constitutionality of future federal legislation, if any, in relation to this matter will be assessed according to traditional constitutional principles, including whether in pith and substance the legislation is in relation to the matter of national concern recognized in these reasons or in relation to a matter of provincial jurisdiction. A relevant consideration will be the degree to which the legislation appears to intrude on areas of provincial jurisdiction.

[134] Third, the *Act* strikes an appropriate balance between Parliament and provincial legislatures, having regard to the critical importance of the issue of climate change caused by GHG emissions, the need to address it by collective action, both nationally and internationally, and the practical inability of even a majority of the provinces to address it collectively: see *Hydro-Québec*.

[135] While the principle of cooperative federalism cannot validate an unconstitutional law, it does support the concurrent operation of statutes enacted by governments at both levels. The *Act* encourages just that, making room for the operation of provincial carbon pricing legislation of sufficient stringency: see *Rogers Communications*, at paras. 38, 93. Cooperative federalism, in which Parliament addresses a matter of national concern and the provinces address the aspects of the issue that fall within their enumerated powers, can also serve as an interpretative aid. As the Supreme Court noted in *Pan-Canadian Securities Reference*, at para. 17, courts should favour a harmonious reading of statutes so as to permit their concurrent operation:

> Cooperative federalism is an interpretative aid that is used when "interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (*R. v. Comeau*, 2018 SCC 15, para. 78). Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 38). This principle is based on the presumption that "Parliament intends its laws to co-exist with provincial laws" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27).

[136] A harmonious reading of the *Act*, which itself confines its operation to the creation of a national minimum pricing scheme to address a national and international concern, permits it to operate concurrently with provincial laws

applicable to the environment in general, and to the reduction of GHG emissions in particular.

[137] Finally, Ontario does not suggest that the *Act* is in conflict with any existing Ontario legislation or with any measures Ontario proposes to undertake to reduce GHG emissions and mitigate climate change. Nor do either of the attorneys general who support Ontario suggest that the *Act* conflicts with their present or contemplated future legislation. This is a good indication that the *Act* leaves generous room for provincial jurisdiction in relation to these matters and that the *Act* simply does what the provinces are constitutionally unable to do.

[138] As explained above, the environment is an area of shared constitutional responsibility. The *Act* is Parliament's response to the reality and importance of climate change while securing the basic balance between the two levels of government envisioned by the Constitution: *Hydro-Québec*, at para. 86, per La Forest J.

(d) Conclusion on National Concern

[139] For these reasons, I conclude that the *Act* is constitutionally valid under the national concern branch of the POGG power contained in s. 91 of the *Constitution Act, 1867*.

[140] In view of this conclusion, it is unnecessary to consider whether the *Act* falls under other heads of jurisdiction proposed by Canada and some of the interveners.

[141] I turn now to Ontario's alternative submission.

Constitutionality of the Fuel Charge and the Excess Emissions Charge

[142] Ontario's second submission consists of two independent arguments relating to ss. 91(3) and 53 of the *Constitution Act, 1867*.

[143] Section 91(3) of the *Constitution Act, 1867*, gives Parliament jurisdiction to enact laws for the "[t]he raising of Money by any Mode or System of Taxation." Section 53 provides: "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."

[144] The latter section, while seemingly unexceptional, has historical roots in the English *Bill of Rights* of 1689, 1 Will. & Mary, sess. 2, c. 2, art. 4. It was explained in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, and *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, as codifying the principle of "no taxation without representation" and ensuring not only "that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply)": *620 Connaught*, at paras. 4-5, quoting P.W. Hogg & P.J. Monahan, *Liability of the Crown*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at p. 246; and *Eurig Estate*, at para. 30.

[145] The law differentiates between taxes and regulatory charges. Both typically have some common features: see *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357; *Eurig Estate*; and *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134. The

distinguishing feature is the primary purpose of the levy. If it is imposed primarily for a regulatory purpose, or as necessarily incidental to a broader regulatory scheme, it is a regulatory charge. If it is imposed primarily to raise revenues for general fiscal purposes, it is a tax. Since some levies have aspects of both a tax and a regulatory charge, the court must look to the levy's primary purpose, as opposed to its incidental effects, in order to determine its true nature: see *Westbank*, at para. 30; *620 Connaught*, at paras. 16-18; and Hogg, *Constitutional Law of Canada*, at para. 31.10(b).

[146] The principle expressed in s. 53, that taxes must be imposed by a taxing statute originating in the House of Commons, means that taxes cannot be imposed by a regulatory statute unless expressly authorized as such.

(1) Ontario's First Argument: The Charges do not fall under s. 91(3)

[147] Ontario's first submission is that the *Act* is a regulatory statute, it was never intended to impose a tax, and Canada, therefore, cannot rely on its taxation power as a constitutional basis for the charges under the *Act*.

[148] I agree with Ontario that, given its pith and substance, the *Act* does not fall under the federal taxation power enumerated in s. 91(3). As noted, the *Act* falls under the national concern branch of the POGG power.

[149] Although I would find the *Act* valid under the POGG power, Ontario's second argument must be addressed – whether the charges imposed by the *Act* nevertheless offend s. 53.

(2) Ontario's Second Argument: The Charges have no Nexus to the Purposes of the *Act*

[150] Ontario's second submission is that the charges imposed under the *Act* are unconstitutional regulatory charges because they have no nexus to the purposes of the *Act* – a requirement Ontario says is imposed by s. 53.

[151] The *Act* creates a regulatory scheme as described in *Westbank*, at paras. 24-29. Ontario acknowledges this. But that is not enough. *Westbank* requires a second step to distinguish between a regulatory charge and a tax – the government levy must be "connected" to or "adhesive" to the regulatory scheme itself. As put by Gonthier J., at para. 44, this connection will exist "when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour" (emphasis added).

[152] Ontario submits that there is no nexus between the fuel charge and the excess emissions charge on the one hand and the regulatory purposes of the *Act* on the other because: (1) the revenues generated by the charges are not linked to the cost of administration of the regulatory scheme; and (2) those revenues will not be spent in connection with the purposes of the *Act*.

[153] Canada responds that the charges imposed by the *Act* are intended to create a financial incentive for businesses and individuals to change their behaviour in order to reduce GHG emissions and to encourage the development

and use of cleaner fuels or alternatives. Canada says that the requirement for a nexus between the charges and the regulatory scheme does not mean that the revenues raised by the charges must be tied to the cost of administration or used to further the purposes of the scheme. The behaviour-changing nature of the charges themselves can provide that nexus.

[154] I agree that behaviour modification is one of the purposes of the charges. This has been recognized as an appropriate purpose for a regulatory scheme: *Westbank*, at paras. 29, 44; and *620 Connaught*, at paras. 20, 27. While it is true, as Canada observes, that there is no Supreme Court authority stating that the behaviour-changing nature of charges themselves cannot provide a sufficient nexus, the Supreme Court in *620 Connaught* expressly left for another day the question of "[w]hether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct": para. 48. But for this statement, one might have thought that the observation of Gonthier J. in *Westbank* at para. 44, quoted and emphasized above, meant that the nexus to the regulatory purpose could be met by the charges themselves – for example, where the purpose of the charges is "the regulation of certain behaviour."

[155] The issue was addressed by the Federal Court of Appeal in *Canadian Association of Broadcasters v. Canada*, 2008 FCA 157, [2009] 1 F.C.R. 3, leave to appeal granted, [2008] S.C.C.A. No. 423, appeal discontinued on October 7,

2009. It was argued that broadcasting licence fees imposed by the Canadian Radio-television and Telecommunications Commission were a tax, because the revenues generated by the fees exceeded the costs of the regulatory scheme. The Federal Court of Appeal concluded that *Westbank* does not require that there be a reasonable nexus between the revenue generated by a levy and the cost of the regulatory scheme. Justice Ryer, who gave the principal judgment, pointed out at para. 49 that, in *Westbank*, Gonthier J. had stated that the requisite nexus would exist where the levy had a regulatory purpose. He continued: “It follows, in my view, that where a regulatory purpose for a levy has been established, the requisite nexus between that levy and the regulatory scheme in which it arises will nevertheless exist even if the quantum of the revenues raised by that levy exceeds the costs of the regulatory scheme in which that levy arises.”

[156] Justice Ryer found in any event that the fees were “tied to” the costs of the regulatory scheme (using the language of *Westbank*, at para. 44) because the costs of the Canadian broadcasting system, including federal appropriations to the Canadian Broadcasting Corporation, were well in excess of the revenues generated by the fees: paras. 66-67, 79, 83. However, in the event he was wrong in that conclusion, he went on to consider whether the fees would constitute regulatory charges if they were “otherwise connected” to the regulatory scheme: para. 86.

[157] Referring to *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, Ryer J.A. observed that a levy will be connected to a regulatory scheme, and will be a regulatory charge, if it has a regulatory purpose. In *Natural Gas*, the majority observed, at p. 1070: "If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme … then the levy is not in pith and substance 'taxation'". Justice Ryer concluded that the fees at issue "serve a regulatory purpose by ensuring that licensees are required to make payments for the privilege of operating in an industry that is protected by the regulatory scheme from the rigours of full-blown competition": para. 94. The fees served a regulatory purpose, were therefore connected to the regulatory scheme and were in pith and substance regulatory charges, not taxes.

[158] Justice Létourneau gave brief concurring reasons, expressing the view that no nexus is required between the amount of the levy and the costs of the scheme where a regulatory purpose exists and the charge is levied for a benefit or privilege. Justice Pelletier, also concurring, expressed the view that s. 53 does not invalidate as a "tax" legislation that requires the payment of a charge or fee for a form of licence – at para. 109:

> Section 53 is about democratic accountability. Its function is to ensure that only those who are politically accountable to the electorate are authorized to impose a compulsory levy on that electorate. It does not offend any notion of "no taxation without representation" for a government to make available to those who are prepared

> to pay for it, a property, a commercial right or a licence to do something which can only lawfully be done by a licence holder. While such transactions are capable of raising issues of accountability for public property, there is no issue of *democratic* accountability where citizens acquire property or commercial rights from the government in exchange for money. [Emphasis in original.]

[159] I agree with the Federal Court of Appeal. Regulatory charges need not reflect the cost of administration of the scheme. This is consistent with the Supreme Court's observations in *620 Connaught*, at para. 20:

> By contrast [to user fees], regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour….

[160] Contrary to Ontario's submissions, the fees levied under a regulatory scheme are not required to be cost recovery mechanisms. *620 Connaught* expressly contemplates that funds collected under the scheme may be used to alter behaviour.

[161] I would also reject Ontario's submission that revenue raised by a regulatory charge must be used to further the purposes of the regulatory scheme. There is no authority for that proposition and indeed there is appellate authority against it.

[162] Moreover, even if it is necessary to show that the revenues raised are used for the purposes of the *Act*, this has been established. The funds are returned to

provinces, taxpayers and institutions to reward them for their participation in a program that benefits the provinces and the entire country. This promotes and rewards behaviour modification, encourages shifts to cleaner fuels, and fosters innovation, all of which are purposes identified in the Preamble of the *Act*.

[163] I conclude that the fuel charge and the excess emissions charge under the *Act* are constitutional regulatory charges.

VI. Disposition

[164] I would answer the question referred by the Lieutenant Governor in Council as follows:

> Question: Is the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12, unconstitutional in whole or in part?
>
> Answer: No. The *Act* is constitutional.

"G.R. Strathy C.J.O."
"I agree. J.C. MacPherson J.A."
"I agree. Robert J. Sharpe J.A."

Hoy A.C.J.O. (concurring):

[165] I agree with the Chief Justice that the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12 (the "*Act*") is constitutional under the national concern branch of the "Peace, Order, and good Government" ("POGG") power contained in s. 91 of the *Constitution Act, 1867*. However, I do not agree with him that the true subject matter or "pith and substance" of the *Act* is properly distilled as: "establishing minimum national standards to reduce greenhouse gas emissions."

[166] In my opinion, that description is too broad and does not capture the true substance of the *Act*. Further, it risks an unnecessarily broad impingement on provincial jurisdiction. As I will explain, I conclude that the pith and substance of the *Act* is: "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."

[167] My conclusion finds support both in statements made during the parliamentary debates of the legislation and in the *Act* itself. My characterization of the pith and substance of the *Act* is cast at a level of abstraction that is both legally permissible and legally desirable.

[168] Statements during the parliamentary debates of the legislation provide some indication of the purpose of the *Act*. For example, the Hon. Catherine McKenna

(Minister of Environment and Climate Change) indicated in the House of Commons that pricing pollution was essential to a credible climate plan:

> Central to any credible climate plan is a price on pollution. That is exactly why we are working in partnership with the provinces and territories to price carbon.
>
> …
>
> Without a doubt, pricing carbon pollution is making a major contribution to helping Canada meet its climate targets under the Paris Agreement. [*House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 289 (1 May 2018), at p. 18982; emphasis added.]

[169] Jonathan Wilkinson (Parliamentary Secretary to the Minister of Environment and Climate Change) echoed these comments, explaining that the government was committed to setting a minimum price on carbon:

> To ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon. This system will apply to any province or territory that requests it or that does not create its own pollution pricing system that meets federal criteria.
>
> …
>
> Madam Speaker, the focus of the pricing of carbon pollution is to actually incent choices that drive people toward more efficient use of hydrocarbon resources so that we will reduce our GHG emissions over time. It is an important piece of a broader approach to addressing climate change and to achieving our Paris targets. [*House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 294 (8 May 2018), at p. 19237-38; emphasis added.]

[170] Before the House of Commons Standing Committee on Finance, Judy Meltzer (Director General, Carbon Pricing Bureau, Department of the Environment) observed that the federal carbon pricing backstop system would help reduce greenhouse gas ("GHG") emissions by applying a carbon price throughout Canada:

> The introduction of the proposed greenhouse gas pollution pricing act is a step in the development of a federal carbon pricing backstop system. The key purpose of the act is to help reduce greenhouse gas emissions by ensuring that a carbon price applies broadly throughout Canada, with increasing stringency over time. It provides the legal framework for the federal backstop system[.] [House of Commons, Standing Committee on Finance, *Evidence*, 42nd Parl., 1st Sess., No. 146 (25 April 2018), at p. 6; emphasis added.]

[171] Similarly, John Moffet (Associate Assistant Deputy Minister, Environmental Protection Branch, Department of the Environment) told the Committee that the legislation was aimed at ensuring that carbon pricing applies throughout the country:

> [T]he government's goal was to ensure that carbon pricing applied throughout Canada so that a price signal was sent to a broad range of activities, to ensure coherence and as much efficiency as possible, and to send a signal to other countries and businesses planning to invest in Canada that Canada was committed to carbon pricing. [House of Commons, Standing Committee on Finance, *Evidence*, 42nd Parl., 1st Sess., No. 148 (1 May 2018), at p. 5; emphasis added.]

…

> [T]he goal of this legislation is to change behaviour, reduce emissions … and make a contribution, but not be the sole contributor to attaining the target. [House of Commons, Standing Committee on Finance, *Evidence*, 42nd Parl., 1st Sess., No. 152 (8 May 2018), at p. 8.]

[172] Further, the *Act* is entitled the "*Greenhouse Gas Pollution Pricing Act*". The *Act*'s long title is: "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts."

[173] "Pricing" is part of both the long and short titles of the *Act*.

[174] The Preamble to the *Act* also provides insight into the *Act*'s purpose. As the Chief Justice notes in para. 75 of his reasons, after adverting to the scientific consensus that anthropogenic GHG emissions contribute to global climate change and the fact that climate change is a national problem that requires immediate action by all levels of government, the Preamble of the *Act* states the following:

> Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;
>
> And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada[.] [Emphasis added.]

[175] Together, the statements made during the parliamentary debates, the *Act*'s titles, and its Preamble clearly indicate that the purpose of the *Act* is to put a

minimum national price on anthropogenic GHG emissions. The intended effect of the *Act* is to thereby modify behaviour and reduce anthropogenic GHG emissions on a national basis. In my view, the pith and substance of the *Act* is "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."

[176] As stated above, my characterization of the *Act* is cast at a level of abstraction that is both legally permissible and legally desirable.

[177] Without citing authority, both Canada and Ontario caution that characterizing the pith and substance of the *Act* with reference to GHG emissions pricing impermissibly incorporates Parliament's chosen "means" of addressing what they say is the purpose of the *Act,* reducing GHG emissions, into the matter. It was in the interests of both parties to resist a narrow characterization. Canada seeks the broadest constitutionally permissible characterization of the pith and substance of the *Act* in order to ensure future, court-endorsed legislative flexibility to reduce GHG emissions through the POGG power by any means. As for Ontario, as the Chief Justice observes, at para. 74 of his reasons, its broad characterization of the pith and substance of the *Act* supports its submission that the *Act* will result in Canada acquiring such sweeping authority to legislate in relation to "local" matters that it is not constitutionally sustainable.

[178] In three cases, the Supreme Court has cautioned that when determining the pith and substance of a law for the purpose of determining which order of

government can legislate, care should be taken not to confuse the purpose of a law with the means chosen to achieve it: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 24.

[179] However, I do not read these cases as going so far as to say that the characterization of the pith and substance of a law cannot include any reference to means. Indeed, the principle that legislative purpose and means may diverge and so must be considered separately during the characterization exercise has no bearing on whether the means chosen may affect or form part of the pith and substance of a law. As the parliamentary debate of this *Act* reveals, the choice of means may be so central to the legislative objective that the main thrust of the law, properly understood, is to achieve a result in a particular way.

[180] The narrow definition of the pith and substance of laws in some cases arguably belies Canada and Ontario's position. For example, in *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, the Supreme Court defined the pith and substance of impugned provisions for maternity and parental benefits as "replac[ing] the employment income of insured women whose earnings are interrupted when they are pregnant" and

"providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child": at paras. 34, 75.

[181] Moreover, none of these cases cautioning that care be taken not to confuse the purpose of a law with the means chosen to achieve it involved determining whether the law at issue properly fell within the national concern branch of the POGG power. Rather, they considered whether a law should be classified under an existing, enumerated head of federal power under s. 91 or under a head of provincial power under s. 92. In such an exercise, over-emphasis on the means by which the purpose of the impugned legislation is to be effected might skew the classification. That is a very different exercise than defining a new matter for the purpose of determining whether it can be added to Parliament's legislative jurisdiction under the POGG power. The national concern branch of the POGG power creates new and permanent federal jurisdiction by taking powers away from the provinces; it is not about classification in the conventional sense. The more broadly a new matter is characterized, the greater the impingement on provincial jurisdiction.

[182] My colleague, Justice Huscroft, cites Professor Jean Leclair's caution in "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 U.B.C. L. Rev. 353, at pp. 363-64, that the conceptual indivisibility test in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, must be applied to the matter said to be of national importance, and not to the legislative means employed to ensure

its regulation. In my view, Professor Leclair's point is not that the characterization of the pith and substance of a law cannot include any reference to means. Rather, his concern is that if the pith and substance of the law is broadly defined, that broad definition, and not the narrower means by which the purpose of the law is to be effected, must satisfy the *Crown Zellerbach* test.

[183] At paras. 76 and 77 of his reasons, the Chief Justice describes the purpose of the *Act* as reducing GHG emissions on a nation-wide basis and characterizes the establishment of national minimum prices for GHG emissions as the "means" used to carry out the *Act*'s purpose. But the Chief Justice's characterization of the *Act* as "establishing minimum national standards to reduce greenhouse gas emissions" itself incorporates a means element – "establishing minimum national standards". In my view, the Chief Justice tacitly recognizes that the characterization of a law may include some reference to the means by which its purpose is achieved.

[184] Accordingly, I would characterize my limited disagreement with the Chief Justice as concerning the appropriate level of abstraction at which the pith and substance of the *Act* should be characterized.

[185] At para. 113 of his reasons, the Chief Justice agrees with the Attorney General of British Columbia that *Crown Zellerbach* requires that "the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute." I

also agree with this. But I disagree that characterizing the pith and substance of the *Act* as "establishing minimum national standards to reduce greenhouse gas emissions" characterizes the *Act* as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the *Act*.

[186] Several interveners characterize the pith and substance of the *Act* more narrowly, with reference to GHG emissions pricing. For example:

- Athabasca Chipewyan First Nation – putting a minimum national price on GHG emissions;
- Canadian Environmental Law Association – mitigating climate change by imposing fuel charges or emissions levies on GHG emissions sources to induce them to reduce GHG emissions;
- Canadian Public Health Association – incentivizing the behavioural changes necessary to reduce Canada's GHG emissions by ensuring that GHG emissions pricing applies throughout Canada; and
- Centre québécois du droit de l'environnement and Équiterre – implementing a national carbon pricing scheme or ensuring that GHG emissions pricing applies throughout Canada.

[187] The fundamental purpose of the *Act* is to put a minimum national price on anthropogenic GHG emissions. The intended effect of the *Act* is to thereby modify

behaviour and reduce anthropogenic GHG emissions on a national basis. Characterizing the pith and substance of the *Act* as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" characterizes the pith and substance of the *Act* as specifically and narrowly as possible, consistent with its fundamental purpose and effect. It also captures the *Act*'s true substance.

[188] As the Chief Justice describes, a wide range of GHGs are emitted by human activity and there are a variety of forms of GHG emissions pricing. The "means" chosen by Parliament in the *Act* are a minimum national regulatory charge on carbon-based fuels and a mechanism that prices excess industrial GHG emissions. Framing Canada's jurisdiction under the POGG power as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" leaves Canada considerable legislative latitude to reduce anthropogenic GHG emissions on a national basis through GHG emissions pricing in other ways. I disagree with Justice Huscroft that framing Canada's jurisdiction under the POGG power in this manner simply constitutionalizes the *Act*.

[189] Finally, in characterizing the pith and substance of the *Act* more narrowly than the Chief Justice, I note, as Justice Huscroft does in his dissenting reasons, that it must also be remembered that Canada also has other constitutional powers

– taxation, criminal law, and trade and commerce – it can rely upon to legislate to reduce anthropogenic GHG emissions.

[190] I agree with and adopt the Chief Justice's careful analysis, at paras. 78-138, of why the *Act* is constitutional under the national concern branch of the POGG power, recognizing that it would differ somewhat for my narrower characterization of the *Act*. I would only add that characterizing the *Act* in the manner that I propose further constrains the impact on provincial jurisdiction and therefore more readily satisfies the *Crown Zellerbach* test.

[191] I also agree with the Chief Justice that the *Act* does not fall under the federal taxation power enumerated in s. 91(3) and the charges it imposes do not offend s. 53 of the *Constitution Act, 1867*, and with his reasons for so concluding.

"Alexandra Hoy A.C.J.O."

Huscroft J.A. (dissenting):

[192] This is a request for the court's advice on a question of constitutionality. The court is not required to decide anything about the science of climate change in order to provide that advice: all of the governments that are party to the reference – those arguing in support of the constitutionality of the law as well as those opposing it – proceed on the basis that climate change is a real and pressing problem that must be addressed. Nor does this case require the court to decide anything about how climate change is best addressed. That is a question for governments and legislatures, not the court, which has neither the expertise nor the mandate to express any views on the matter.

[193] This case concerns legislative authority in the Canadian constitutional order to address climate change. The starting point is well established: neither Parliament nor provincial legislatures enjoy exclusive lawmaking authority concerning either the environment in general or pollution in particular. Instead, lawmaking authority over these subject matters exists at both levels of government. Parliament has considerable authority to address climate change by, for example, employing its broad powers of taxation, which can be used to establish taxes on greenhouse gas ("GHG") producing fuels and GHG emissions, and criminal law, which can be used to prohibit and regulate a wide range of activities that contribute to climate change. The provinces also have considerable

authority to address climate change by, for example, exercising their powers over property and civil rights and matters of a local and private nature, which permit them to regulate manufacturing, farming, mining and related activities that generate GHGs, in addition to purely private, non-commercial activities.

[194] There is no question that the provinces can address climate change by imposing fuel and excess emission charges; some provinces did so prior to Parliament's passage of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12 (the "*Act*"), which effectively requires that all of the provinces do so. However, several provinces prefer to employ different strategies to reduce GHGs and address climate change, strategies that are, in their view, more suited to local needs and conditions.

[195] The question raised by this case is whether Canada can require these provinces to adopt its preferred means of addressing climate change – eschewing its enumerated powers under s. 91 of the *Constitution Act, 1867* and asserting residual lawmaking authority under the national concern branch of the "Peace, Order, and good Government" ("POGG") clause. In effect, Canada has asked the court to sanction a change to the constitutional order – to increase Parliament's lawmaking authority while diminishing that of the provincial legislatures, and to do so on a permanent basis.

[196] I agree with the Chief Justice, as well as with both the majority and the minority of the Court of Appeal for Saskatchewan in *Reference re Greenhouse Gas*

Pollution Pricing Act, 2019 SKCA 40, appeal as of right to S.C.C. filed, 38663, that Canada's assertion of authority over the "cumulative dimensions" of GHGs cannot be supported under the national concern branch of the POGG power. Given the pervasiveness of GHGs – the fact that GHGs are generated by most activities regulated by the provinces – recognition of federal authority over the cumulative dimensions of GHGs would result in an extensive and permanent transfer of lawmaking authority to Parliament, allowing Parliament to regulate vast areas of provincial life, business as well as personal.

[197] However, I disagree with the Chief Justice's reformulation of Canada's position, and his conclusion that Parliament has the authority to establish "minimum national standards to reduce GHG emissions" under the POGG power. Although this formulation narrows the lawmaking authority granted to Parliament somewhat, it is amorphous and distorts the POGG power and the limited purpose it is designed to serve in the constitutional order.

[198] I appreciate that federalism concerns seem arid when the country is faced with a major challenge like climate change. As long as something gets done, it may seem unimportant which level of government does it. But federalism is no constitutional nicety; it is a defining feature of the Canadian constitutional order that governs the way in which even the most serious problems must be addressed, and it is the court's obligation to keep the balance of power between the levels of government in check.

I. Federalism and Peace, Order, and Good Government

[199] I begin with some brief background on the nature of federalism analysis and Parliament's POGG power.

[200] The two-step approach that informs the analysis of federalism questions is well established. The first step is to characterize the impugned law. This is referred to as determining the "pith and substance" of the law, an arcane phrase that describes a simple idea: the court must identify what the law does – its essential character – before it can determine where lawmaking authority lies. The second step is to determine whether the law comes within a class of subjects assigned to provincial or federal lawmaking authority.

[201] This case is unusual because Canada's primary claim is that Parliament has legislated, not on the basis of the federal powers enumerated in s. 91, but on the basis of its power to legislate for peace, order, and good government. In order to evaluate this claim, the court must determine whether the *Act* fits under a subject matter that ought to be recognized under the POGG power.

[202] Parliament's power to make laws under the POGG power flows from the introductory clause in s. 91 of the *Constitution Act, 1867*, which provides as follows:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the

> foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated. [Emphasis added].

[203] Once a matter is recognized by the court to be a matter falling under the POGG power, Parliament acquires "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects": *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 433. The transfer of power from provincial legislatures to Parliament effected under the POGG power is either temporary, in the case of the emergency branch, or permanent, in the case of both the "gap" branch (not at issue in this case) and the national concern branch, under which Canada claims the authority to enact the *Act*. In effect, Canada seeks to augment the list of federal powers enumerated under s. 91, not by amendment to the Constitution but by means of judicial interpretation of the POGG clause.

II. Characterizing the *Act*

[204] With this background in mind, I turn to the impugned legislation. What does it do, and where in the constitutional order does it fit?

[205] The characterization of legislation in the course of federalism analysis is based on the understanding that laws will often have more than one feature; indeed, they may have several features that address several goals. Thus, the court is concerned with identifying the most important feature of the law – its essential

character. The law is classified having regard to its essential character regardless of any secondary or incidental aspects that it may have.

[206] The second step, classification, can be difficult because the powers enumerated under ss. 91 and 92 of the *Constitution Act, 1867*, are, in significant respects, worded vaguely rather than specifically, and overlap between them is to be expected.

[207] An example demonstrates the point. In *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, the Supreme Court considered the constitutionality of a federal regulation that prohibited the sale of young hooded and harp seals. On the face of things, this appeared to be a regulation concerning intraprovincial trade, and so a matter of provincial lawmaking authority under the property and civil rights power (s. 92(13)). But the court did not consider simply the immediate effect of the regulation; it went on to consider *why* the regulation banned the sale of seals. Looked at from this perspective, the court concluded that the prohibition was directed not at trade within a province but, instead, at managing fisheries – the economic viability of the seal fishery and Canadian fisheries in general, a matter of Parliament's lawmaking authority under the sea coast and inland fisheries power (s. 91(12)). *Ward* demonstrates the importance of ensuring that laws are not characterized on the basis of the means chosen to give effect to the legislature's purpose. See also this court's decision in *Canada Post v. Hamilton (City)*, 2016 ONCA 767, 134 O.R. (3d) 502, at para. 37.

[208] A similar point can be made about the *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783. In that case, the court concluded that the purpose and effect of a law requiring the licensing and registration of firearms was the enhancement of public safety – a matter of federal criminal lawmaking authority under s. 91(27) – even though the means chosen by Parliament included requirements that, on the face of things, involved the regulation of firearms as property ownership, otherwise a matter of provincial jurisdiction under s. 92(13).

[209] In this case, Canada asserts that the impugned legislation is in pith and substance concerned with the "cumulative dimensions of GHG emissions". This characterization was rejected by the Court of Appeal for Saskatchewan on the basis that there is no meaningful distinction between individual and cumulative GHG emissions, and that recognizing GHGs as a subject matter under the POGG power would upset the fundamental distribution of legislative power under the Constitution: *Reference re Greenhouse Gas Pollution Pricing Act*, at paras. 134-38, *per* Richards C.J.S., at paras. 424-26, *per* Ottenbreit and Caldwell JJ.A. (dissenting). It is also rejected by the majority in this case on the basis that it is "vague and confusing", because GHGs are inherently cumulative and the "cumulative dimensions" of the problem are undefined.

[210] I agree. However, in my view, the majority decisions in both cases characterize the *Act* in ways that are problematic.

[211] In Saskatchewan, Richards C.J.S. characterizes the *Act* in a manner that dictates the outcome of the POGG analysis. He proffers a highly specific characterization of the law, concluding that its pith and substance "is best seen as being the establishment of minimum national standards of price stringency for GHG emissions:" para. 125. To a similar effect, the Associate Chief Justice in this case concludes that the *Act*'s pith and substance is "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions." These are both descriptions of the means or technique Parliament has chosen to give effect to the *Act*'s ultimate purpose, rather than a characterization of the *Act*'s dominant feature.

[212] The Chief Justice's decision in this case avoids this problem but introduces a different one. With respect, to say that the essential character of the *Act* is to establish "minimum national standards to reduce greenhouse gas emissions" is to leave unanswered the key question for classification purposes: minimum standards of *what*? This characterization leaves "standards" free-floating. What is it, exactly, that the *Act* regulates? The problem is all the more acute given that we are concerned not with whether the law fits under one of the existing federal powers enumerated in s. 91, but, instead, the more normative question of whether it fits under a new federal subject matter that *ought* to be recognized for purposes of the POGG power.

[213] In my view, the *Act* should be characterized more simply: it regulates GHG emissions. The means Parliament has adopted is the establishment of an escalating “fuel charge” on carbon-based fuels and a mechanism for crediting and charging industrial GHG emissions, both of which are supposed to establish economic incentives that help to achieve the *Act*’s ultimate purpose: reducing GHG emissions.

III. Classifying the *Act*

[214] As I mentioned above, it is well established that neither the environment nor pollution is a standalone area of legislative responsibility under the Canadian constitution. Both Parliament and provincial legislatures can, within their enumerated powers, legislate to protect the environment and address the problem of pollution: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 112; *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, at pp. 63-64.

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

nevertheless, entitled to legislate on the basis of the national concern branch of the POGG power. Before I address this argument, it is important to refer briefly to the emergency branch of the POGG power and its relevance in this case.

The emergency branch

[216] It is well established that Parliament may legislate under the POGG power on the basis of an emergency, and in so doing, may encroach upon provincial lawmaking authority, albeit for a temporary period.

[217] Although the language of Canada's submissions is cast in terms of an emergency – climate change is described as "an urgent threat to humanity" – this is not an emergency case. In this court, counsel for Canada conceded that the *Act* was not passed on the basis that climate change constitutes an emergency. Nevertheless, in its written argument, Canada submitted that the *Act* could be upheld on the basis of the emergency power, adopting a submission advanced by one of the interveners. This submission came in the final sentence of Canada's reply factum.

[218] It is difficult to see how this court could endorse so casual a submission of an emergency. It is one thing for Canada to proffer an emergency argument on an alternative basis, as occurred in *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, but quite another not to make the argument at all, only to adopt the submissions of a private intervener as an afterthought.

[219] In any event, unless the Supreme Court revisits the requirements to enact legislation under the emergency branch of the POGG power, the *Act* could not be upheld on that basis. The emergency branch argument founders on the requirement that emergency legislation be of a temporary nature: *Re: Anti-Inflation Act*, at pp. 427, 437 and 461; *Crown Zellerbach*, at p. 432. The *Act* is not – and does not purport to be – a temporary measure.

The national concern branch

[220] Given that this is not an emergency case, it is important to ensure that the rhetoric of emergency does not colour the POGG analysis. The courts have long prescribed caution when it comes to using the POGG national concern power because it results in a permanent, as opposed to a temporary, transfer of provincial lawmaking authority to Parliament. Lord Watson counselled that "great caution" had to be used in identifying things that had become matters of national concern: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 (P.C.), at p. 361 (the "*Local Prohibition* case"). More recently, Beetz J. warned that courts had to be "careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers", given the risk that those powers would continue to expand federal lawmaking authority: *Re: Anti-Inflation Act*, at p. 458.

[221] The criteria identified by Le Dain J. in *Crown Zellerbach* – singleness, distinctiveness, and indivisibility – speak to this caution. These criteria constrain rather than facilitate the exercise of the power, but they do not establish a test that

can be applied to reach an undisputed outcome. Thus, resort to the POGG power is bound to be controversial, as the decisions of divided courts in cases like the *Re: Anti-Inflation Act* and *Crown Zellerbach* attest.

[222] There is no doubt that, in common parlance, climate change is a matter of national concern. More than this, it is a matter of international concern, as the history of treaties to which Canada is a party demonstrates. But the national concern branch of the POGG power does not authorize federal plenary lawmaking authority wherever there is intense, broadly based concern. The national concern branch of the POGG power operates on a limited basis in limited circumstances. That is the point of the approach that has long been taken by the Supreme Court, as Le Dain J. recapitulated in *Crown Zellerbach*, at pp. 431-32:

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is

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

[223] The criteria articulated by the court in that case – singleness, distinctiveness, and indivisibility – are each amenable to broader or narrower interpretation, but they are not proffered as discrete tests and should not be applied mechanically. They should, instead, be interpreted in light of the purpose they are designed to serve: limiting the scope of the national concern branch rather than expanding it.

(1) Identifying a matter of national concern

[224] It is important not to conflate pith and substance analysis at the first step – characterizing a law for purposes of classifying it – with the subsequent classification that is required to identify a corresponding head of power at the second step. Conflation results in circularity: if legislation is classified in terms of a particular subject matter it will necessarily be classified as falling under that matter, as they will be one and the same. This problem is evident in the majority decision of the Court of Appeal for Saskatchewan. In essence, that decision specifically constitutionalizes the *Act*, as opposed to finding (1) that the *Act* can be

characterized as an instance of a matter that (2) comes within the scope of a matter appropriately recognized under the national concern branch of the POGG power.

[225] The problem here is conceptual in nature: the national concern branch of the POGG power requires the identification of a new subject matter independent of the means adopted in the relevant law. Once something is recognized as a matter of national concern under POGG, it becomes subject to exclusive federal lawmaking authority. Hence, it is a category error to describe the specific means adopted in legislation to address a problem, rather than the subject matter of the problem itself, as a matter of national concern.

[226] Past examples of national concern POGG matters demonstrate the need to identify the matter at an appropriate level of generality: aeronautics (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292); radio (*In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 (P.C.)); atomic energy (*Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327); a national capital region (*Munro v. National Capital Commission*, [1966] S.C.R. 663); and marine pollution (*Crown Zellerbach*). These matters function as heads of federal lawmaking authority under s. 91, and allow for the passage of additional federal legislation – or alternative legislation that employs other means – as required.

[227] Canada argued that the matter that should be recognized under the POGG power is the “cumulative dimensions of GHG emissions”, but this is untenable.

There is no meaningful distinction between the “cumulative dimensions” of GHG emissions and GHG emissions per se. Thus, Canada’s position must be understood as an attempt to establish exclusive federal lawmaking authority over GHG emissions – to repeat, “exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects”, as Le Dain J. explained in *Crown Zellerbach*, at p. 433. Given that GHGs are generated by virtually every activity regulated by provincial legislation, including manufacturing, farming, mining, as well as personal daily activities including home heating and cooling, hot water heating, driving, and so on, federal authority over GHG emissions would constitute a massive shift in lawmaking authority from provincial legislatures to the Parliament of Canada.

(2) Singleness, distinctiveness, and indivisibility

[228] In addressing the criteria of singleness, distinctiveness, and invisibility the Chief Justice reasons as follows:

- Greenhouse gases are a distinct form of pollution that knows no boundaries.
- The provinces cannot alone or in tandem regulate greenhouse gases emitted extraprovincially and cannot reduce Canada’s net emissions. Moreover, action or inaction in other provinces can undermine an individual province’s efforts.

- Therefore, greenhouse gas emissions must be addressed on a national basis.

[229] The difficulty is that this reasoning begs the question: it depends on the premise that a national standard is required – something that, by definition, no province can establish. There are many things that individual provinces cannot establish, but it does not follow that those things are matters of national concern on that account. If it were otherwise, any matter could be transformed into a matter of national concern simply by adding the word “national” to it.

[230] In short, provincial inability to establish a national standard on carbon pricing is not determinative of federal jurisdiction under the POGG power. But in any event, carbon pricing is only one approach to addressing GHG emissions – one of many policy options that might be chosen, whether alone or as part of a broader strategy. There are many ways to address climate change and the provinces have ample authority to pursue them, whether alone or in partnership with other provinces, using their powers under ss. 92(13) and (16). Put another way, nothing stops the provinces from taking steps to reduce their GHG emissions, and hence the emissions of Canada as a whole, and they are in fact doing so.

[231] No doubt, action or inaction by one province could undermine the effectiveness of another province’s efforts to establish carbon pricing, but this does not speak to provincial inability to address the GHG problem; it is, instead, a reflection of legitimate political disagreement on a matter of policy, and in particular

the suitability of carbon pricing as a means of reducing GHG emissions in a particular province.

[232] In summary, Parliament is fully entitled to choose its preferred policy option in dealing with a particular problem, but only if it has lawmaking authority over the subject matter with which the problem is concerned. Parliament cannot insist that its preferred means of dealing with a problem be implemented by the provinces when that means encroaches on provincial lawmaking authority. The criteria of singleness, distinctiveness, and indivisibility apply to a *matter*, not to the particular means Parliament has chosen to address that matter. As Professor Jean Leclair has explained in "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 U.B.C. L. Rev. 353, at pp. 363-64:

> The conceptual indivisibility test must be applied using the approach of Justice Beetz in *Anti- Inflation*; that is, to the matter said to be of national interest … and not to the legislative means employed to ensure its regulation … In other words, the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its "... exclusive jurisdiction of a plenary nature to legislate in relation to that matter", Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt. [Footnote omitted.]

(3) Scale of impact on provincial jurisdiction

[233] Even assuming that GHGs were a matter that satisfied the singleness, distinctiveness, and indivisibility criteria, the scale of impact on provincial jurisdiction would have to be considered. Although the criteria from *Crown Zellerbach* are oft-quoted, Le Dain J.'s warning is often overlooked. He emphasized that in order for a matter to be recognized as a matter of national concern under the POGG power, "it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned": p. 438 (emphasis added). The key concern, in other words, lies in containing the reach of the POGG power, and so limiting its capacity to undermine the balance of power in the federal order.

[234] The majority of the Court of Appeal for Saskatchewan addresses this problem by, in essence, constitutionalizing the *Act* as the matter of national concern under the POGG power. By definition, the POGG matter the court recognized is contained; it goes no further than the *Act* itself, and so the impact on provincial jurisdiction is ascertainable and limited. But the POGG power is not designed to constitutionalize particular legislation; it is designed to afford Parliament the authority to legislate in regard to a matter of national concern. On the Court of Appeal for Saskatchewan's approach, Parliament's ability to legislate under the POGG power begins and ends with the carbon pricing scheme the current legislation supports.

[235] The Chief Justice concludes that the *Act* has a limited impact on provincial jurisdiction and is reconcilable with the fundamental division of legislative power. His reasons may be summarized as follows:

- Properly characterized, the *Act* deals only with the establishment of minimum national standards to reduce GHG emissions; its operation is limited to an aspect of a threat to Canada as a whole and leaves the provinces free to legislate intraprovincially to establish higher (and additional) standards that can operate concurrently.
- The *Act* strikes an appropriate balance given the importance of climate change and the need for collective action. It is not in conflict with any existing or proposed Ontario legislation or measures to address climate change, and does no more than address what the provinces are constitutionally unable to do.

[236] But while the Chief Justice emphasizes the limited reach of the *Act*, the matter of national concern that he has identified is too vague to limit the reach of Parliament's authority in the manner required. It affords no basis to determine the areas in which Parliament may legislate to establish minimum national standards beyond the carbon pricing scheme that his decision upholds.

[237] Thus, the Chief Justice avoids the problem apparent in the Court of Appeal for Saskatchewan's decision, but does so by introducing great uncertainty and, as a result, a potentially significant impact on provincial lawmaking authority. Can

Parliament establish “minimum national standards” governing such provincial matters as home heating and cooling? Public transit? Road design and use? Fuel efficiency? Manufacturing processes? Farming practices? These are just some of the things that a vaguely worded federal power to establish “minimum national standards” to reduce GHG emissions may permit – all of which would have a major impact on provincial jurisdiction.

IV. Conclusion

[238] For these reasons, I conclude that Parts 1 and 2 of the *Act* are not valid exercises of the national concern branch of the POGG power. The constitutionality of Parts 3 and 4 of the *Act* is not challenged.

[239] I conclude with a brief comment on Parliament’s lawmaking authority.

[240] The key point is this: my conclusion that passage of the *Act* is not authorized under the national concern branch of the POGG power does not mean that Parliament is powerless to address climate change. On the contrary, Parliament has significant authority to address pollution and the environment, including lawmaking authority over taxation, criminal law, and trade and commerce – none of which have been exercised here. Not only can Parliament legislate in a variety of ways to reduce GHGs; it can legislate to accomplish much of what the *Act* aims to do.

[241] The provinces, too, have significant lawmaking authority that allows them to reduce GHGs. In a federal constitutional order, a variety of different approaches

may be taken to the same problem, with each jurisdiction learning from the experience of the others. That is how Canada has long been governed. As the Supreme Court has emphasized, Canadian federalism is characterized by overlapping legislative jurisdiction and cooperation to achieve national goals. Canada has not established that Parliament's lawmaking authority should be expanded under the POGG power in this case.

Released: "GS" JUN 28 2019

"Grant Huscroft J.A."