Docket: CACV3239

COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, BILL C-74, PART V

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

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PART I – INTRODUCTION

1. Global climate change is happening now and is having very real consequences on people's lives in Canada and around the world. Addressing global climate change is one of the major challenges of our time. Carbon pollution, through greenhouse gas ("GHG") emissions, enables global climate change, giving rise to national and international risks to health and well-being. Taking action to reduce GHG emissions in Canada requires an integrated national approach.

2. On June 21, 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* ("*Act*"). The *Act* falls within Parliament's jurisdiction to enact legislation for the peace, order, and good government of Canada on matters of national concern. The matter of GHG emissions is so vital to the nation as a whole that Parliament must have the authority to regulate it. Carbon pricing encourages necessary behavioural changes and is widely recognized to be an effective and efficient regulatory mechanism to reduce GHG emissions. The *Act* establishes a federal GHG emissions pricing scheme to ensure that pricing applies broadly in every Canadian province.

3. The *Act* ensures that one province's failure to act does not adversely affect the nation as a whole. The *Act*'s architecture takes provincial GHG emissions pricing schemes into account. It allows provinces to tailor their pricing schemes to their diverse economies, provided those schemes meet minimum standards, and complements them by filling gaps in the provinces that do not. The use of Parliament's authority to regulate GHG emissions does not preclude the provinces from exercising their powers under s. 92 of the *Constitution Act, 1867* in ways that regulate and control GHG emissions, either independently or in cooperation with federal action.

4. The fuel charge is an essential component of the *Act*'s complete GHG emissions pricing mechanisms. Its primary purpose is to encourage consumers and industry to change their behaviour in ways that will reduce their consumption of fossil fuels in order to reduce GHG emissions, not to raise revenue. The fuel charge is a valid regulatory charge that advances the *Act*'s regulatory objectives.

5. In the alternative, if this Court characterizes the fuel charge as a tax, then it comes within Parliament's taxation power and was constitutionally enacted.

PART II – JURISDICTION

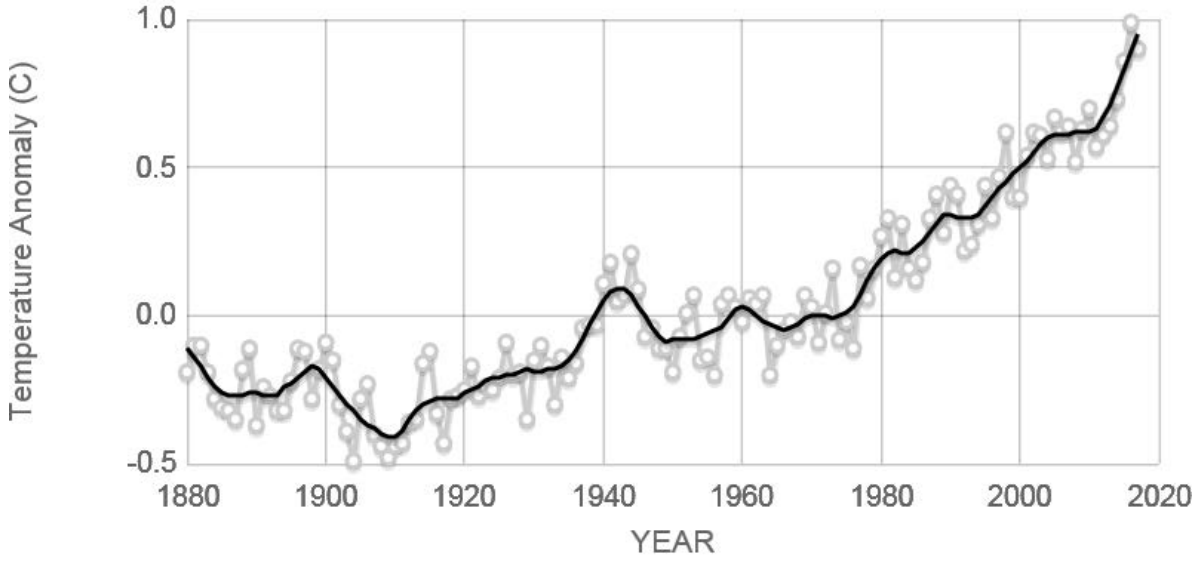
6. For the reasons set out in the factum of the Attorney General of Saskatchewan ("Saskatchewan"), the Attorney General of Canada ("Canada") agrees that this Court has jurisdiction to provide an advisory opinion on the question stated by the Lieutenant Governor in Council. That question asks whether the *Act* is unconstitutional in whole, or in part.

PART III – SUMMARY OF FACTS

7. Canada generally agrees with the statement of facts set out in Saskatchewan's factum. Additional relevant facts and clarifications are set out below.

A. Climate change, fueled by GHG emissions, is an international concern

8. Global climate change is real, measured, and documented. Climate records reviewed by the National Aeronautics and Space Administration show that 2017 marked the 41st consecutive year with global temperatures above the 1951-1980 average temperatures. Seventeen of the 18 warmest years in the 136-year record have all occurred since 2001, with the 18th being in 1998. The past four years (2014-2017) are the hottest four years on record, with 2016 being the hottest.[1]



Source: climate.nasa.gov

[1] Record of the Attorney General of Canada [**CR**] Vol 1, Tab 1, Affidavit of John Moffet, affirmed October 25, 2018, at paras 6, 7 [**Moffet Affidavit**].

9. Burning fossil fuels such as coal, oil, and natural gas releases GHGs into the earth's atmosphere, which enables global climate change. Carbon dioxide (CO_2) is the most abundant GHG emitted by human activity. The scientific properties of GHGs and the role they play in global climate change are well established. When the sun's rays reflect off the surface of the earth, GHGs trap some of this reflected solar energy in the earth's atmosphere instead of letting it escape outward. Higher levels of GHGs mean that more solar energy is trapped. This leads to a rise in air and water temperatures, which in turn significantly affects our global climate. Given the global impacts of climate change, GHG emissions create a risk of harm to both human health and the environment upon which life depends.[2]

10. The United Nations World Meteorological Organization ("WMO") has observed that we are in "a new era of climate change reality". Atmospheric CO_2 levels have reached record levels, almost 50% higher than before the industrial revolution, and CO_2 levels are not expected to drop below these record levels for many generations, even assuming aggressive global action is taken to reduce GHG emissions.[3] Indeed for CO_2, the most prevalent GHG on earth, the levels in the atmosphere are higher now than at any time in the last 400,000 years—and are still climbing.[4]

11. The climate change impacts in Canada are significant. While climate change encapsulates far more than warming temperatures, temperatures have been increasing at roughly double the average global rate, with average temperatures having already increased by 1.7˚C since 1948. Warming has been observed across most of Canada, with stronger trends in the North and West, and in winter and spring. In the Arctic, average temperature has increased at a rate of nearly three times the global average. Predictions are that Canada's temperature will continue to warm at a faster rate than the world as a whole, with the strongest warming projected for winter and for northerly latitudes.[5]

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[2] CR, Vol 1, Tab 1, Moffet Affidavit at paras 8-14, 30-31, 61, Exhibit B at 5, Exhibit C at 2-8, 13-16, Exhibit D at 4-8, 11-14, Exhibit E at 2, 4-5.

[3] *House of Commons Debates*, 42nd Parl, 1st Sess [***Debates***] (23 February 2017) at 9294-5 (Jonathan Wilkinson, Parliamentary Secretary to the Minister of Environment and Climate Change [**Parl. Secretary, ECC**]), Book of Authorities of the Attorney General of Canada [**CBA**], Vol 2, Tab 49; CR, Vol 1, Tab 1, Moffet Affidavit at para 9, Exhibit A at 8.

[4] CR, Vol 1, Tab 1, Moffet Affidavit at para 8, Exhibit A at 8.

[5] CR, Vol 1, Tab 1, Moffet Affidavit at paras 14, 17-18, 20-21, Exhibit G at 178-81; *Debates* (1 May 2018) at 18981, 18984 (Hon. Catherine McKenna, Minister of Environment and Climate Change [**ECC**

12. Some of the existing and anticipated impacts of climate change in Canada include changes in extreme weather events, degradation of soil and water resources, increased frequency and severity of heat waves (which may lead to an increase in illness and death), and expansion of the ranges of life-threatening vector-borne diseases, such as Lyme disease and West Nile virus.[6] Melting permafrost in the North will undermine infrastructure (foundations) and winter roads.[7] The increasing frequency and severity of extreme weather events has real economic costs. Insurance claims in Canada from severe weather events have risen dramatically in the past decade, now costing up to $1.2 billion a year.[8]

i. International agreements to address climate change as an "urgent" priority

13. The United Nations has identified climate change caused by GHG emissions as an international concern that cannot be contained within geographic boundaries. GHG emissions circulate in the atmosphere, so emissions anywhere raise concentration everywhere. International concern about the risks associated with climate change caused by GHG emissions led to adoption of the *United Nations Framework Convention on Climate Change* ("*UNFCCC*") in 1992, and subsequent international agreements and actions under the *UNFCCC*. Canada has been committed to combating climate change under international law since ratifying the *UNFCCC*.[9]

14. The *UNFCCC* acknowledges that climate change and its adverse effects are a common concern of humankind. Its ultimate objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[10] Under the *UNFCCC*, Canada committed to taking GHG emissions mitigation measures, with the aim of returning GHG emissions to their 1990 levels. The *UNFCCC* created a framework for effective implementation of the Convention by establishing the "Conference of the Parties" ("COP"). All States that are Parties to the *UNFCCC* are represented at the COP. The

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Minister]), CBA Vol 2, Tab 54; (8 May 2018) at 19235 (Parl. Secretary ECC), CBA Vol 2, Tab 55; (23 February 2017) at 9295 (Parl. Secretary ECC), CBA Vol 2, Tab 49.

[6] CR, Vol 1, Tab 1, Moffet Affidavit at paras 14, 16-19, 22-26, Exhibit D at 10, para B3.3, Exhibit G at 183-88.

[7] CR, Vol 1, Tab 1, Moffet Affidavit at paras 14, 20, Exhibits G at 185 and E.

[8] *Debates* (1 May 2018) at 18981 (ECC Minister), CBA Vol 2, Tab 54; (23 February 2017) at 9295 (Parl. Secretary, ECC), CBA Vol 2, Tab 49; CR, Vol 1, Tab 1, Moffet Affidavit at para 22, Exhibit G at 183-4.

[9] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 8, 27-45, Exhibits H, I.

[10] CR, Vols 1-2 Tab 1, Moffet Affidavit at para 29 and Exhibit H at art 2.

COP reviews implementation of the *UNFCCC* and makes decisions necessary to achieve the objectives of the Convention. The *Kyoto Protocol*, the *Copenhagen Accord*, and the *Paris Agreement* are each outcomes from key COP meetings.[11]

15. In December 1997, the COP adopted the *Kyoto Protocol*. It supplemented the GHG emissions reduction aims of the *UNFCCC*, by establishing specific reduction commitments. Canada ratified the *Kyoto Protocol* in December 2002 and committed to reducing its GHG emissions for 2008-2012 to 6% below 1990 levels. However, Canada submitted notification of its withdrawal from the *Kyoto Protocol* in December 2011. Canada's emissions during the 2008–2012 period were higher than the levels it committed to meet.[12]

16. In December 2009, the COP took note of the *Copenhagen Accord*, in which the endorsing Parties underlined that "climate change is one of the greatest challenges of our time." The *Copenhagen Accord* recognized the scientific view that the increase in global temperature should be below 2 degrees Celsius (2˚C) to achieve the ultimate objective of the *UNFCCC*. Canada joined the *Copenhagen Accord* in 2009 and pledged to reduce its GHG emissions by 17% from its 2005 levels by 2020. Canada is not on track to meet its Copenhagen target.[13]

17. The international community recognizes that tackling climate change has become an increasingly urgent priority. In December 2015, Canada and 194 other countries committed to strengthen the global response to the threat of climate change through adoption and implementation of the *Paris Agreement*. In adopting the *Paris Agreement*, the Parties formally recognized "that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global emissions". The Parties agreed to accelerate and intensify the actions and investments needed for a sustainable low-carbon future. The *Paris Agreement* "aims to strengthen the global response to the threat of climate change" by "holding the increase in the global average

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[11] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 32-45, Exhibit H at 5-6, art 4, paras 2(a), 2(b) and at 10-12, art 7, Exhibit I.
[12] CR, Vol 1, Tab 1, Moffet Affidavit at para 34.
[13] CR, Vol 1, Tab 1, Moffet Affidavit at para 36.

temperature to well below 2˚C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5˚C above pre-industrial levels."[14]

18. On October 5, 2016, Canada ratified the *Paris Agreement*, which entered into force in November of 2016. Under the *Paris Agreement*, Canada must report and account for its progress made towards achieving its nationally determined contribution. Canada first communicated its intended nationally determined contribution on May 15, 2015. When Canada became a Party to the *Paris Agreement*, it reconfirmed this target, which is to reduce Canada's GHG emissions by 30% below 2005 levels by 2030.[15]

ii. International support for and trend towards widespread carbon pricing

19. There is international consensus that carbon pricing[16] is an essential measure to achieve the necessary global reductions in GHG emissions. The International Monetary Fund (IMF) considers carbon pricing to be a necessary mechanism that should be at the forefront of all GHG emissions reduction plans. The IMF describes carbon pricing as potentially the most effective emissions mitigation instrument because it establishes the price signals needed to redirect technological changes towards low-emission investments. Recently, the High-Level Commission on Carbon Prices, comprised of economists and climate change and energy specialists from all over the world, reported that "a well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way."[17]

20. There is a widespread global trend in favour of carbon pricing. The World Bank monitors carbon pricing initiatives globally. It reports that, "[o]verall, 67 jurisdictions – representing about half of the global economy and more than a quarter of global GHG emissions – are putting a price on carbon".[18]

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[14] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 35, 37-38, 40, Exhibit I at 2, 22-23, art 1, para 1(a), art 2, art 4.
[15] CR, Vol 1, Tab 1, Moffet Affidavit at paras 42-45.
[16] Pricing for GHG emissions is typically referred to as "carbon pricing" even though pricing applies to a range of GHG emissions. This nomenclature reflects the dominant role of CO_2 in total GHG effects and the practice of equating GHGs emissions on a CO_2 equivalent basis; see CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 1 (footnote 1), 61, Exhibit P at 7.
[17] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 46-48, 50, Exhibit J at i, 1-3, 9, Exhibit M at 5.
[18] CR, Vols 1-2, Tab 1, Moffet Affidavit at para 49, Exhibits K, L.

B. GHG emissions are a matter of national concern

i. Canada's GHG emissions

21. The *UNFCCC* requires annual reports on national GHG inventories (emissions and removals). The *UNFCCC* defines "greenhouse gases" as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation." Reporting is required for seven GHGs: CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3).[19] The concept of "global warming potential" allows comparison of the ability of each GHG to trap heat in the atmosphere relative to CO_2, which has a nominal global warming potential of 1. For example, methane (CH_4) has a global warming potential of 25, which means that CH_4 will trap heat in the atmosphere at 25 times the level of CO_2 over a 100-year period.[20]

22. Canada's national GHG inventory reports are an authoritative source of information on GHG emissions in Canada, prepared in accordance with the *UNFCCC* Reporting Guidelines. Canada made its most recent National Inventory Report ("NIR") to the *UNFCCC* on April 13, 2018, reporting emissions estimates between 1990 and 2016. These estimates show that, since 2005, annual emissions fluctuated between 2005 and 2008, dropped in 2009 due to the global financial crisis, then gradually increased until 2013. Emissions dropped slightly in 2015 and again in 2016. Canada's GHG emissions in 2005 were 732 megatonnes (732 million tonnes) of carbon dioxide equivalent (Mt CO_2e). Canada's 2016 GHG emissions were 704 Mt CO_2e. This is a net decrease of 28 Mt, or 3.8%, from 2005 emissions.[21] Canada's 2020 target under the *Copenhagen Accord* is 613 Mt CO_2e and Canada's 2030 target under the *Paris Agreement* is 517 Mt CO_2e.[22]

23. GHG emissions and emissions trends vary by province. Since 2005, GHG emissions in Newfoundland and Labrador, Manitoba, Saskatchewan, Alberta, Northwest Territories, and Nunavut have increased, while emissions in Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, British Columbia, and Yukon have decreased. Ontario's emissions reductions

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[19] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 30-31, Exhibit H at 3; CR, Vol 3, Tab 2, Affidavit of Dominique Blain, affirmed October 18, 2018, at paras 3, 6-11 [**Blain Affidavit**].
[20] CR, Vol 1, Tab 1, Moffet Affidavit at para 61.
[21] CR, Vol 3, Tab 3, Blain Affidavit at paras 10-18.
[22] CR, Vol 1, Tab 1, Moffet Affidavit at para 64.

are primarily due to the closure of coal-fired electricity generation plants, coupled with additional complementary measures.[23] In British Columbia, 5-15% of the emissions reductions have been attributed to carbon pricing.[24] The top five emitters in 2016 were Alberta, Ontario, Quebec, Saskatchewan, and British Columbia. Saskatchewan's GHG emissions have increased by 10.7% from 68.9 Mt CO_2e in 2005 to 76.3 Mt CO_2e in 2016, and accounted for 10.8% of Canada's emissions in 2016. Ontario accounted for 22.8% of Canada's emissions in 2016.[25]

ii. The *Vancouver Declaration on Clean Growth and Climate Change*

24. The Government of Canada sought to work cooperatively with the provinces to reduce GHG emissions. Before Canada signed the *Paris Agreement*, the Prime Minister met with all provincial and territorial Premiers (collectively First Ministers) to discuss the economy and actions to address climate change. At that meeting, the First Ministers recognized "that the cost of inaction is greater than the cost of action with regard to GHG emissions mitigation and adaptation to the impacts of climate change". They committed to implement GHG mitigation policies in support of meeting or exceeding Canada's *Paris Agreement* target and agreed to work together to develop a pan-Canadian framework on clean growth and climate change.[26]

iii. Working Group on Carbon Pricing Mechanisms

25. The *Vancouver Declaration* led to the establishment of four Federal-Provincial-Territorial working groups including a Working Group on Carbon Pricing Mechanisms ("Working Group"). The Working Group's mandate was to "provide a report with options on the role of carbon pricing mechanisms in meeting Canada's emission reduction targets, including different design options taking into consideration existing and planned provincial and territorial systems." All provinces and territories, including Saskatchewan, had at least one senior official on the Working Group and its *Final Report*, supported by all provinces, was prepared on a consensus basis.[27]

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[23] CR, Vol 3, Tab 2, Blain Affidavit at para 21, Exhibit A at 13-14; CR, Vol 2, Tab 1, Moffet Affidavit at Exhibit M at 10.
[24] CR, Vol 3, Tab 5, Affidavit of Nicholas Rivers, affirmed October 5, 2018, Exhibit B at 23-24 [**Rivers Affidavit**].
[25] CR, Vol 3, Tab 2, Blain Affidavit at para 21, Exhibit A at 13-14.
[26] CR, Vol 1, Tab 1, Moffet Affidavit at paras 53-55; Record of the Attorney General of Saskatchewan [**SKR**], Tab 1, *Vancouver Declaration* at 1.
[27] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 56-57, Exhibit P.

26. The Working Group's *Final Report* outlined that many experts regard carbon pricing as a necessary tool for reducing GHG emissions. Carbon pricing is considered one of the most efficient policy approaches to reduce GHG emissions because it provides flexibility to industry and consumers to identify how they will reduce their own emissions, and spurs innovation to find new ways to do so. The report explains how carbon pricing works, discusses various carbon pricing mechanisms, reviews the main design parameters for broad-based pricing mechanisms, evaluates how carbon pricing can help Canada meet its GHG reduction targets, discusses considerations relevant to the implementation of carbon pricing in Canada, and discusses three broad options.[28]

27. Extensive modelling and other analyses supported the Working Group's examination of the economic and GHG emissions reduction impacts carbon pricing could have in Canada. Three carbon price scenarios were modelled. All three scenarios result in GHG emissions reductions at the national level, with the largest reductions resulting from the higher carbon price scenario.[29]

iv. The *Pan-Canadian Approach to Pricing Carbon Pollution*

28. Based on the work done by the Working Group, on October 3, 2016, the Prime Minister announced in Parliament the pan-Canadian approach to pricing carbon pollution.[30]

29. The corresponding *Pan-Canadian Approach to Pricing Carbon Pollution* document published by the Government of Canada on the same day explained that "economy-wide carbon pricing is the most efficient way to reduce emissions, and by pricing pollution, will drive innovative solutions to provide low-carbon choices for consumers and businesses." Both the Prime Minister's announcement and the Government of Canada document presented the pan-Canadian benchmark for carbon pricing ("Benchmark") and its underlying principles. The Benchmark emphasizes that carbon pricing must be a foundational element of Canada's overall approach to fighting climate change. It expresses the policy objective of ensuring "that carbon

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[28] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 58-70, Exhibit P.
[29] CR, Vols 1-2, Tab 1, Moffet Affidavit at para 63, Exhibit P at 20-25; CR, Vol 3, Tab 3, Affidavit of Warren Goodlet, affirmed October 25, 2018, at paras 8-20 [**Goodlet Affidavit**].
[30] *Debates* (3 October 2016) at 5359- 61 (Right Hon. Justin Trudeau, Prime Minister of Canada [**Prime Minister**]), CBA Vol 2, Tab 48; CR, Vol 1, Tab 1, Moffet Affidavit at para 71.

pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time to reduce GHG emissions".[31]

30. The Benchmark was expressly designed to achieve the goal of having carbon pricing apply throughout Canada while recognizing the four existing provincial systems and giving provinces and territories the flexibility to develop a carbon pricing system that suits their own circumstances. The Benchmark outlines basic stringency criteria for carbon pricing systems. It provides guidance on the scope of GHG emissions to be covered by carbon pricing, and provides criteria for each type of carbon pricing system, including minimum escalating stringency requirements. For example, for jurisdictions with an explicit price-based system, the price would start at $10/tonne in 2018 and rise to $50/tonne in 2022. Finally, the Benchmark provides that the Government of Canada will implement a backstop carbon pricing system in jurisdictions that do not develop a system that aligns with the Benchmark, or where a province or territory requests the backstop.[32]

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

31. The *Vancouver Declaration* and the reports from the four working groups it established led to the adoption of the *Pan-Canadian Framework on Clean Growth and Climate Change* ("*Pan-Canadian Framework*") on December 9, 2016. The *Pan-Canadian Framework* is a national climate change plan. It includes commitments by federal, provincial, and territorial governments, and is the country's overarching framework to reduce GHG emissions across all sectors of the economy, stimulate clean economic growth, and build resilience to the impacts of climate change. Contrary to Saskatchewan's characterization of the *Pan-Canadian Framework* as "the federal government's plan to address climate change",[33] the First Ministers described it as "not simply an agreement between First Ministers, but a pan-Canadian plan for action".[34] Eight provinces and all

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[31] CR, Vol 1, Tab 1, Moffet Affidavit at para 72; *Pan-Canadian Approach to Pricing Carbon Pollution*, SKR at Tab 2.
[32] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 72-76, 89-90, Exhibits R, S; *Pan-Canadian Approach to Pricing Carbon Pollution*, SKR at Tab 2.
[33] Factum of the Attorney General of Saskatchewan at para 6 [**SKF**]. See contra, SKR, Tab 4, *Pan-Canadian Framework on Clean Growth and Climate Change*, at "Foreword" [***Pan-Canadian Framework***].
[34] SKR, Tab 3, "Communiqué of Canada's First Ministers" at 2.

three territories joined the *Pan-Canadian Framework* on December 9, 2016. The province of Manitoba joined on February 23, 2018. The province of Saskatchewan has not joined.[35]

32. The *Pan-Canadian Framework* aims to achieve the behavioural and structural changes needed to transition to a low-carbon economy. It builds on the diverse array of policies and measures already in place across Canada to reduce GHG emissions. It includes over fifty concrete measures under four key pillars: pricing carbon pollution; complementary actions to further reduce emissions across the economy; measures to adapt to the impacts of climate change and build resilience; and actions to accelerate innovation, support clean technology, and create jobs. This multi-faceted approach is consistent with the approach recommended by international organizations.[36] Saskatchewan's approach to climate change mainly focuses on one of the four key pillars – resilience – which Saskatchewan's plan defines as "the ability to cope with, adapt to and recover from stress and change." It does include a partial carbon pricing system for large industrial sectors such as mining and manufacturing, covering about 11% of Saskatchewan's total GHG emissions. It does not include a specific GHG emissions reduction target.[37]

33. Pricing carbon pollution is central to the *Pan-Canadian Framework*, which reiterates the broad recognition of carbon pricing as one of the most effective and efficient policy approaches to reduce GHG emissions. The *Pan-Canadian Framework* rearticulated the pan-Canadian approach to carbon pricing and annexed the Benchmark announced on October 3, 2016. Because carbon pricing is essential but not sufficient for Canada to meet its *Paris Agreement* targets, the *Pan-Canadian Framework* also outlines extensive complementary actions.[38]

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[35] CR, Vol 1, Tab 1, Moffet Affidavit at paras 77, 78; SKR, Tab 4, *Pan-Canadian Framework*, at "Foreword". Despite joining the *Pan-Canadian Framework*, on July 3, 2018, Ontario revoked its cap and trade carbon pricing regulation and on October 3, 2018, Manitoba announced that it would cancel its carbon pricing scheme, CR, Vols 1, 3, Tab 1, Moffet Affidavit at para 79, 81, Exhibit MM at 11.

[36] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 46, 48-50, 82, 87, Exhibit J at 3, 46-49, Exhibit M at 5-6; SKR, Tab 4, *Pan-Canadian Framework* at 1-5.

[37] SKR, Tab 10, *Prairie Resilience* at 3, 8, 10; see also: CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 120-1, Exhibit "Z"; CR, Vol 3, Tab 3, Goodlet Affidavit at para 29.

[38] CR, Vol 1, Tab 1, Moffet Affidavit at paras 83-87; *Pan-Canadian Framework*, ch 2, 3, 5, 6 and Annex I; House of Commons, Standing Committee on Finance, *Evidence*, 42nd Parl, 1st Sess, No 148 (1 May 2018) at 5, 8 (John Moffet, Associate Assistant Deputy Minister, Environmental Protection Branch, ECCC) [**FINA**], CBA Vol 2, Tab 59; Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 42nd Parl, 1st Sess, No 44 (1 May 2018) at 44:9-11 (John Moffet) [**ENEV**], CBA Vol 2, Tab 65.

C. The *Greenhouse Gas Pollution Pricing Act*

i. Additional pre-enactment consultation and policy development

34. Following up on Canada's *Pan-Canadian Framework* undertaking to introduce a federal carbon pricing system as a "backstop", in May 2017 the Government of Canada released a *Technical Paper* outlining the elements and operation of the proposed federal system, and invited Canadian stakeholders, business, and the public to submit feedback. It explained the backstop's two complementary components: a fuel charge, and an Output-Based Pricing System ("OBPS").[39]

35. Over the course of 2017, the Government of Canada also published *Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark* and *Supplemental Benchmark Guidance* to support provincial governments' efforts to have carbon pricing in place throughout Canada in 2018. The Benchmark and the guidance documents set out some common, basic requirements for carbon pricing systems while attempting to provide provinces and territories with the flexibility to design their own system.[40]

36. In late 2017, the Ministers of Environment and Climate Change ("ECC") and Finance wrote to their provincial counterparts to outline the next steps in the federal government's process to price carbon. These steps included a date for provinces or territories choosing the federal backstop to confirm their intention. Provinces and territories opting to establish or maintain their own carbon pricing system were asked to outline how they were implementing carbon pricing by September 1, 2018. They were advised that "[b]ased on the information provided, as well as follow-up information as needed, Canada will work with the provinces and territories to confirm whether their carbon pricing system meets the Benchmark."[41]

37. In January 2018, the Ministers of ECC and Finance released a draft legislative proposal of the *Act*, with explanatory notes, for public comment. On the same day, the Government of Canada published a document called *Carbon Pricing: Regulatory Framework for the Output-based Pricing System*. It explains that the aim of the OBPS is to minimize competitiveness impacts and

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[39] CR, Vol 1, Tab 1, Moffet Affidavit at para 88; SKR, Tab 5, *Technical Paper on the Federal Carbon Pricing Backstop*.
[40] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 72-76, 89-91, Exhibits R, S; SKR, Tab 2, *Pan-Canadian Approach to Pricing Carbon Pollution* at 2-3.
[41] CR, Vol 1, Tab 1, Moffet Affidavit at para 92.

carbon leakage for emissions-intensive, trade-exposed industrial facilities, while retaining the carbon price signal and incentive to reduce GHG emissions. This document provided additional information on the proposed design of the OBPS and explained how output-based standards for industrial sectors would be established. This document also indicated that Environment and Climate Change Canada ("ECCC") would undertake structured engagement on the development of the OBPS and invited further input on key technical issues to inform its development.[42]

ii. Parliament's objective: Implementing a national carbon pricing scheme to reduce GHG emissions

38. The *Act* was introduced on March 27, 2018 as Bill C-74 and received Royal Assent on June 21, 2018.[43] The key purpose of the *Act* is to incentivize the behavioural changes and innovative solutions necessary to reduce GHG emissions by ensuring that GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time. This key purpose is reflected in the preamble of the *Act*, which reads, in part:

> Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change; …
>
> Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;
>
> Whereas behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;
>
> Whereas the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change; …
>
> 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; …

39. Parliament's objective of incentivizing the behavioural changes necessary to reduce GHG emissions is reflected throughout the legislative enactment process for Bill C-74, and even before

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[42] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 93-95, and Exhibit T at 1-2, 6-7.

[43] SKR, Tab 11, *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12. The long title of the *Act* is *An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts*.

it was introduced. This objective was identified by the Prime Minister in 2016 when he spoke in the House of Commons about the government's ratification of the *Paris Agreement*:

> We will not walk away from science, and we will not deny the unavoidable. With the plan put forward by the government, all Canadian jurisdictions will have put a price on carbon pollution by 2018. To do that, the government will set a floor price for carbon pollution. The price will be set at a level that will help Canada reach its targets for greenhouse gas emissions, while providing businesses with greater stability and improved predictability.
>
> …[carbon pricing], when it is done well, it is the most effective way to reduce emissions while continuing to grow the economy.[44]

40. In speaking about Canada's *Paris Agreement* commitment, the Minister of Finance explained that the purpose of carbon pricing is to encourage the behavioural changes and innovations in clean technology that are needed to reduce GHG emissions. He said:

> Pollution is not free. As of now, most of the world agrees that the most effective and efficient means of addressing [climate change] is carbon pricing. This sends an important signal to the market and it promotes the reduction of energy consumption as a result of conservation measures and energy efficiency, by allowing the use of alternative fuels and technological advances.[45]

41. During second reading of the Bill in the House of Commons, the Minister of ECC indicated that "[p]utting a price on pollution is central to any credible plan to combat climate change" and that "[w]ithout a doubt, pricing carbon pollution is making a major contribution to helping Canada meet its climate targets under the *Paris Agreement*".[46] The legislative objective was emphasized throughout debate on Bill C-74 in the House of Commons[47] and before the Parliamentary Committees considering the Bill.[48] In her testimony before the Standing Senate Committee on

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[44] *Debates* (3 October 2016) at 5360 (Prime Minister), CBA Vol 2, Tab 48.
[45] *Debates* (5 June 2017) at 11991 (Hon. Bill Morneau, Minister of Finance) [**Minister of Finance**], CBA Vol 2, Tab 50; see also: (23 April 2018) at 18612 (Minister of Finance), CBA Vol 2, Tab 53.
[46] *Debates* (1 May 2018) at 18982 (ECC Minister), CBA Vol 2, Tab 54; see also: *Debates* (31 May 2018) at 19985 (ECC Minister), CBA Vol 2, Tab 57.
[47] *Debates* (8 May 2018) at 19238 (Parl. Secretary, ECC), CBA Vol 2, Tab 55; (23 April 2018) at 18629 (Parl. Secretary, ECC), CBA Vol 2, Tab 53; (16 April 2018) at 18315 (Joël Lightbound, Parliamentary Secretary to the Minister of Finance), CBA Vol 2, Tab 52.
[48] FINA, No 146 (25 April 2018) at 5-6 (Judy Meltzer, Director General, Carbon Pricing Bureau, Environment and Climate Change Canada [**ECCC**]), CBA Vol 2, Tab 58; Senate, Standing Senate Committee on Agriculture and Forestry, 42nd Parl, 1st Sess, No 50 (1 May 2018) at 50:9-10 (John Moffet) [**AGFO**], CBA Vol 2, Tab 63; ENEV, No 44 (1 May 2018) at 44:9-10 (John Moffet), CBA Vol 2, Tab 65.

Energy, the Environment and Natural Resources, the Minister of ECC described the *Act*'s GHG emissions reduction objective as follows:

> … let me start by getting to the heart of the matter: pollution isn't free. Severe weather due to climate change is already costing Canadians billions of dollars a year in insurance costs. …
>
> Canadians overwhelmingly want to see their government take action on climate change and they want to see a growing economy. That's exactly why we're pricing pollution. A price on carbon creates a powerful incentive to cut pollution, encouraging people in businesses to save money by making cleaner choices…
>
> Pricing pollution is flexible. It sets an economic signal that people respond to in various ways. The price makes pollution more expensive and clean innovation cheaper, so it spurs innovation, creates good middle-class jobs, and rewards clean choices.
>
> Because it's flexible, it's cost effective. Pricing pollution lets markets do what they do best. …
>
> And it's working to cut carbon pollution. Over the past decade, B.C.'s direct price on pollution has reduced emissions by 5 to 15 percent. Meanwhile, provincial real GDP grew by more than 17 per cent. …
>
> Pricing pollution is a win for the environment and the economy. It's the approach that economists overwhelmingly recommend…[49]

iii. Parliament understood that carbon pricing is an effective way to reduce GHG emissions

42. As reflected in the preamble of the *Act*, Parliament was fully aware of the efficacy of carbon pricing as a means to incentivize the behavioural changes needed to reduce GHG emissions. Parliament was informed that "[e]xperts around the world, including the vast majority of Canadian economists, agree that carbon pricing is one of the most cost-effective ways to reduce emissions."[50] Throughout the legislative process, the Minister of ECC, the Parliamentary Secretary to the Minister of ECC, and others repeated the evidence on the emissions reduction impact of British

[49] ENEV, No 46 (22 May 2018) at 46:7-8, CBA Vol 2, Tab 67.
[50] *Debates* (8 May 2018) at 19236 (Parl. Secretary, ECC), CBA Vol 2, Tab 55; see also: FINA, No 146 (April 25, 2018) at 5 (Judy Meltzer), CBA Vol 2, Tab 58.

Columbia's carbon price.[51] The GHG emissions-reducing finding cited during debate on the *Act* is from a study co-authored by Dr. Rivers and referred to in the report he prepared for this Court.[52]

43. Additionally, on April 30, 2018, the Government of Canada published *Estimated Results of the Federal Carbon Pollution Pricing System*, which was provided to the House of Commons and Senate committees considering the Bill. These estimates were based on a scenario in which the federal carbon pricing system was applied in the nine jurisdictions that did not have a pricing system in place and on the existing systems remaining in place in British Columbia, Alberta, Quebec, and Ontario. That analysis estimated that carbon pricing across Canada (collectively) would achieve an 80 to 90 Mt reduction in annual GHG emissions by 2022, making a significant contribution towards meeting Canada's *Paris Agreement* targets, with minimal impact on estimated GDP growth.[53]

44. The testimony of non-governmental witnesses appearing before the committees supported the claim that carbon pricing is effective for reducing GHG emissions. Relying on the experience of British Columbia, as well as other studies, several non-governmental witnesses agreed that there is "ample and empirical evidence that carbon pricing works."[54] "When emissions have a price, we'll use fewer of them."[55] Simply put, "[c]arbon pricing works. Study after study shows that in jurisdictions with a carbon price, emissions are lower than they would otherwise be."[56] Dr. Rivers' expert report provides this Court with a full discussion and explanation of the empirical evidence that carbon pricing works.[57]

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[51] *Debates* (1 May 2018) at 18982 (ECC Minister), CBA Vol 2, Tab 54; ENEV, No 46 (22 May 2018) at 46:8 (ECC Minister), CBA Vol 2, Tab 67; *Debates* (8 May 2018) at 19238 (Parl. Secretary, ECC), CBA Vol 2, Tab 55; *Debates* (30 May 2018) at 19972-3 (Mark Gerretsen, Lib.), CBA Vol 2, Tab 56.
[52] CR, Vol, 3, Tab 5, Rivers Affidavit at Exhibit B at 23-24.
[53] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 97-99 and Exhibit U at 3-5; CR, Vol 3, Tab 3, Goodlet Affidavit at paras 25-26; ENEV, No 44 (1 May 2018) at 44:9-10 (John Moffet), CBA Vol 2, Tab 65; FINA, No 148 (1 May 2018) at 5-6 (John Moffet), CBA Vol 2, Tab 59; FINA, No 152 (8 May 2018) at 7-8 (John Moffet), CBA Vol 2, Tab 61.
[54] FINA, No 151 (7 May 2018) at 3 (Dale Beugin, Executive Director, Canada's Ecofiscal Commission), CBA Vol 2, Tab 60.
[55] FINA, No 151 (7 May 2018) at 1 (Andrew Leach, Associate Professor, Alberta School of Business, University of Alberta), CBA Vol 2, Tab 60.
[56] ENEV, No 45 (10 May 2018) at 45:47 (Martha Hall Finlay, President and Chief Executive officer, Canada West Foundation), CBA Vol 2, Tab 66. See also: ENEV, No 45 (10 May 2018) at 45:62 (Dale Beugin), CBA Vol 2, Tab 66; AGFO, No 52 (22 May 2018) at 52:34-35 (Dale Beugin), CBA Vol 2, Tab 64.
[57] CR, Vol 3, Tab 5, Rivers Affidavit at paras 5, 6, Exhibit B.

iv. Architecture and operation of the *Act*

45. The *Act* provides the legal framework and enabling authorities for the federal carbon pricing backstop. Part 1 of the *Act* implements the fuel charge and Part 2 provides the framework for the OBPS and implements the excess emissions charge for large industrial emitters. Together, Parts 1 and 2 of the *Act* provide a complete and complementary system for pricing GHG emissions to ensure that comprehensive carbon pricing applies throughout Canada, with increasing stringency over time.[58]

46. Parts 1 and 2 of the *Act* will operate in provinces or areas that are listed by the Governor in Council in Parts 1 and 2 of Schedule 1, respectively. The Governor in Council may list provinces or areas in Part 1 or Part 2, or both. The *Act* links the Governor in Council's decision to "the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada". The *Act* requires the Governor in Council to "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" in making a regulation listing a province or area.[59] Provinces that have their own sufficiently stringent GHG emissions-pricing scheme will not be listed.

47. Where the federal carbon pricing system applies, the Minister of National Revenue must return all direct revenue from the charges to the jurisdiction of origin. The *Act* provides discretion as to how this will be done. It may be returned to the province, or to designated persons, or to a combination of both.[60]

48. The fuel charge under Part 1 applies to 22 kinds of fuel, all of which are GHG emitting fuels, including common fuels like gasoline, light fuel-oil (diesel), and natural gas, as well as less common fuels like methanol and coke oven gas. The specific fuels and their charge rates are set out in Schedule 2 of the *Act*. The charge rate for each fuel represents $20 per tonne of CO_2e emitted from each fuel in 2019, rising to $50 per tonne of CO_2e in 2022.[61]

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[58] *Act*, Part 1, ss 3-168, and Part 2, ss 169-261; CR, Vol 1, Tab 1, Moffet Affidavit at paras 101-2.
[59] *Act*, ss 166(2), 166(3), 189(1) and 189(2); FINA, No 157 (23 May 2018) at 12-14, CBA Vol 2, Tab 62; CR, Vol 1, Tab 1, Moffet Affidavit at para 102.
[60] *Act*, ss 165(2) and 188(1).
[61] *Act*, Schedule 2, Table 2, Item 6; CR, Vol 1, Tab 1, Moffet Affidavit at para 104.

49. The fuel charge under Part 1 will apply to fuels that are produced, delivered, or used in a listed province, brought to a listed province from another place in Canada, or imported into Canada at a place in a listed province. Generally, a registered distributor will pay the fuel charge. Most commonly, registered distributors are fuel producers or persons who distribute fuels at the wholesale level, typically large corporations. Registered distributors are responsible for paying the charge in respect of the fuel that they delivered to another person.[62] It is expected that distributors will accordingly adjust the price at which they sell the fuel to their customers.[63]

50. Part 1 provides for specific circumstances in which no charge is applicable on certain fuels when they are delivered to individuals or industries with an exemption certificate. For example, gasoline and diesel used by farmers for farming is entirely exempted from carbon pricing. Another example is an industrial facility subject to the OBPS under Part 2 of the *Act*. In this case, excess GHG emissions are priced under Part 2 of the *Act*, so they are exempted from the fuel charge under Part 1.[64] Part 1 also provides specific rules for determining the fuel charge applicable to certain interjurisdictional air, marine, rail, and road carriers for various specific reasons.[65]

51. The fuel charge under Part 1 of the Act will be administered by the Minister of National Revenue acting through the Canada Revenue Agency ("CRA"). Part 1 sets out administrative rules, specifying filing periods, the obligation to file a form, and the obligation to pay the fuel charge to the Receiver General. Part 1 also includes administration and enforcement provisions to ensure compliance. This includes provisions containing offences, penalties, and means of recovery, which are similar to enforcement measures found in other Acts administered through the CRA. This similarity is intentional so that the implementation and enforcement of Part 1 will be based on rules that are familiar both to the regulated parties and to CRA officials.[66]

52. Part 2 of the *Act* sets out the main powers and authorities for the OBPS for GHG emissions by large industrial facilities. Part 2 is intended to minimize negative competitiveness impacts and

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[62] *Act*, s 55; CR, Vol 1, Tab 1, Moffet Affidavit at para 105.
[63] CR, Vol 3, Tab 5, Rivers Affidavit at para 6, Exhibit B at 2, 4-7.
[64] *Act*, s 36, esp ss 36(1)(b)(i), (v), (vii); CR, Vol 1, Tab 1, Moffet Affidavit at paras 106-7.
[65] *Act*, ss 28-35; CR, Vol 1, Tab 1, Moffet Affidavit at para 108.
[66] *Act*, ss 3 "Minister", 68-71, 84-164; CR, Vol 1, Tab 1, Moffet Affidavit at para 109.

the risk of carbon leakage from industries that engage in trade, while still imposing a price signal that encourages those industries to reduce their GHG emissions.[67]

53. Part 2 of the *Act* will apply to "covered facilities". To qualify, an industrial facility's emissions must be over a given threshold and the facility must perform certain activities, which will be set in the forthcoming OBPS regulations. Initially, the intention is that the OBPS will apply primarily to facilities that emit 50 kt CO_2e or more annually. Part 2 of the *Act* sets out registration requirements and GHG emissions reporting requirements. Covered facilities will be required to determine the quantity of GHG they emit and compare this quantity against the prescribed GHG emissions limit. Schedule 3 lists the GHGs to which Part 2 of the *Act* applies.[68]

54. The OBPS and the excess emissions charge under Part 2 of the *Act* complement the fuel-charge scheme under Part 1 of the *Act*. Instead of paying the fuel charge, covered facilities will be required to provide compensation for the portion of their emissions that exceed the applicable prescribed emissions limit, which will be an output-based standard (*i.e.* emissions intensity) for the applicable industrial sector. The output-based standard for a sector will be set as a percentage of the quantity of GHGs emitted on average by that sector in the course of its activity (i.e. production of a product) in forthcoming regulations. The most recent update on the OBPS indicates that most sectors will have their output-based standard set at 80% of the sector's average GHG emissions intensity. A subset of sectors assessed to be in a high competitiveness risk category will likely have their output-based standard set at 90% of the sector's average emissions intensity. These adjustments will reduce total cost impacts while retaining the price incentive.[69]

55. The *Act* requires that covered facilities provide compensation for the portion of their GHG emissions that exceeds their prescribed annual limit. Facilities that must remit compensation for excess emissions may do so in one of three ways. First, the facilities may submit surplus credits they have earned in the past, or that they have acquired from other facilities. Second, the facilities may submit other prescribed credits that they acquired. Third, the facilities may pay an excess emissions charge. The excess emissions charge rate is set out in Schedule 4 of the *Act* and is

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[67] CR, Vol 1, Tab 1, Moffet Affidavit at para 110; ENEV, No 44 (1 May 2018) at 44:14, 44:20-21, CBA Vol 2, Tab 65.
[68] *Act*, s 169, Schedule 3; CR, Vol 1, Tab 1, Moffet Affidavit at paras 111-2.
[69] *Act*, s 174; CR, Vol 1, Tab 1, Moffet Affidavit at paras 106-7, 111, 113, 117, Exhibit W.

equivalent to the escalating fuel charge rates. Conversely, facilities that emit less than their annual limit will receive surplus credits from the Government of Canada, which they may use for future compliance obligations or sell to other regulated facilities. In this way the system creates an incentive for continuous emissions reductions. The more a covered facility emits GHGs above the prescribed limit, the more it will have to pay. The more a covered facility reduces its GHG emissions below its limit, the more it will be able to earn by selling its credits.[70]

56. Part 2 also includes provisions related to the enforcement or application of the *Act*. These provisions are designed to ensure the integrity and proper operation of the pricing system. They are largely based on the application and enforcement provisions found in other federal environmental statutes such as the *Canadian Environmental Protection Act, 1999* (*CEPA, 1999*).[71]

57. On October 23, 2018, the Government of Canada announced the outcome of its stringency assessments. The fuel charge under Part 1 will apply in Saskatchewan, Ontario, Manitoba, and New Brunswick starting in April 2019 and the OBPS under Part 2 will apply in Ontario, Manitoba, New Brunswick, Prince Edward Island, and partially in Saskatchewan starting in January 2019. For the territories, the Government of the Northwest Territories is planning to implement a system that meets the Benchmark on July 1, 2019. Parts 1 and 2 of the *Act* will apply in Yukon and Nunavut starting on July 1, 2019, to ensure alignment across the territories.[72]

58. The OBPS will only apply partially in Saskatchewan, because the Government of Saskatchewan plans to implement its own output-based performance standards system on January 1, 2019. Their proposed regulatory system will apply to large industrial facilities that emit 25,000 tonnes or more of CO_2e per year, with the exception of electricity generation and natural gas transmission pipelines. Saskatchewan estimates it will cover approximately 11 percent of the province's emissions. Saskatchewan's proposed carbon pricing system was assessed as being on track to partially meet the Benchmark stringency requirements. The federal backstop will apply to the emission sources not covered by Saskatchewan's system, so the OBPS will apply to

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[70] *Act*, ss 174, 175, 185, Schedule 4; CR, Vol 1, Tab 1, Moffet Affidavit at paras 114-5, Exhibit O at 27.
[71] *Act*, ss 197-252; CR, Vol 1, Tab 1, Moffet Affidavit at para 116.
[72] New Brunswick and Prince Edward Island asked to have Part 2 apply. The Yukon and Nunavut asked to have both Part 1 and Part 2 applied. CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 119, 124, Exhibits Z-FF.

electricity generation and natural gas transmission pipelines. This will cover facilities from those sectors that emit 50,000 tonnes of CO_2e per year or more, with the ability for smaller facilities that emit 10,000 tonnes of CO_2e per year or more to voluntarily opt-in to the system over time.[73]

59. On October 23, 2018, the Government of Canada also announced that jurisdictions that voluntarily adopted the federal system will receive the revenues directly from the federal government, leaving those governments to decide how to use them. For Saskatchewan, Ontario, Manitoba, and New Brunswick the federal government proposes to return the majority of the proceeds from the fuel charge directly to individuals and families in the province of origin in the form of Climate Action Incentive payments. The direct proceeds from the fuel charge not returned through Climate Action Incentive payments, will be used to provide support to schools, hospitals, small and medium-sized businesses, colleges and universities, municipalities, not-for-profits, and Indigenous communities in the province of origin.[74]

D. Complementary measures to reduce Canada's GHG emissions

60. Carbon pricing is an essential, but not an exclusive, part of Canada's approach to reducing GHG emissions. In addition to pricing carbon pollution, investment in clean technology research and innovation is an important complementary measure outlined in the *Pan-Canadian Framework*. The Government of Canada's Low Carbon Economy Fund supports the *Pan-Canadian Framework* by investing in projects that will generate clean growth, reduce GHG emissions, and help Canada meet its *Paris Agreement* commitments.[75]

61. Additionally, a number of federal GHG emissions reduction measures are in place or planned under *CEPA, 1999* to address issues for which carbon pricing may not be as effective. In the electricity sector, the Government of Canada plans to phase out coal-fired electricity generation by 2030 and to establish GHG emissions limits for natural gas-fired electricity generation. In the oil and gas sector, the federal government is taking steps to reduce methane (CH_4) emissions. In the transportation sector, the federal government is regulating emissions standards for light and

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[73] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 120-1, 124, Exhibit Z.
[74] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 122, 124 and Exhibits X-BB, CC, HH-KK.
[75] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 82, 87, 127-134, Exhibits Z-FF; SKR, Tab 4, *Pan-Canadian Framework* at 1-5, 9-26, 37-44.

heavy-duty vehicles. Regulations are also in place to limit GHG emissions from fuels by prescribing a minimum content of renewable fuels. Finally, steps are being taken to reduce hydrofluorocarbon (HFCs) emissions. Each of these measures will contribute to Canada's overall GHG emissions reductions.[76]

E. Canada's environmental obligations and relations with its *Paris Agreement* partners

62. Canada's *Paris Agreement* partners in Europe have emphasized the importance they place on the *Paris Agreement* as a relevant factor in their trade relations going forward.[77]

63. The Canada-European Union Comprehensive Economic and Trade Agreement ("CETA") comprehensively frames Canada's trade relations with the European Union's Member States. After the *Paris Agreement* was ratified, it was of great importance to a number of the Member States that a commitment to environmental protection, including the implementation of the *Paris Agreement*, be acknowledged. As a result, the Parties negotiated a Joint Interpretative Instrument on CETA between Canada, the European Union, and its Member States ("Joint Interpretive Instrument"). The Joint Interpretive Instrument identifies the *Paris Agreement* as "an important shared responsibility for the European Union and its Member States and Canada." The Joint Interpretive Instrument also recognizes the Parties' agreement "not to lower levels of environmental protection in order to encourage trade or investment".[78]

64. The European Commission and a number of key Member States are watching the developments in Canada closely with respect to Saskatchewan's and Ontario's rejection of a national carbon pricing regime. They are observing these developments with great concern in relation to their impact on Canada's ability to meet its *Paris Agreement* emissions reduction target. France, in particular, has expressed concern over making trade deals with countries who do not abide by climate conventions. On September 25, 2018, French President Emmanuel Macron declared before the United Nations General Assembly in New York that France would no longer accept "commercial agreements" with countries that do not respect the *Paris Agreement*.[79]

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[76] CR, Vol 1, Tab 1, Moffet Affidavit at paras 125-140.
[77] CR, Vol 3, Tab 4, Affidavit of André François Giroux, affirmed October 19, 2018, at paras 13, 16, Exhibit B at 7-8 [**Giroux Affidavit**].
[78] CR, Vol 3, Tab 4, Giroux Affidavit at paras 10-15.
[79] CR, Vol 3, Tab 4, Giroux Affidavit at paras 3, 16-20, Exhibit B at 7-8.

PART IV – CANADA'S POSITION ON THE POINTS IN ISSUE

65. The whole *Act* is constitutional. GHG emissions are a matter of national concern. Thus, Parliament has jurisdiction to legislate for the peace, order, and good government of Canada under s. 91 of the *Constitution Act, 1867*.

66. Federalism is an interpretive principle that cannot render unconstitutional legislation that is validly enacted by Parliament to address a matter of national concern.

67. Properly characterized, the fuel charge and excess emissions charge are regulatory charges intended to change behaviour, not taxes enacted to raise revenue for federal purposes.

68. In the alternative, if this Court characterizes the fuel charge as a tax, then it comes within Parliament's taxation power and was constitutionally enacted.

PART V – ARGUMENT

A. GHG emissions are a matter of national concern - Parliament has legislative competence to enact the *Act* under the peace, order, and good government power

69. The *Constitution Act, 1867* does not assign the matter of "environment" to either the provincial legislatures or Parliament.[80] Legislation on environmental matters "cuts across many different areas of constitutional responsibility, some federal, some provincial."[81] Federal legislation on environmental matters is validly enacted if it otherwise comes within Parliament's legislative jurisdiction.[82] The federalism principle does not prevent either level of government from enacting legislation validly falling under their heads of power.[83] Here, the *Act* comes within Parliament's jurisdiction under the peace, order, and good government power because GHG emissions are a matter of national concern.

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[80] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63 [***Oldman River***], CBA Vol 1, Tab 12.
[81] *R v Hydro-Québec*, [1997] 3 SCR 213 at para 112 [***Hydro-Québec***], CBA Vol 1, Tab 25; *Oldman River* at 63-64, CBA Vol 1, Tab 12.
[82] *Oldman River* at 72, CBA Vol 1, Tab 12.
[83] Canada's response to Saskatchewan's submissions on federalism set out in section B, below.

70. The Supreme Court most comprehensively addressed the national concern doctrine of the federal peace, order, and good government power in *Crown Zellerbach*.[84] In that case, the Supreme Court reviewed the evolution of the national concern doctrine,[85] which reflected on and incorporated respect for the fundamental principles of Canadian federalism and the "equilibrium of the Constitution".[86] After confirming that the national concern doctrine is distinct from the national emergency doctrine, the Supreme Court set several indicators to be used in determining whether a matter constitutes a national concern, as follows:

a) The national concern doctrine applies both to new matters which did not exist at Confederation and to matters which, although originally of a local or private nature in a province, have since become matters of national concern.

b) For a matter to qualify as a matter of national concern, it must have a singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of powers under the Constitution.

c) A relevant factor in determining whether a matter has achieved the necessary singleness, distinctiveness, and indivisibility is 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. This last indicator is also referred to as the "provincial inability" test.[87]

71. GHG emissions are a matter so vital to the interests of the nation as a whole that GHG emissions must be dealt with on a national basis. Indeed, GHG emissions are a matter so vital to the interests of the world that they are the subject of joint effort by many States, with a view to international solutions. GHG emissions, regardless of their origin, have extra-provincial as well as global impacts. Further, GHG emissions have a singleness, distinctiveness, and indivisibility distinguishing them from matters of merely provincial or local concern. Failure by one province

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[84] *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 423-34 [***Crown Zellerbach***], CBA Vol 1, Tab 24.
[85] *Crown Zellerbach* at 423-31, CBA Vol 1, Tab 24.
[86] *Reference re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458, CBA Vol 1, Tab 26, as quoted in *Crown Zellerbach* at 427, CBA Vol 1, Tab 24.
[87] *Crown Zellerbach* at 431-32, CBA Vol 1, Tab 24.

to reduce GHG emissions will harm other provinces and territories, harm Canada's relations with other countries, and impede international efforts to mitigate climate change. Recognizing GHG emissions as a matter of national concern has a reconcilable scale of impact. It will not skew the fundamental jurisdictional division of powers.

i. The dominant purpose of the Act is to incentivize the behavioural changes necessary to reduce Canada's GHG emissions

72. Determining whether the *Act* is within Parliament's legislative competence to address GHG emissions requires this Court to engage in a division of powers analysis. Contrary to Saskatchewan's suggestion that a pith and substance analysis in not required,[88] Supreme Court jurisprudence maintains that an inquiry into the true nature of the law to determine its matter, or pith and substance, is the first step in this analysis. Considering the law's purpose and its legal and practical effects helps identify the matter to which the *Act* relates.[89] The question is: what does the law do and why?

a. The purpose of the *Act* is to incentivize the behavioural changes necessary to reduce GHG emissions

73. The purpose of a law may be determined by examining both intrinsic evidence, such as the preamble and the general structure of the statute, and extrinsic evidence, such as a statute's legislative history, other accounts of the legislative process, and the context of its enactment. Considering the problem that Parliament seeks to remedy with the enactment may also demonstrate its purpose.[90] All of these indicators confirm that the dominant purpose of the *Act* is to ensure that a minimum GHG emissions price applies throughout Canada to incentivize the behavioural changes necessary to reduce GHG emissions.

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[88] SKF at para 43.

[89] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at paras 28, 29, [2015] 1 SCR 693 [***Firearms Sequel***], SKBA Vol 1, Tab 20; *Rogers Communications v Châteauguay*, 2016 SCC 23 at paras 34-36, [2016] 1 SCR 467 [***Rogers Communications***], CBA Vol 2, Tab 34; *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 21, [2015] 3 SCR 250, CBA Vol 1, Tab 14; *Reference re Securities Act*, 2011 SCC 66 at paras 63-64, [2011] 3 SCR 837 **[*Securities Reference*],** CBA Vol 2, Tab 33; *Reference re: Firearms Act (Canada)*, 2000 SCC 31 at paras 15-16, [2000] 1 SCR 783 [***Firearms Reference***], CBA Vol 1, Tab 27.

[90] *Securities Reference* at para 64, CBA Vol 2, Tab 33; *Firearms Reference* at para 17, CBA Vol 1, Tab 27.

74. As outlined above in the summary of facts, the *Act*'s entire legislative history reflects Parliament's objective of incentivizing behavioural changes to reduce GHG emissions and that pricing GHG emissions is the means by which Parliament seeks to achieve this objective.[91]

75. The *Act*'s preamble affirms Parliament's motivations and intentions. Parliament explicitly notes the impact of GHG emissions on global climate change, that the high level of GHG emissions globally presents "an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity" and that the detrimental impacts of climate change are already being felt throughout Canada. Parliament acknowledges Canada's international law obligation to contribute to the global efforts to reduce GHG emissions in pursuit of the aims of the *Paris Agreement*, and confirms the Government's commitment to doing so by taking comprehensive action to reduce GHG emissions. The preamble notes that "behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change". The preamble then notes that pricing GHG "emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change".[92] Thus, the preamble provides a clear statement of the problem Parliament seeks to address, why it is seeking to do so, and how it aims to achieve that objective through the *Act*.

76. The overarching context for the *Act* is Canada's *Paris Agreement* commitments to take increasingly ambitious GHG emissions reduction measures to address climate change, which is an increasingly urgent global priority. All relevant indicators confirm that the dominant purpose of the *Act* is to incentivize the behavioural changes necessary to reduce GHG emissions.

b. The effect of the *Act* is to create a federal GHG emissions pricing scheme to ensure that GHG emissions pricing applies throughout Canada

77. "Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. … Parliament is the judge of whether a measure is likely to achieve its intended purposes. … [T]he inquiry [into the effect of the *Act*] is directed to how the law sets out to achieve its purpose in order to better understand its 'total meaning'".[93]

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[91] See paras 38-44 above.
[92] *Act*, Preamble, paras 11-12.
[93] *Firearms Reference* at para 18, CBA Vol 1, Tab 27.

78. The *Act*'s preamble also speaks to its intended effect. In the preamble, Parliament notes the recognition in the *Pan-Canadian Framework* that climate change is a national problem that requires immediate action and that pricing GHG emissions is a core element of the *Pan-Canadian Framework*. Parliament notes that some provinces are developing or have implemented GHG emissions pricing systems, but that the absence of GHG emissions pricing systems in some provinces and the lack of stringency in GHG emissions pricing systems in others could contribute to significant deleterious effects on the environment. Parliament concludes the preamble by stating that it is necessary to create a federal GHG emissions pricing system to ensure GHG emissions pricing applies broadly in Canada.[94]

79. The *Act*'s intended effect aligns with its purpose. The legal effect of the *Act* is to ensure GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time. Thus, the *Act* creates the price signal intended to incentivize the behavioural change and innovative solutions needed to reduce GHG emissions.

80. The structure of the *Act* demonstrates the comprehensiveness of the GHG emissions pricing system devised to achieve the legislative objective. Together, Parts 1 and 2 of the *Act* provide a complete and complementary regulatory system for pricing GHG emissions, in a way that aims to minimize negative competitive impacts on emissions-intensive, trade-exposed industries. The backstop architecture of Parts 1 and 2 of the *Act* ensures that GHG emissions pricing will apply throughout Canada. The Governor in Council will list the provinces or areas where the fuel charge in Part 1 and the OBPS in Part 2 will apply. The Governor in Council's decision is expressly linked to ensuring that pricing of GHG emissions is applied broadly in Canada, requiring that the primary factor in deciding to list a province or area is "the stringency of provincial pricing mechanisms for greenhouse gas emissions".[95]

81. While it is ultimately for Parliament to determine whether a law is likely to achieve its purpose, Parliament's determination that pricing carbon pollution is an effective regulatory means of incentivizing the behavioural changes and innovation needed to reduce GHG emissions is well

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[94] *Act*, Preamble, para 16.
[95] *Act* ss 166(2), 166(3), 189(1), and 189(2); FINA, No 157 (23 May 2018) at 12-14, CBA Vol 2, Tab 62; see para 46 above.

supported. The convergent evidence that carbon pricing reduces emissions,[96] the international consensus that carbon pricing is an essential measure to achieve the necessary global reductions in GHG emissions,[97] the extensive work done by the Working Group, and the *Pan-Canadian Framework*,[98] are all important aspects of the background and circumstances surrounding the *Act*'s enactment. The repeated references to the efficacy of economy-wide GHG emissions pricing as the most efficient way to incentivize behavioural changes to reduce emissions – in the pan-Canadian approach to carbon pricing, in the Parliamentary legislative record, and in the preamble to the *Act*[99] – all speak to how Parliament sought to achieve its objective.

82. Contrary to Saskatchewan's suggestion at paragraph 46 of its factum, the *Act* is neither a colourable attempt at industrial regulation, nor an intrusion into areas of provincial jurisdiction. The *Act* prices GHG emissions to incentivize behavioural change, not determine specific industrial actions. It does not tell industrial and other facilities how they must operate, or how they must change their behaviour. The *Act* implements the "polluter pays" principle, which is "firmly entrenched in environmental law in Canada."[100] It operates based on sound economic principles that pricing carbon pollution changes behaviour and reduces GHG emissions. The means by which industrial and other facilities achieve GHG emissions reductions remains entirely open. It would not remain open under industrial regulation.

83. The *Act*'s purpose and effect confirm that its pith and substance is to incentivize the behavioural changes necessary to reduce Canada's GHG emissions by ensuring that GHG emissions pricing applies throughout Canada.

ii. GHG emissions are a vital matter of national concern

84. Having characterized the law, the second step in the division of powers analysis requires classification of the law's essential character by reference to the heads of power in the *Constitution*

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[96] CR, Vol 3, Tab 5, Rivers Affidavit at para 6, Exhibit B.
[97] See paras 19-20 above; CR, Vol 1, Tab 1, Moffet Affidavit at paras 46-50
[98] See paras 25-27, 31-33 above; CR, Vol 1, Tab 1, Moffet Affidavit at paras 56-70, 77-87; CR, Vol 3, Tab 3, Goodlet Affidavit at paras 14-20.
[99] *Act*, Preamble, para 12; see paras 28-26, 38-44 above.
[100] *Imperial Oil Ltd. v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 23, [2003] 2 SCR 624, CBA Vol 1, Tab 16.

Act, 1867. In this case, the essential character of the *Act* comes under Parliament's peace, order, and good government power because GHG emissions are a matter of national concern.

85. In *Oldman River*, the Supreme Court declared that "[t]he protection of the environment has become one of the major challenges of our time."[101] In *Ontario v Canadian Pacific Ltd.*, the Supreme Court described "environmental protection … as a fundamental value in Canadian society".[102] In *Hydro-Québec*, the Supreme Court emphasized that environmental protection measures relate "to a public purpose of superordinate importance".[103] In *British Columbia v Canadian Forest Products Ltd*., the Supreme Court cited these cases, then reiterated:

> ... our common future, that of every Canadian community, depends on a healthy environment. ... This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment … environmental protection [has] emerged as a fundamental value in Canadian society"....[104]

86. Given their role in causing climate change, GHG emissions are a national and international concern that cannot be contained within geographic boundaries. The presence of the *UNFCCC* and other international agreements confirms the international community's concern and Canada's obligations in respect of addressing GHG emissions. GHG emissions, regardless of their origin, have extra-provincial, national, and global impacts. The scientific properties of GHGs and the role they play in global climate change are well established. The existing and anticipated national and global impacts of climate change are well documented, and are not correlated to the location of the GHG emission source. Existing and anticipated impacts include changes in extreme weather events, degradation of soil and water resources, increased frequency and severity of heat waves, expansion of the ranges of vector-borne diseases, drought, desertification, food shortages, and a resulting increase in global unrest. GHG emissions create a risk of harm to both human health and the environment upon which life depends; the impacts affect Canada as a whole.[105]

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[101] *Oldman River* at 16, CBA Vol 1, Tab 12.
[102] *Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para 55, CBA Vol 1, Tab 21.
[103] *Hydro-Québec* at para 85, CBA Vol 1, Tab 25.
[104] *British Columbia v Canadian Forest Products Ltd*., 2004 SCC 38 at para 7, [2004] 2 SCR 74, CBA Vol 1, Tab 5, citing *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241, CBA Vol 1, Tab 1.
[105] See paras 8-12 above; CR, Vol 1, Tab 1, Moffet Affidavit at paras 8-25, Exhibits A-G. See also: Court of Appeal, The Hague, October 9, 2018, *Urgenda Foundation v The State of the Netherlands*, Case Number: 200.178.245/01 (The Netherlands) at paras 44, 45, 67, 71, CBA Vol 2, Tab 40.

87. GHG emissions are a new matter that did not exist at Confederation. Rapidly escalating climate change caused by anthropogenic GHG emissions was unimaginable in 1867 when provincial and federal constitutional "matters" were assigned. Scientists had only begun considering the role of CO_2 in the earth's atmosphere.[106] Smoke abatement, historically seen as a local matter,[107] bears no resemblance to the now known global threat of GHG emissions. GHG emissions are a quintessential matter of national concern.

iii. GHG emissions are a single, distinct, and indivisible subject-matter

88. The *Act* deals with a single, distinct, and indivisible matter. Canada is not claiming that the environment generally is a matter of national concern. Neither is it claiming that pollution generally, nor air pollution at large, are matters of national concern. Canada claims only that GHG emissions – a discrete, distinct, and indivisible form of pollution – are a matter of national concern.

89. GHG emissions are defined and specifically targeted through the *UNFCCC* and subsequent agreements negotiated by the COP, with the *Paris Agreement* being the most recent.[108] The United Nations' identification of GHG emissions as a distinct matter provides definable boundaries for scoping GHG emissions as a Canadian constitutional concept. GHGs are a precisely defined type of environmental pollutant, based on a specific set of scientific characteristics. The *UNFCCC* defines "greenhouse gases" as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation."[109] The *Act* lists the GHGs subject to carbon pricing, which are the same GHG emissions on which Canada must annually report to the *UNFCCC*.[110]

90. Like marine pollution in *Crown Zellerbach*, GHG emissions possess sufficiently distinct and separate characteristics to make them amenable to Parliament's residual power. Recognizing GHG emissions as a matter of national concern has definable boundaries. GHG emissions are a

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[106] Spencer R. Weart, *The Discovery of Global Warming* (Cambridge, MA: Harvard University Press, 2008) ch 1-2, CBA Vol 2, Tab 71; James R. Fleming, *Historical Perspectives on Climate Change* (Oxford: Oxford University Press, 1998) ch 6, CBA Vol 2, Tab 68.
[107] SKF at para 24.
[108] CR Vols 1-2, Tab 1, Moffet Affidavit at paras 8, 27-44, Exhibits H and I.
[109] CR, Vol 1, Tab 1, Moffet Affidavit at para 30 and Exhibit H, art 2.
[110] *Act*, s 190(2) and Schedule 3; CR Vol 1, Tab 1, Moffet Affidavit at paras 31, 112.

measurable and persistent environmental pollutant, with specific scientific characteristics, including their global warming potential.[111] Schedule 3 of the *Act* lists the global warming potential of each of the GHGs subject to pricing.

91. The precise scientific characteristics of GHG emissions and their explicit listing in the *Act* are a stark contrast to the broad definition of "toxic substance" in the former *Canadian Environmental Protection Act* ("*CEPA*") that the Supreme Court considered in *Hydro- Québec*. In that case, a majority of the Supreme Court upheld Part II of the *CEPA* as a valid exercise of Parliament's criminal law power. However, the Supreme Court declined to uphold Part II of the *CEPA* under the national concern doctrine of the peace, order, and good government power, because it applied to a wide array of substances, not only to chemical pollutants, and was not limited to substances having inter-provincial effects. As the minority explained, there was "no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extraprovincial aspects."[112]

92. Unlike the broad definition of "toxic substances", the *UNFCCC* and the *Act* precisely and specifically define GHGs. Additionally, GHG emissions are persistent in the atmosphere, and their inter-provincial, national, and global effects are well established. GHG emissions are a single, distinct, and indivisible matter.

iv. A provincial failure to implement an intra-provincial carbon price to reduce GHG emissions negatively affects extra-provincial interests

93. A provincial failure to pursue aggressively a reduction of GHG emissions will adversely affect extra-provincial interests. Climate change is a global phenomenon and GHG emissions are a driver of global climate change. Because GHG emissions circulate in the atmosphere, and cause climate change globally, they necessarily have inter-provincial and international effects. Deleterious effects would result nationally from the failure or inability of one or more provinces to pursue aggressively GHG emissions reductions. "It is a notorious fact that air is not impounded

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[111] CR, Vol 1, Tab 1, Moffet Affidavit at para 61, Exhibit D at 4; CR, Vol 3, Tab 2, Blain Affidavit generally, esp paras 7-8, 16-19, 21.
[112] *Hydro-Québec* at para 75, see also paras 5, 68-70, CBA Vol 1, Tab 25.

by provincial boundaries."[113] In the case of GHG emissions, this is compounded by their contribution to global climate change regardless of the location of their source.

94. The national and international expert evidence is convergent in finding that pricing carbon reduces GHG emissions.[114] The failure of some provinces to act undermines the GHG emissions pricing measures taken by the rest. Moreover, provinces that are mitigating GHG emissions with carbon pricing are constitutionally unable to take legislative measures to compel other provinces to do so. Only Parliament can ensure that GHG emissions pricing applies throughout Canada.

95. The case of British Columbia is demonstrative. British Columbia is a provincial carbon pricing leader.[115] Since 2005, British Columbia's GHG emissions have decreased by 5.1%, falling from 63.3 Mt CO_2e emissions in 2005 to 60.1 Mt CO_2e emissions in 2016.[116] Several studies have attributed a portion of these reductions to the impact of carbon pricing on fuel consumption and purchasing behaviours.[117] In contrast, Saskatchewan's GHG emissions have increased by 10.7% since 2005, rising from 68.9 Mt CO_2e emissions in 2005 to 76.3 Mt CO_2e emissions in 2016. In 2016, Saskatchewan contributed 10.8% of Canada's GHG emissions.[118] Saskatchewan's increased GHG emissions undermine British Columbia's GHG emissions reductions. Despite British Columbia's GHG emissions reductions, it continues to experience climate change impacts, such as increasingly destructive forest fires.[119] Yet British Columbia has no ability to legislate GHG emissions pricing in Saskatchewan.[120]

96. Inter-provincial carbon leakage is another possible negative impact of inconsistent GHG emissions pricing among provinces. Carbon leakage is a term to describe an increase in carbon emissions in one country or jurisdiction as a result of a stricter climate change policy in another

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[113] *Canada Metal Co. v R* (1982), 144 DLR (3d) 124 (CanLII) (Man QB) at para 16, CBA Vol 1, Tab 8.
[114] CR, Vol 3, Tab 5, Rivers Affidavit at para 6, Exhibit B; CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 46-52, 59, Exhibit P at 5, 56-57.
[115] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 73, 75 and Exhibit P at 37.
[116] CR, Vol 3, Tab 2, Blain Affidavit at para 21, Exhibit A at 13-14.
[117] CR, Vol 3, Tab 5, Rivers Affidavit at Exhibit B at 24-28.
[118] CR, Vol 3, Tab 2, Blain Affidavit at para 21, Exhibit A at 13-14.
[119] CR, Vol 1, Tab 1, Moffet Affidavit at para 22.
[120] *Interprovincial Co-Operatives Ltd. v Dryden Chemicals Ltd.*, [1976] 1 SCR 477 at 516 [***Interprovincial Co-Operatives***], CBA Vol 1, Tab 17.

country or jurisdiction. This may occur if, for reasons of costs, emitting industries transfer production from a jurisdiction with a carbon price to a jurisdiction that does not price carbon.[121]

97. Finally, just as Canada is concerned with the impact of a province's failure to act, given the global impacts of GHG emissions, other countries have justifiable concerns about actions or inactions in Canada. Thus, actions taken in Canada toward fulfilling Canada's contribution to achieving the *Paris Agreement* objectives are important in Canada's ongoing relationships with its *Paris Agreement* partners. The European Commission and a number of key Member States are watching the developments in Canada closely with respect to Saskatchewan's and Ontario's rejection of a national carbon pricing regime. Irrespective of the reasons, if it becomes clear that Canada is not on track to meet its GHG emissions reduction targets under the *Paris Agreement*, then European countries that have not ratified CETA, including France, Italy, and Germany, may not proceed with ratification. Other countries do not dictate Canadian constitutional jurisdiction. However, by attaching a firm consequence to insufficient action on GHG emissions, their actions can demonstrate in a compelling way that action, not inaction, is the rule. Thus, a provincial failure to act could undermine an agreement that is important to the country's prosperity as a whole.[122]

v. The scale of impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution

98. Recognizing GHG emissions as a matter of national concern within Parliament's legislative jurisdiction will not skew the jurisdictional division of powers. The scale of impact on provincial jurisdiction is reconcilable with the balance of federal and provincial legislative powers and, thus, respects the principles of federalism. The Supreme Court has recognized that the environment is not exclusively assigned to either level of government. As Professor Hogg states, "it is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."[123] It is well accepted that Parliament's

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[121] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 65, 67, Exhibit P at 4, 5, 43. For a discussion of carbon leakage generally during the legislative process, see: ENEV, No 44 (1 May 2018) at 44:14 (Philippe Giguère, Manager, Legislative Policy, ECCC), 44:20-21 (John Moffet), 44:30-32 (Peter Boag, President and CEO, Canadian Fuels Association); ENEV, No 44 (3 May 2018) at 44:65-68 (Adam Auer, Vice President, Environment and Sustainability, Cement Association of Canada), CBA Vol 2, Tab 65.
[122] See paras 62-64 above; CR, Vol 3, Tab 4, Giroux Affidavit at paras 3, 7-8, 10, 16-21.
[123] Peter Hogg, *Constitutional Law of Canada*, loose-leaf (2017-Rel 1) 5th ed (Toronto: Carswell, 2007) at 30.7(a), 30-20, CBA Vol 2, Tab 69.

legislative powers, including its power to legislate on matters of national concern, can embrace environmental matters in appropriate circumstances.[124] One of those circumstances is where a specific type of pollution cannot be contained within geographic boundaries.[125] As explained above, the matter of national concern is defined as narrowly as possible to permit Parliament to adequately address the matter.[126]

99. Federal jurisdiction to regulate GHG emissions does not impair the provincial legislatures' power to regulate local matters and industries. The modern approach to federalism recognizes that areas of overlapping powers are unavoidable.[127] The double aspect doctrine assists in determining whether the impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. Very similar laws can be validly enacted by both levels of government, and concurrently applied, even though the provincial and federal governments may not share concurrent jurisdiction over the matters that those laws each regulate: "[t]he federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction."[128]

100. The *Pan-Canadian Framework* outlines extensive complementary actions, which are within the provinces' jurisdiction, including in relation to electricity generation, construction practices, transportation, industry, forestry, agriculture, and waste management.[129] Provincial legislation that is, in pith and substance, directed towards these provincial matters may validly include GHG emissions mitigation measures. The double aspect doctrine would remain applicable in each of these areas, as the matters they deal with would raise real, and not simply nominal, double aspects.[130] As the Supreme Court has stated, when "courts apply the various constitutional

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[124] *Crown Zellerbach*, CBA Vol 1, Tab 24; *Hydro-Québec*, CBA Vol 1, Tab 25; *Oldman River* at 63-64, CBA Vol 1, Tab 12; *Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 [***Syncrude Canada***], CBA Vol 2, Tab 37.
[125] *Crown Zellerbach*, CBA Vol 1, Tab 24; *Interprovincial Co-Operatives*, CBA Vol 1, Tab 17.
[126] See paras 88, 91, 92 above.
[127] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 42, [2007] 2 SCR 3 [***Canadian Western Bank***], CBA Vol 1, Tab 11.
[128] *Securities Reference* at para 66, CBA Vol 2, Tab 33.
[129] CR, Vol 1, Tab 1, Moffet Affidavit at paras 77, 78, 82; SKR, Tab 4, *Pan-Canadian Framework* at 9-26.
[130] *Bell Canada v Québec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 765-66, CBA Vol 1, Tab 2.

doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels."[131]

101. Recognizing GHG emissions as a matter of national concern will not alter the balance of legislative power under the Constitution. As noted above, the provinces have several heads of power that allow them to legislate in respect of GHG emissions, and Parliament has available to it the criminal law power.[132] Federal jurisdiction to legislate as a matter national concern does not shift the balance of legislative power, but rather provides Parliament with a flexible tool, reflecting the scale of the problem. The legislation at issue encourages the provinces to come up with a made-in-the-province solution, but responds to provincial inaction.

102. Here, Parliament has adopted an approach that incentivizes companies, investors, and consumers to change their behaviour, rather than using its criminal law power to enact additional prohibitions aimed at reducing GHG emissions. Regulations that require specific outcomes or use of particular technologies in specific sectors are less flexible and more intrusive. The coordination between the fuel charge under Part 1 and the OBPS under Part 2 was carefully designed to provide the necessary price signal while being sensitive to emissions-intensive, trade-exposed industries. Recognizing Parliament's power to legislate in this vital area under its peace, order, and good government power has a reconcilable scale of impact on provincial jurisdiction.

103. With respect to the *Act* itself, Parliament designed it to intrude minimally. The *Act*'s backstop architecture provides provincial flexibility and minimally intrudes on provincial GHG emissions pricing schemes. The Government of Canada took a cooperative approach to recognize and encourage provincial pricing schemes. However, the fact that provincial governments can implement GHG emissions pricing schemes does not turn a matter of national concern back into a local matter. Contrary to Saskatchewan's assertion, cooperative federalism does not necessarily

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[131] *Rogers Communications* at para 38, CBA Vol 2, Tab 34; see also: *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44 at para 50, [2013] 3 SCR 53, CBA Vol 1, Tab 18; *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 669-70 **[*General Motors*]**, CBA Vol 1, Tab 13; *Firearms Sequel* at paras 17-21, SKBA Vol 1, Tab 20.

[132] *Syncrude Canada* at paras 8-12, 20, 41-45, 77, 93, 101, CBA Vol 2, Tab 37; *Hydro-Québec* at para 115-118, CBA Vol 1, Tab 25.

include the right not to cooperate on a matter of national concern.[133] Indeed, in describing the Supreme Court's decision in *Munro*,[134] Professor Hogg notes that a lack of provincial cooperation may support recognizing Parliament's jurisdiction:

> In the case of the national capital region (*Munro*), the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital. Indeed, in the *Munro* case the Supreme Court of Canada took judicial notice of the fact that the "zoning" of the national capital region was only undertaken federally after unsuccessful efforts by the federal government to secure cooperative action by Ontario and Quebec.[135]

B. Canada's approach to implementing a pan-Canadian price on carbon pollution respects all principles of federalism

104. There is no dispute that federalism is one of the foundational principles underlying Canada's constitution. As the Supreme Court of Canada has recently explained, "The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests."[136] However, the federalism principle "does not mandate any specific prescription for how governments within a federation should exercise their constitutional authority."[137] It does not alter the text of the *Constitution Act, 1867*, which remains supreme, and does not prevent Parliament from enacting legislation validly addressing a matter of national concern.

105. The *Pan-Canadian Framework* reflects a cooperative approach to addressing climate change, including using carbon pricing as a mechanism for reducing Canada's GHG emissions. The backstop architecture of the *Act* fosters and accommodates this cooperative approach. Saskatchewan accepts the premise that Parliament would have the constitutional authority to adopt a national price on carbon that operates uniformly across Canada,[138] without regard to GHG emissions prices already in place in many provincial jurisdictions. Saskatchewan even admits to the validity of a national price on GHG emissions that provides for variations based on objective

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[133] SKF at paras 48-49.
[134] *Munro v National Capital Commission*, [1966] SCR 663 [***Munro***], CBA Vol 1, Tab 19.
[135] Peter Hogg, *Constitutional Law of Canada*, loose-leaf (2006-Rel 1) 5th ed (Toronto: Carswell, 2007) at 17.3(b), 17-14, CBA Vol 2, Tab 69; *Munro* at 667, CBA Vol 2, Tab 69.
[136] *R v Comeau*, 2018 SCC 15 at para 78 [***Comeau***], CBA Vol 1, Tab 23.
[137] *Comeau* at para 87, CBA Vol 1, Tab 23.
[138] SKF at para 39.

criteria.[139] The province's objection is to the criteria Parliament has used in the *Act* (stringency of provincial GHG emissions-pricing mechanisms) for determining where Parts 1 and 2 of the *Act* will operate. Paradoxically, Saskatchewan's view of how Parliament should have exercised its constitutional authority would result in diminishing the scope provided under the *Act* for provincial carbon pricing mechanisms. Under Saskatchewan's view of federalism, it would have been necessary to limit the respect accorded to provincial jurisdictional means to legislate a carbon pricing mechanism for "fear that cooperative measures could risk diminishing a government's legislative authority to act alone."[140]

106. The Supreme Court recently rejected an argument that parallels Saskatchewan's argument. In the *Firearms Sequel*, Quebec argued that the principles of cooperative federalism prevented Parliament from legislating to destroy data contained in the long-gun registry. The Supreme Court rejected Quebec's argument, emphasizing that "[t]he primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework".[141] Unwritten constitutional principles can "not be taken as an invitation to dispense with the written text of the Constitution."[142]

107. Thus, while federalism is undoubtedly a foundational principle, Saskatchewan's view that the federalism principle, in the abstract, renders the *Act* unconstitutional regardless of its pith and substance or fit with s. 91 of the *Constitution Act, 1867* should be rejected. There is no constitutional requirement that federal laws operate equally throughout Canada. Indeed, as Saskatchewan acknowledges,[143] the Supreme Court recognized in *R v S(S)* "that differential application of federal law can be a legitimate means of forwarding the values of a federal system",[144] such that Parliament may differentiate in the application of its enactments, including in terms of the location of operation.[145]

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[139] SKF at para 39.
[140] *Firearms Sequel* at para 20, SKBA Vol 1, Tab 20.
[141] *Firearms Sequel* at para 18, SKBA Vol 1, Tab 20.
[142] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53, CBA Vol 2, Tab 32; see also: *Securities Reference* at para 62, CBA Vol 2, Tab 33.
[143] SKF at para 40.
[144] *R v S(S)*, [1990] 2 SCR 254 at 289 **[*R v S(S)*]**, SBA Vol 2, Tab 35.
[145] *R v S(S)* at 290, SBA Vol 2, Tab 35.

108. Contrary to Saskatchewan's submission, the fact that *R v S(S)* and the Supreme Court's decision in *Haig v Canada*[146] were both *Charter* cases does not diminish their applicability here. A consideration in each case was whether the *Charter* introduced a requirement for uniformity, which the Supreme Court rejected, finding that the *Charter* "does not alter the division of powers between governments, nor does it require that all federal legislation must always have uniform application to all provinces."[147] As Professor Hogg states, "in fields entrusted to the Federal Parliament, while uniform laws are usual, federal laws occasionally impose different rules on different parts of the country. There is no constitutional requirement of uniformity."[148]

109. Here, the *Act* applies throughout Canada to ensure that sufficiently stringent GHG emissions pricing systems apply in every province. However, Parts 1 and 2 of the *Act* will only operate in listed provinces or areas if it is necessary to achieve the *Act*'s objectives.

110. The *Act* is a valid exercise of Parliament's jurisdiction to enact legislation for the peace, order, and good government of Canada on matters of national concern. The reconcilable scale of impact portion of the *Crown Zellerbach* test for validly exercising this power integrates the principle of federalism.[149] It requires consideration of the "careful and complex balance of interest captured in constitutional texts"[150] embodied by the federalism principle. The principle of federalism informed the division of powers in ss. 91 and 92 and informs the recognition of matters of national concern under the peace, order, and good government provision in s. 91. However, federalism does not constrain the manner in which Parliament exercises its constitutional authority.

C. The fuel charge and excess emissions charge are regulatory charges - the *Act* implements a pricing regime to change behaviour to reduce GHG emissions

111. The fuel charge under Part 1 and the excess emissions charge under Part 2 are regulatory charges not taxes. Supreme Court jurisprudence has established that the character of a levy is

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[146] *Haig v Canada*, [1993] 2 SCR 995 [***Haig***], CBA Vol 1, Tab 15.
[147] *Haig* at 1046-7, CBA Vol 1, Tab 15.
[148] Peter Hogg, *Constitutional Law of Canada*, loose-leaf (2006-Rel 1) 5th ed (Toronto: Carswell, 2007) at 17.3(b), 17-13, CBA Vol 2, Tab 69.
[149] See paras 98-103 above.
[150] *Comeau* at para 82, CBA Vol 1, Tab 23.

determined by "its dominant or most important characteristic".[151] Although both purpose and legal effect are relevant considerations in the characterization process,[152] "[i]n the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative".[153] Here, as set out above, the fuel charge and the OPBS, including the excess emissions charge, are the regulatory means by which Parliament seeks to achieve the dominant purpose of the *Act* - to incentivize the behavioural changes necessary to reduce GHG emissions.[154]

112. A levy is only a tax if its primary purpose is to raise revenue for general federal purposes and it is unconnected to any form of regulatory scheme.[155] The Supreme Court in *Westbank* recognized two kinds of regulatory charges: those that are imposed to finance a regulatory scheme and those that are themselves the means of advancing a regulatory purpose.[156] A levy that is necessarily incidental to a broader regulatory scheme (i.e. to finance that scheme), or that is primarily for regulatory purposes will be a regulatory charge even if it otherwise has all the characteristics of a tax.[157]

113. Saskatchewan argues that only the fuel charge is a tax. The fact that the fuel charge has tax characteristics, which the Supreme Court in *620 Connaught* noted will be present for most government levies,[158] is not determinative. In the case of charges imposed to finance a regulatory scheme, the purpose is to raise revenue, but for regulatory rather than general purposes. The purpose of the second kind of regulatory charge is not to raise revenue, although it will inevitably do so, rather, it is to provide an economic incentive or disincentive for certain conduct, with a view

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[151] *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7 at para 16, [2008] 1 SCR 131 [***620 Connaught***], SKBA Vol 1, Tab 4.
[152] *Canadian Western Bank* at para 27, CBA Vol 1, Tab 11; *Firearms Reference* at para 16, CBA Vol 1, Tab 27.
[153] *620 Connaught* at para 17, SKBA Vol 1, Tab 4.
[154] See paras 73-83 above.
[155] *Reference re Proposed Federal Tax on exported Natural Gas*, [1982] 1 SCR 1004 at 1070 **[*Re Exported Natural Gas Tax*]**, CBA Vol 1, Tab 30; *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at paras 30, 43 [***Westbank***], SKBA Vol 2, Tab 36.
[156] *Westbank* at para 29, SKBA Vol 2, Tab 36; *620 Connaught* at para 20, SKBA Vol 1, Tab 4.
[157] *620 Connaught* at para 24, SKBA Vol 1, Tab 4.
[158] *620 Connaught* at paras 22-23, SKBA Vol 1, Tab 4.

to changing behaviour. Where a levy has elements of both taxation and regulation, its characterization depends on which is the dominant purpose and which is secondary.[159]

114. The dominant purpose of the fuel charge and the excess emissions charge is regulatory. Their purpose, as supported by the legislative record and extrinsic evidence,[160] is to influence industry and consumers to adopt emissions-reducing behaviour, to encourage behavioural changes that will result in less fossil fuel consumption, more efficient energy use, more attractive and affordable green technologies and, therefore, lower GHG emissions. The revenue generated by the fuel charge is entirely secondary.

115. The fuel charge and excess emissions charge are not imposed for the purpose of raising revenues for general federal purposes, and are thus not a tax. Nor are they imposed in order to defray the costs of implementing, administering, or enforcing the regulatory scheme in backstop jurisdictions. Rather, their pith and substance is to create the price signal needed to achieve the legislative objective. Unquestionably, their primary purpose is to incentivize behavioural change. In short, the charges themselves are *essential components* of the regulatory scheme.[161]

116. Further, the charges are connected to a regulatory scheme as they meet the necessary criteria. The test for determining whether a levy is connected to a regulatory scheme involves two steps: (1) determining whether a relevant regulatory scheme exists; and (2) establishing a relationship between the levy and the scheme.

i. A relevant regulatory scheme exists

117. To find a regulatory scheme, a Court will look for the presence of some or all of the following indicia: (1) a complete, complex, and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; and (4) a relationship between the person being regulated and the

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[159] *620 Connaught* at para 24, SKBA Vol 1, Tab 4.
[160] See paras 38-44, 81 above.
[161] *Eurig Estate (Re)*, [1998] 2 SCR 565 at para 15 [***Eurig Estate***], SKBA Vol 2, Tab 30; *Westbank* at paras 24, 44, SKBA Vol 2, Tab 36; *620 Connaught* at para 25, SKBA Vol 1, Tab 4; *Steam Whistle Brewing Inc. v Alberta Gaming and Liquor Commission*, 2018 ABQB 476 at paras 37-40, CBA Vol 2, Tab 36; *Canadian Association of Broadcasters v Canada*, 2008 FCA 157 at para 49 [***Canadian Broadcasters***], CBA Vol 1, Tab 9; *Act*, Preamble; see paras 38-44, 72-83 above.

regulation, where the person being regulated either benefits from, or causes the need for, the regulation. This list is not exhaustive, nor must all of the elements be met in any given case to find a regulatory scheme exists.[162]

118. The federal GHG emissions pricing system, including both the *Act* and regulations, constitutes a complete, complex, and detailed code of regulation that meets the first criterion. Both the fuel charge in Part 1 and the OBPS in Part 2, including the excess emissions charge, are complementary components of a single scheme intended to encourage behavioural change, through a price signal, to reduce GHG emissions.[163] Both parts are enacted in the same statute and serve to further a single comprehensive code of federal environmental regulation to apply to backstop jurisdictions.

119. The second criterion, the presence of a regulatory purpose that seeks to affect behaviour, is decidedly met in the present case. Parliament clearly expressed that the intent of the legislation is to correct a market failure by putting a price on GHG emissions to encourage consumers and industry to adopt emissions-reducing behaviour and to encourage innovation in low-emissions technologies.[164] The legislation achieves this by creating a financial incentive to businesses and individuals to change their behaviour in ways that reduce consumption, result in more efficient energy use, and create incentives for the development of more affordable green technologies. The result will be lower GHG emissions.[165]

120. The third criterion, which centres on the presence of actual or estimated costs of the regulation, is of little or no relevance to this case. That there will be regulatory costs incurred in the operation of the federal scheme is self-evident, but since the charges themselves will be the catalyst for behavioural change and not the means of financing the scheme, focusing on actual or

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[162] *Westbank* at para 44, SKBA Vol 2, Tab 36; *620 Connaught* at paras 24-28, SKBA Vol 1, Tab 4.
[163] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 101-16, Exhibit P at 7.
[164] *Act*, Preamble, paras 10-12; paras 38-44 above.
[165] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 124, 126, Exhibit Y; CR, Vol 3, Tab 3, Goodlet Affidavit at paras 17-18, 24, and 26-29; CR, Vol 3, Tab 5, Rivers Affidavit at Exhibit B.

estimated regulatory costs does not assist in determining the existence of a regulatory scheme.[166] Moreover, not all of the elements need to be met to find a regulatory regime exists.[167]

121. The fourth criterion requires a relationship between the regulatory scheme and the persons being regulated in that those persons either benefit from the regulation or cause the need for it. Here, the need to regulate GHG emissions is caused by the producers and importers of GHG-emitting fuels, and by consumers whose use of them both drives demand and contributes to GHG emissions. While the fuel charge and excess emissions charge are not imposed directly on end-use consumers, the cost will be passed through to them, bringing them within the scope of the regulation and encouraging a change in their behaviour.[168]

122. The fuel charge and the excess emissions charge established by the *Act* thus qualify as a regulatory scheme.

ii. The requisite relationship between the fuel charge and the scheme exists

123. If a valid regulatory regime is found to exist, the second step is to determine whether there is a relationship between the levy itself and the overall scheme.[169] This relationship will exist in either of two situations: (1) "when the revenues are tied to the cost of the scheme",[170] and (2) where the levy itself has "a regulatory purpose of influencing the behaviour of the persons concerned."[171] The fuel charge under the *Act* falls within the second situation. Its purpose, as previously stated, is to influence behaviour to reduce GHG emissions. The fuel charge will be set at annually increasing levels to encourage greater behavioural change over time to make it possible for Canada to reach its GHG emissions reduction targets.[172]

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[166] *Confédération des syndicats nationaux v Canada (Attorney General),* 2008 SCC 68 at para 72, [2008] 3 SCR 511 [***Confédération des syndicats nationaux***], SKBA Vol 1, Tab 11; *Westbank* at para 44, SKBA Vol 2, Tab 36; *620 Connaught* at para 20, SKBA Vol 1, Tab 4; *Canadian Broadcasters* at para 53, CBA Vol 1, Tab 9.
[167] *Westbank* at para 24, SKBA Vol 2, Tab 36.
[168] Rivers Affidavit, Exhibit B at 4-14.
[169] *Westbank* at para 44, SKBA Vol 2, Tab 36; *620 Connaught* at para 27, SKBA Vol 1, Tab 4.
[170] *Westbank* at para 44, SKBA Vol 2, Tab 36; *Canadian Broadcasters* at para 53, CBA Vol 1, Tab 9.
[171] *Confédération des syndicats nationaux* at para 72, SKBA Vol 1, Tab 11; *Westbank* at para 44, SKBA Vol 2, Tab 36; *620 Connaught* at para 20, SKBA Vol 1, Tab 4; *Canadian Broadcasters* at para 53, CBA Vol 1, Tab 9.
[172] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 101, 115, 124, Exhibit Y.

124. Where a levy is not set to defray costs but to influence behaviour, there is no need for the funds generated by the levy to be tied to the costs of the regulatory scheme. The nexus here between levy and scheme is inherent in the levy's regulatory purpose. A surplus of money raised over the costs of the scheme, therefore, will not invalidate the levy.[173]

125. While it is estimated that the fuel charge levied by the *Act* will generate significant amounts, Canada has never intended to retain the amounts generated, by either the fuel charge or the excess emissions charge, for any federal purpose. For the fuel charge, the legislation requires that the "net amount" be returned to the backstop provinces.[174] The government proposes to do this largely through Climate Action Incentive payments to individuals and families.[175]

126. Where amounts are returned directly to a province or territory, the use that may be made of the returned amounts by that jurisdiction is not relevant to this Court's determination of the pith and substance of the *Act*'s charges, and should not colour their characterization. The regulatory scheme could, however, be frustrated if a province opposed to carbon pricing takes countervailing policy actions to undermine the price signal created by the *Act*'s charges,[176] so this possibility has been avoided. Even if, in choosing the means for returning the amounts, the federal government could be said to be spending the proceeds for its own purposes, it can permissibly do so.[177]

127. Saskatchewan's reliance on the identity of the Minister responsible for administering Part 1 of the *Act* relates to form, not substance.[178] Administration by the Minister of National Revenue is not relevant to this Court's determination of the dominant purpose of the fuel charge, nor is the fact that the fuel charge will be administered in a similar manner to a tax. As stated by the majority in *Re Exported Natural Gas Tax*, "[f]ederal legislation which is in form taxation may yet be binding on a province if it is in substance and primarily enacted under another head of power."[179]

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[173] *Canadian Broadcasters* at para 49, CBA Vol 1, Tab 9.
[174] *Act*, s 165(2); see also *Act*, s 188(1) for the excess emissions charge.
[175] CR, Vols 1, 3, Tab 1, Moffet Affidavit at paras 122, 124-6, and Exhibits X, Y.
[176] CR, Vols 1-2, Tab 1, Moffet Affidavit at paras 48, 125-6, Exhibit J at 39-40; CR, Vol 3, Tab 5, Rivers Affidavit at paras 5-6, Exhibit B.
[177] *British Columbia (Attorney General) v Canada (Attorney General)* (1922), 64 SCR 377 at 382, aff'd [1923] 4 DLR 669 at 670-71 (JCPC), CBA Vol 1, Tabs 3, 4.
[178] SKF at para 55. Saskatchewan erroneously identifies the Minister of Finance, rather than the Minister of National Revenue; see *Act*, ss 3 "Minister", 93, 94.
[179] *Re Exported Natural Gas Tax* at 1068, CBA Vol 1, Tab 30.

Thus, utilizing the existing expertise of the Minister of National Revenue, acting through the CRA, and the Tax Court of Canada to administer the *Act* is a matter of economic and organisational efficiency, not an indicator of taxation.

128. The Minister of National Revenue has a broad range of responsibilities. This Minister, acting through the CRA, administers all or part of many Acts of Parliament requiring collection or payment of substantial sums for a variety of purposes.[180] Apart from tax legislation, the Minister through the CRA also administers all or part of a number of other statutes that do not involve taxation. For example, the CRA supports collection of non-tax debts under the *Canada Student Loans Act* and the *Canada Student Financial Assistance Act*.[181] The CRA also supports delivery of social and economic benefits (for example the Canada Child Benefit[182]), Parts IV and VII of the *Employment Insurance Act*, and Part I of the *Canada Pension Plan*.[183] Given the CRA's particular expertise in verification and collection, both in tax and non-tax areas, administration of the fuel charge under Part 1 of the *Act* through the CRA is irrelevant to its characterization.

129. Appeals to the Tax Court of Canada under the *Act* also fails to render the fuel charge a tax. The Tax Court hears appeals from a diverse series of statutes, a number of which are not tax matters. The *Employment Insurance Act*, the *Canada Pension Plan*, and other federal pension legislation are examples.[184] These Acts do not impose a tax and yet appeals to the Tax Court of Canada are available from determinations of whether an individual is engaged in insurable or pensionable employment under those Acts.[185]

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[180] *Canada Revenue Agency Act*, SC 1999, c 17, ss 2 "program legislation", 5, 6, CBA Vol 2, Tab 42.
[181] *Order Transferring Functions from the Department of Human Resources Development to the Canada Customs and Revenue Agency of the National Collection Services and of the Collections Litigation and Advisory Services*, SI/2005-73, CBA Vol 2, Tab 45; *Public Service Rearrangement and Transfer of Duties Act*, RSC, 1985, c P-34, ss 2 and 3, CBA Vol 2, Tab 46.
[182] *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 122.6, 122.61, CBA Vol 2, Tab 44.
[183] The *Employment Insurance Act*, SC 1996, c 23, ss 81, 90, 91, 92, 144, 146, 148, CBA Vol 2, Tab 43, enacted under s 91(2A) of the *Constitution Act, 1867*, as a result of *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 684 at 687-88 (JCPC) [***Employment Insurance Reference***], CBA Vol 1, Tab 7. *Canada Pension Plan*, RSC 1985, c C-8, ss 5, 26.1(1), 27.1, CBA Vol 2, Tab 41, enacted under s 94A of the *Constitution Act, 1867*, SKBA Vol 1, Tab 1.
[184] *Tax Court of Canada Act*, RSC 1985, c T-2, s 12, CBA Vol 2, Tab 47.
[185] *Employment Insurance Reference*, CBA Vol 1, Tab 7.

iii. As the fuel charge is a regulatory charge, Saskatchewan's submissions on s. 53 of the *Constitution Act, 1867* need not be considered

130. Section 53 of the *Constitution Act, 1867* mandates that bills for imposing any tax shall originate in the House of Commons,[186] so it is only relevant if this Court finds that the *Act* imposes a tax. Because the fuel charge and the excess emissions charge are regulatory charges, not taxes, s. 53 need not be considered. Parliament established a complete regulatory scheme that instituted a price on GHG emissions in order to ensure that a minimum price applies in all jurisdictions in Canada. Within this scheme, the Governor in Council's assessment of the stringency of provincial pricing mechanisms, relative to a minimum national benchmark, is directly relevant to determining whether, and to what extent, the federal backstop will apply in each province.

D. If this Court finds that Part 1 of the *Act* imposes a tax, then it is validly enacted under s. 91(3) in a manner consistent with s. 53 of the *Constitution Act, 1867*

131. In the alternative, if this Court finds that the fuel charge is a tax rather than a regulatory charge, then Parliament has the legislative competence to enact it under Parliament's taxation power in s. 91(3) of the *Constitution Act, 1867* and has done so in accordance with s. 53 of the *Constitution Act, 1867*.

132. The Constitution confers the federal taxing power in the broadest of terms. Subsection 91(3) of the *Constitution Act, 1867* gives Parliament exclusive legislative authority in the matter of the "raising of money by any mode or system of taxation."[187] Any potential intrusion of the *Act* into matters of provincial jurisdiction is, as described by the Supreme Court in *Canadian Western Bank*, "merely incidental" and by this Court in *TransGas Ltd. v Mid-Plains Contractors Ltd.*, "necessarily incidental" to Parliament's valid exercise of its taxation power.[188]

133. Saskatchewan does not challenge Parliament's legislative competence to enact the *Act* under its taxation power. Rather, Saskatchewan takes issue with the discretion delegated by

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[186] *Eurig Estate* at para 32, SKBA Vol 2, Tab 30; *Westbank* at paras 2 and 19, SKBA Vol 2, Tab 36; *620 Connaught* at paras 4-5, SKBA Vol 1, Tab 4.
[187] *Reference re: Goods and Services Tax (GST)(Can.)*, [1992] 2 SCR 445 at 468, 471 **[*Re GST*]**, CBA Vol 1, Tab 28; see also: *Westbank* at para 45, SKBA Vol 2, Tab 36.
[188] *Canadian Western Bank* at para 28, CBA Vol 1, Tab 11; *TransGas Ltd. v Mid-Plains Contractors Ltd.* (1993), 101 DLR (4th) 238 at paras 19-22 (WL) (Sask CA), aff'd [1994] 3 SCR 753, CBA Vol 2, Tabs 38, 39, citing *Re GST*; see also: *General Motors*, CBA Vol 1, Tab 13.

Parliament to the Governor in Council to determine the jurisdictions in which Parts 1 and 2 of the *Act* operate.[189] This discretion is defined, explicitly related to the objectives of the *Act*, and constitutionally valid.

134. The *Act* complies with the s. 53 requirement that bills imposing a tax shall originate in the House of Commons. As the Supreme Court confirmed in *Eurig Estate*, s. 53 "prohibits any body other than the elected legislature from imposing a tax on its own accord"; in other words, imposing "a new tax *ab initio*" or "*proprio vigore"* without the authorization of Parliament. It ensures that "taxation powers cannot arise incidentally in delegated legislation."[190]

135. The *Act* originated in the House of Commons. On March 27, 2018, the Minister of Finance presented a Notice of Ways and Means Motion to the House of Commons, to implement certain provisions of the budget. The motion carried, and the Minister of Finance moved for leave to introduce Bill C-74, which would later become the *Act*. The motion was deemed adopted, and the Bill was read the first time.[191] There is no dispute that the House of Commons debated the Bill during second reading, examined the Bill by committees, and gave the Bill third reading. The Bill received Royal Assent and became law on June 21, 2018.

136. The Supreme Court has confirmed that "[t]he delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation."[192] In *Ontario English Catholic Teachers' Assn.*, the Supreme Court further explained:

> When the Minister sets the applicable rates, a tax is not imposed *ab initio*, but it is imposed pursuant to a specific legislative grant of authority. Furthermore, the delegation of the setting of the rate takes place within a detailed statutory framework, setting out the structure of the tax, the tax base, and the principles for its imposition.[193]

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[189] *Act*, ss 166(2), 166(3), 189(1) and 189(2); SKF at para 63.
[190] *Eurig Estate* at paras 29-32, SKBA Vol 2, Tab 30.
[191] *Debates* (27 March 2018) at 18188-90, CBA Vol 2, Tab 27.
[192] *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15 at paras 74, 77, [2001] 1 SCR 470 [***OECTA***], CBA Vol 1, Tab 22; *Confédération des syndicats nationaux* at paras 86-92, SKBA Vol 1, Tab 11.
[193] *OECTA* at para 75, CBA Vol 1, Tab 22.

137. The fuel charge does not arise, even incidentally, in any delegated legislation. The fuel charge is imposed in the *Act*.[194] The *Act* establishes who is subject to the charge in the jurisdictions where it operates.[195] The charge is computed under the *Act* for time periods that are established by the *Act.*[196] The amount of the charge is set by the *Act*[197] and the Governor in Council's authority to determine the rate is expressly delegated in s. 166(4). Unlike the legislation in issue in *Confédération des syndicats nationaux,* the *Act* was introduced in Parliament under the accepted method for introducing a tax: a Ways and Means Motion.[198]

138. With respect to the ability of the Governor in Council to list provinces or areas in Part 1 of Schedule 1 of the *Act*, Parliament expressly delegated this decision-making authority under s. 166(2) of the *Act*. It thus meets the requirements of the principle of "no taxation without representation".[199] Under s. 166(3) of the *Act*, Parliament has defined the scope of the Governor in Council's regulatory power to list provinces in which the fuel charge will apply. The legislation connects the exercise of that discretion to the purpose of the *Act* and prescribes that the "stringency of provincial pricing mechanisms for greenhouse gas emissions" is the primary consideration.[200] Saskatchewan's suggestion that the decision to list a province could "be based on a political decision as opposed to the application to any objective criteria"[201] lacks any foundation and would be entirely contrary to long-established principles of administrative law.[202]

139. The cases of *Eurig Estate* and *Confédération des syndicats nationaux* are distinguishable as the charges in those cases were taxes disguised as "fees" and "premiums", respectively, which were not enacted by a legislature. In *Eurig Estate*, the Supreme Court held that amounts collected

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[194] *Act*, ss 17-41; see also: *National Steel Car Limited v Independent Electricity System Operator*, 2018 ONSC 3845 at paras 85-87, CBA Vol 1, Tab 20.
[195] *Act*, Part I, Division 2.
[196] *Act*, ss 68, 69 and 71.
[197] *Act*, ss 3 "rate", 40, 41, Schedule 2, column 5; see also: *OECTA* at para 73, CBA Vol 1, Tab 22.
[198] Audrey O'Brien & Marc Bosc, *House of Commons Procedure and Practice*, 2d ed (Ottawa: House of Commons, 2009) at 901-04, CBA Vol 2, Tab 70.
[199] *OECTA* at paras 74, 77, CBA Vol 1, Tab 22.
[200] *Act*, s 166(3); FINA, No 157 (23 May 2018) at 12-14, CBA Vol 2, Tab 62.
[201] SKF at para 63.
[202] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, CBA Vol 2, Tab 35; *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40 at para 52, [2014] 2 SCR 135, CBA Vol 1, Tab 10.

in respect of probate fees constituted a tax.[203] The probate fees were unconstitutional because they were in substance a tax imposed by the Lieutenant Governor in Council without having originated in the legislature.[204]

140. The constitutionally invalid provisions in *Confédération des syndicats nationaux* are distinguishable from the fuel charge. Prior to legislative changes to the *Employment Insurance Act*, s. 66 contained criteria for setting employment insurance rates as a regulatory charge. In enacting s. 66.1, Parliament authorized the Governor in Council to set the employment insurance premium rates for 2002 and 2003, and similarly did so for 2005 by enacting s. 66.3. The new rate-setting mechanism provided no criteria to guide the setting of rates, which then fell within the discretion of the Governor in Council.[205]

141. Unlike either of those situations, if the Court finds that the fuel charge is a tax, then it is validly enacted in accordance with s. 53 of the *Constitution Act, 1867*.

PART VI – RELIEF

142. Canada seeks the Court's opinion that the whole of the *Act* is validly enacted under Parliament's power to pass laws for the peace, order, and good government of the nation as a whole respecting GHG emissions, being a matter of national concern.

143. In the alternative, Canada seeks the Court's opinion that Part 1 of the *Act* is validly enacted under Parliament's taxation power and that Part 2 of the *Act* was validly enacted under Parliament's power to pass laws for the peace, order, and good government of the nation as a whole respecting GHG emissions, being a matter of national concern.

144. Saskatchewan asks this Court to declare the *Act ultra vires*. However, declaratory relief is not an appropriate remedy on a reference. As the Supreme Court explained in *Bedford*, a court's answer to a question posed on a reference is advisory only, even though such opinions are routinely

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[203] *Eurig Estate* at para 23, SKBA Vol 2, Tab 30.
[204] *Eurig Estate* at para 36, SKBA Vol 2, Tab 30.
[205] *Confédération des syndicats nationaux* at paras 75-79, SKBA Vol 1, Tab 11.

followed.[206] Other than in the most exceptional circumstances, where there is a risk that no other court will be able to provide the appropriate remedy, a declaration is not an available remedy.[207]

145. Out of an abundance of caution, if this Court decides to make a declaration of invalidity, Canada requests that any such declaration be suspended until the question of the Parliament's authority to enact the *Act* is finally determined by the Supreme Court of Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 29, 2018.

Sharlene Telles-Langdon

for **Brooke Sittler**

for **Mary Matthews**

Neil Goodridge

for **Ned Djordjevic**
Of Counsel for the Attorney General of Canada

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[206] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 40, [2013] 3 SCR 1101, CBA Vol 1, Tab 6.
[207] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at paras 9-11, CBA Vol 1, Tab 31; *Reference re: House of Assembly Act (N.S.)*, 2017 NSCA 10 at paras 164-67, CBA Vol 1, Tab 29.

PART VII - AUTHORITIES

Tab	**Cases**	**Para(s)**
1	*114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241	85
	620 Connaught Ltd. v Canada (Attorney General), 2008 SCC 7 at paras 4, 5, 16, 17, 20, 22-28, [2008] 1 SCR 131 **[Book of Authorities of the Attorney General of Saskatchewan, Tab 4]**	111, 112, 113, 115, 117, 120, 123, 130
2	*Bell Canada v Québec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 765, 766	100
3	*British Columbia (Attorney General) v Canada (Attorney General)* (1922), 64 SCR 377	126
4	*British Columbia (Attorney General) v Canada (Attorney General)*, [1924] 4 DLR 669 (JCPC)	126
5	*British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 at para 7, [2004] 2 SCR 74	85
6	*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 40, [2013] 3 SCR 1101	144
7	*Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 684 at 687, 688 (JCPC)	128
8	*Canada Metal Co. v R* (1982), 144 DLR (3d) 124 (CanLII) (Man QB) at para 16	93
9	*Canadian Association of Broadcasters v Canada*, 2008 FCA 157 at para 49, 53	115, 120, 123
10	*Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40 at para 52, [2014] 2 SCR 135	138
11	*Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 27, 28, 42, [2007] 2 SCR 3	99, 111, 132

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	Eurig Estate (Re), [1998] 2 SCR 565, [2000] 1 CTC 284 at paras 15, 23, 29-32, 36 **[Book of Authorities of the Attorney General of Saskatchewan, Tab 30]**	115, 130, 134, 139
12	*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16, 63, 64, 72	69, 85, 98
13	*General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 669, 670	100, 132
14	*Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 21, [2015] 3 SCR 250	72
15	*Haig v Canada*, [1993] 2 SCR 995 at 1046, 1047	108
16	*Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at para 23, [2003] 2 SCR 624	82
17	*Interprovincial Co-Operatives Ltd. v Dryden Chemicals Ltd.*, [1976] 1 SCR 477	95, 98
18	*Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44 at para 50, [2013] 3 SCR 53	100
19	*Munro v National Capital Commission*, [1966] SCR 663 at 667	103
20	*National Steel Car Limited v Independent Electricity System Operator*, 2018 ONSC 3845 at paras 85-87	137
21	*Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para 55	85
22	*Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15 at para 73-75, 77, [2001] 1 SCR 470	136, 137, 138

Tab	**Cases**	**Para(s)**
	Quebec (Attorney General) v Canada (Attorney General), 2015 SCC 14 at paras 17-21, 28, 29, [2015] 1 SCR 693 **[Book of Authorities of the Attorney General of Saskatchewan, Tab 20]**	72, 100, 105, 106
23	*R v Comeau*, 2018 SCC 15 at paras 78, 82, 87	104, 110
24	*R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 423 – 434	70, 98
25	*R v Hydro-Québec*, [1997] 3 SCR 213 at paras 5, 68-70, 75, 85, 112, 115-118	69, 85, 91, 98, 101
	R v S(S), [1990] 2 SCR 254 at 289, 290 **[Book of Authorities of the Attorney General of Saskatchewan, Tab 35]**	107
26	*Reference re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458	70
27	*Reference re: Firearms Act (Canada)*, 2000 SCC 31 at paras 15-18, [2000] 1 SCR 783	72, 73, 77, 111
28	*Reference re Goods and Services Tax (GST) (Can.)*, [1992] 2 SCR 445	132
29	*Reference re House of Assembly Act (N.S.)*, 2017 NSCA 10 at paras 164-167	144
30	*Reference re: Proposed Federal Tax on exported Natural* Gas, [1982] 1 SCR 1004 at 1068, 1070	112, 127
31	*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at paras 9-11	144
32	*Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 53	106
33	*Reference re Securities Act*, 2011 SCC 66 at paras 62-64, 66, [2011] 3 SCR 837	72, 73, 99, 106
34	*Rogers Communications v Châteauguay*, 2016 SCC 23 at paras 34-36, 38, [2016] 1 SCR 467	72, 100
35	*Roncarelli v Duplessis*, [1959] SCR 121 at 140	138

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36	*Steam Whistle Brewing Inc. v Alberta Gaming and Liquor Commission*, 2018 ABQB 476 at paras 37-40	115
37	*Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at paras 8-12, 20, 41-45, 77, 93, 101	98, 101
38	*TransGas Ltd. v Mid-Plains Contractors Ltd.*, 104 DLR (4th) 238 at 19-22 (WL) (Sask CA)	132
39	*TransGas Ltd. v Mid-Plains Contractors Ltd.*, [1994] 3 SCR 753	132
40	Court of Appeal, The Hague, October 9, 2018, *Urgenda Foundation v The State of the Netherlands*, Case Number: 200.178.245/01 (The Netherlands)	86
	Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 at paras 2, 19, 24, 29, 30, 43-45 **[Book of Authorities of the Attorney General of Saskatchewan, Tab 36]**	112, 115, 117, 120, 123, 130, 132

Tab	**Statutes**		**Para(s)**
41	*Canada Pension Plan*, RSC 1985, c C-8 ss 5, 26.1(1), 27.1	*Régime de pensions du Canada*, LRC (1985), ch C-8 ss 5, 26.1(1), 27.1	128
42	*Canada Revenue Agency Act*, SC 1999, c 17 ss 2, 5, 6	*Loi sur l'Agence du revenue du Canada*, LC 1999, ch 17 ss 2, 5, 6	128
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