CA. No.: CACV3239

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part 5

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

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO

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2. As well, the "charges" the Act imposes are neither valid regulatory charges nor valid taxation. The Act and its legislative history make it clear that Parliament intended to regulate greenhouse gases, not authorize the imposition of taxation. At the same time, however, the Act does not require the revenues it raises to be spent on reducing greenhouse gas emissions; the "charges" it imposes therefore lack the nexus with the Act's regulatory purpose required to be valid regulatory charges, even if greenhouse gas emissions did fall within the scope of the national concern doctrine.

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regulatory purpose to be valid regulatory charges. The Act is therefore unconstitutional in its entirety.

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

7. To determine whether a law is *ultra vires*, a court must conduct a two-stage analysis: first, it considers the law's purpose and effect with a view to identifying the true subject matter – the *pith and substance* – of the law in question; second, it determines whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity.

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

8. The Act's Preamble shows that its purpose is to regulate all greenhouse gases produced in Canada, regardless of their source. The Act's purpose is to take "comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change."

> *Greenhouse Gas Pollution Pricing Act*, *supra*, Preamble

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

> *Greenhouse Gas Pollution Pricing Act*, *supra*, ss 3, 166(1)(a), 169, 171-74, 190-92, 197-98, and 203; SOR/2018-213; and SOR/2018-214

10. The Act must therefore be seen as, in pith and substance, an attempt to create a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all

sources in Canada. The next step in the federalism analysis is to assign the Act to one or more heads of federal power to see if any can support its validity.

B. Regulating Greenhouse Gas Emissions Is Not a Novel Federal Power Under the National Concern Doctrine

11. The Act as a whole cannot be supported under any of the regulatory powers enumerated in s. 91 of the *Constitution Act, 1867*. The detailed regulatory measures set out in the Act go far beyond the types of prohibition and penalty that can be imposed under the criminal law power. Nor is the Act limited to greenhouse gas emissions caused by federally-regulated industries, such as interprovincial railways, shipping, and pipelines, or the use of federal public lands. It purports to govern all greenhouse gas producing activities in Canada.

> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457; *Constitution Act, 1867*, ss 91(1A), (10), (27), and (29)

12. Parliament has no free-standing power to implement international treaties. The fact that the federal Executive has signed treaties regarding greenhouse gas emissions (as noted in the Act's Preamble) is therefore irrelevant to determining whether the Act is *intra vires* Parliament. Although the federal government can enter into international treaties on a wide range of matters, Parliament can only implement those treaties to the extent they deal with matters that independently fall within federal jurisdiction; otherwise, "the individual provinces will only be bound by the terms of such an agreement once their respective legislatures enact them into law."

> *Pan-Canadian Securities Regulation Reference*, *supra* at para 66; *Thomson v Thomson*, [1994] 3 SCR 551 at 611-12; *Canada (AG) v Ontario (AG) (Labour Conventions)*, [1937] AC 326 (PC)

13. The Act also cannot be supported under a novel federal power to regulate greenhouse gas emissions under the national concern branch of the federal peace, order, and good government ("POGG") power. The fact that climate change is an important societal problem is not a sufficient basis to transfer jurisdiction over greenhouse gas emissions to the federal government under Parliament's power to regulate matters of national concern. Many important societal issues straddle the constitutional division of

powers and must be addressed by a combination of federal and provincial measures, each level of government acting within its assigned sphere of responsibilities.

14. Greenhouse gas emissions are not a single, distinct, and indivisible matter which Parliament can regulate under its jurisdiction over matters of a national concern without fundamentally disturbing the balance of federalism. Greenhouse gases are caused by an extremely wide range of activities that have always been provincially regulated (e.g., electricity generation, natural resource exploration and production, industrial facilities, home heating, intra-provincial transportation, land use, forestry management, etc)

15. Virtually every segment of the provincial economy and society could be regulated in minute detail on the basis that activities in them generate greenhouse gases. Transferring jurisdiction over greenhouse gases to Parliament would give the federal government broad jurisdiction not just to impose a price on greenhouse gas emissions but also to regulate a wide range of matters of traditionally provincial concern. Shifting so much power from the provincial legislatures to Parliament would undermine the federal-provincial division of powers that allows the Canadian union "to reconcile diversity with unity." As the Supreme Court has held, the underlying constitutional principle of federalism "has from the beginning been the lodestar by which the courts have been guided" in interpreting sections 91 and 92 of the *Constitution Act, 1867*.

> *Reference re Secession of Québec*, [1998] 2 SCR 217 at paras 43, 47, and 55-60; *Securities Reference*, *supra* at paras 61-62; *R. v Comeau*, 2018 SCC 15 at paras 77-88, [2018] 1 SCR 342

16. If the Act were found to be a permissible exercise of federal jurisdiction, Parliament could, if it chose, regulate the types of housing developments that could be built, impose quotas on how much gasoline people can buy or the days when they can drive, regulate land use planning to require higher density housing or require the setting aside of land as green space, limit the degree to which oil and gas production can take place, decide how long factories are allowed to operate each day, and many other matters that have always fallen within provincial, not federal, jurisdiction. Such a radical disruption of the

federal/provincial balance should not be permitted under the guise of regulating greenhouse gases as a purported matter of national concern.

(1) The National Concern Branch of POGG Should Be Interpreted Narrowly to Avoid Unduly Trenching Upon Provincial Jurisdiction

17. Like all branches of the POGG power, the national concern doctrine is a residuary power that must be narrowly construed to avoid upsetting the carefully crafted division of power between Parliament and the provincial Legislatures set out in sections 91 to 95 of the *Constitution Act, 1867*.

18. The opening words of section 91, which have been interpreted as giving Parliament the power to make laws for the peace, order, and good government of Canada, expressly state that, unlike Parliament's enumerated powers which operate notwithstanding the provincial legislature's enumerated powers, the POGG power cannot be used to intrude on the "Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sections 92, 92A, and 93 give the provincial legislatures broad and exclusive jurisdiction over a wide range of local matters, including the vast majority of the activities that generate greenhouse gases.

Constitution Act, 1867, ss 91-93

19. The Supreme Court and the Privy Council have repeatedly warned of the danger that overly broad resort to the national concern doctrine could unbalance the division of powers and cause a wholesale transfer of jurisdiction from the provincial legislatures to Parliament. In the *Local Prohibition* case, the first case to articulate the national concern doctrine, Lord Watson warned that "great caution must be observed" given the impact the doctrine could have on provincial jurisdiction if not "strictly confined to such matters as are unquestionably of Canadian interest and importance." Giving too broad an interpretation to the national concern doctrine would "not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces."

Ontario (AG) v Canada (AG) (Local Prohibition), [1896] AC 348 at 360-61 (PC)

20. The Act at issue in this reference is an example of why such great caution must be shown. Transferring jurisdiction over all matters that generate greenhouse gases to Parliament would trench upon virtually all of the classes of subjects enumerated in section 92 and severely limit provincial autonomy to regulate their own societies and economies.

21. The risks of transferring a broad swath of provincial jurisdiction to Parliament by an over-expansive interpretation of "national concern" were well described in the *Anti-Inflation Reference*. Justice Beetz, writing for the majority of the Supreme Court on this point, held that federal jurisdiction to regulate inflation could not be justified under the national concern doctrine given the broad range of activities causing inflation that would have to be transferred from provincial to federal jurisdiction:

> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.
>
> *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 437 (Ritchie J) and 443-45 and 458-59 (Beetz J)

22. A similar analysis applies to greenhouse gas emissions. If Parliament has jurisdiction over greenhouse gas emissions, it could control the activities of the largest to the smallest undertakings, industries, and trades. It could ration fuel, establish quotas, regulate waste, product packaging, land use planning, and housing, and limit the output of goods and services that carbon-emitting industries should produce in any given period. Like inflation, greenhouse gas emissions do not pass muster as a new subject matter. The activities that contribute to greenhouse gas emissions, like those that contribute to inflation, are so pervasive that they too know no bounds. Recognizing greenhouse gas emissions as a new federal head of power would lead, as Justice Beetz warned, to "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, [disappearing] not gradually but rapidly."

> *Anti-Inflation Reference*, *supra* at 445

23. In the *Anti-Inflation Reference*, a majority rejected the federal government's resort to the national concern doctrine to uphold a system of price regulation to combat an important and pervasive economic problem – inflation. Despite the problems inflation was posing for the national economy as a whole, the regulation of prices (except in industries within enumerated federal jurisdiction) was held to be squarely and exclusively within provincial jurisdiction. As in the *Board of Commerce* and *Fort Francis Pulp and Power* cases a half-century earlier, which together held that federal price regulation could be supported by POGG during national emergencies (wartime and a transitional period thereafter) but not otherwise, only a finding of national emergency concerning inflation in the 1970s justified Parliament's imposition of comprehensive price regulation through the *Anti-Inflation Act*.

> *In re Board of Commerce*, [1922] 1 AC 191 (PC); *Fort Frances Pulp and Power Co v Manitoba Free Press*, [1923] AC 695 (PC); *Reference re Wartime Leasehold Regulations*, [1950] SCR 124

24. Now, despite the holdings in the *Board of Commerce* and *Anti-Inflation* cases, the federal government is again seeking to enact an across-the-board system of price regulation (now for all carbon-based energy) and displace broad swathes of exclusive provincial jurisdiction. Except in the temporary context of a national emergency, which is not claimed here, the regulation of prices is ***not*** within the scope of the POGG power.

(2) Greenhouse Gas Emissions Are Not Single, Distinct, and Indivisible

25. Greenhouse gas emissions lack the single, distinct, and indivisible nature required to be regulated as a matter of national concern. In *Crown Zellerbach*, Justice Le Dain, writing for the unanimous Court on this point, accepted that limits had to be placed on the scope of the national concern doctrine to ensure it did not overtake the entire sphere of provincial jurisdiction. The matter in question had to be a single, distinctive, and indivisible matter and transferring it to federal jurisdiction had to be reconcilable with the fundamental distribution of legislative power under the Constitution. Granting Parliament jurisdiction over greenhouse gas emissions would violate both of those limitations.

> *R. v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 432

26. Marine pollution was recognized as a matter of national concern by the majority in *Crown Zellerbach*. But this was understood to be a narrow category of pollution closely tied to Parliament's existing jurisdiction over offshore and international waters, navigation, and fisheries. By contrast, greenhouse gas emissions encompass a wide variety of pollutants (to which the Governor in Council can add at any time) and are not closely tied to Parliament's existing heads of jurisdiction.

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

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

28. Justice La Forest's view that the environment was too diffuse a subject matter for Parliament to regulate under the national concern doctrine was adopted by the entire court in *Oldman River*. The entire Court again held that the environment was not a matter suitable for exclusive federal jurisdiction under the national concern doctrine in *Hydro-Québec* The general structure of the Constitution provides the provinces with broad powers over many aspects of the environment and the federal government the ability to affect aspects of the environment that fall within Parliament's enumerated powers. Finding the environment as a whole (or even just certain aspects of the environment such as pollution) to be an exclusively federal matter of national concern would pose too high a risk to the Constitution's carefully calibrated division of powers.

> *Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3 at 63 (La Forest J) and 81 (Stevenson J dissenting on other grounds); *R. v Hydro-Québec*, [1997] 3 SCR 213 at paras 64-79 (Lamer CJC and Iacobucci J dissenting) and 115-16 (La Forest J)

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

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

30. Unlike the well-defined activity of "dumping […] waste in waters, other than fresh waters, within a province" – the matter at issue in *Crown Zellerbach* – Canada in the present case seeks jurisdiction to regulate everything that gives rise to greenhouse gas emissions. Placing limits on the activities that would be subject to this proposed federal power would be virtually impossible: activities that create greenhouse gases are a product of all we do. They are not a single, distinct, and indivisible matter appropriate for regulation under the national concern doctrine.

> *Crown Zellerbach*, *supra* at 417

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

31. The provinces are not only entirely capable of combatting greenhouse gas emissions, they are already doing so. In discussing whether a matter had the singleness, distinctiveness, and indivisibility needed to distinguish it from matters of provincial concern, Justice Le Dain held that "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of a matter." This so-called "provincial inability" test, however, is only "one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine." It does not "go so far as to provide a rationale for the general notion, hitherto

rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem."

Crown Zellerbach, *supra* at 432 and 434

32. The provincial inability test is not particularly helpful in assessing whether greenhouse gas emissions should be considered a matter of national concern. The test asks whether provincial non-participation jeopardizes the ***functioning*** of a national scheme, not just its ***effectiveness*****.** Reducing the emission of greenhouse gases is not like the regulation of aeronautics where regulation would be entirely unworkable if different provinces imposed their own rules or refused to allow planes to land. Different provinces reducing greenhouse gases in different ways and on different timelines to account for their different circumstances does not preclude other provinces from reducing greenhouse gases in their own preferred manner.

Johannesson v West St. Paul (Municipality), [1952] 1 SCR 292; *Canada (AG) v Ontario (AG) (Aeronautics Reference)*, [1932] AC 54 (PC)

33. The provincial inability test, like the fourth and fifth *General Motors* criteria used to determine whether a matter falls within the general trade and commerce power, should not be used to "confuse what is optimum as a matter of policy and what is constitutionally permissible": "Efficaciousness is not a relevant consideration in a division of powers analysis. … The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.

Securities Reference, *supra* at para 90; *Pan-Canadian Securities Regulation Reference*, *supra* at para 82; *Firearms Reference*, *supra* at paras 18 and 57

34. Acting separately or in concert, the provinces are capable of reducing their greenhouse gas emissions in a manner that takes into account their unique circumstances. Regulating greenhouse gases does not become a matter of "national concern" just because different provinces take different views as to the most effective way to reduce them. There is no need for a one-size-fits-all federal carbon price.

35. There is no provincial inability to combat greenhouse gas emissions. Every province in Canada has a climate change plan that includes greenhouse gas reduction measures. The

fact that not every province has adopted the federal government's preferred mechanism for combatting greenhouse gas emissions – an express pricing mechanism that will increase the cost of almost everything Canadians do – does not mean that the provinces are incapable of taking action against greenhouse gases.

36. As in *Hydro-Québec*, the Act itself "implicitly undermines any contention that the provinces are incapable of regulating" greenhouse gas emissions. In that case, the minority, without dispute from the majority, held that the Governor in Council's power to exempt a province from the application of federal regulations if the province already had equivalent regulations in force demonstrated that "the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible."

Hydro-Québec, *supra* at paras 57 and 77

37. In the present case, ss. 166 and 189 of the Act go even further – they require the Governor in Council to "take into account, as the primary factor" whether a province has enacted a sufficiently stringent "provincial pricing mechanism" in determining whether to apply either Part 1 or Part 2 of the Act to that province. In essence, Canada has implicitly, if not explicitly, acknowledged that the provincial legislatures can effectively regulate greenhouse gas emissions. Canada's concern is not that the provinces are unable to combat climate change; it is that they might choose a different way of doing so than the mechanism Parliament believes is essential. That is federal overreach, not provincial inability.

Greenhouse Gas Pollution Pricing Act, *supra*, ss 166(2)-(3) and 189

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

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

Crown Zellerbach, *supra* at 432

39. Transferring jurisdiction over the vast range of activities that could potentially generate greenhouse gas emissions to the federal Parliament would radically alter the balance of the Canadian federation. Parliament would have near-plenary power to regulate almost all aspects of Canadian society and economy. So broad an impact on provincial jurisdiction is not reconcilable with the Constitution's intention to divide legislative power between Parliament and the provincial legislatures.

40. In *Crown Zellerbach*, Justice La Forest for the minority considered how the dangers identified by Justice Beetz in the *Anti-Inflation Reference* could arise equally well in the environmental context. As discussed above, the unanimous Court adopted Justice La Forest's reasoning on this point in *Oldman River* and *Hydro-Québec*

41. Even if, as the majority in *Crown Zellerbach* found, marine pollution were a valid matter of national concern, allowing Parliament to regulate pollution more broadly "would effectively gut provincial legislative jurisdiction" because "all physical activities have some environmental impact" and "there would not be much left of the distribution of power if Parliament had exclusive jurisdiction over this subject."

> *Crown Zellerbach*, *supra* at 447-48 and 453-56; *Oldman River*, *supra* at 63; *Hydro-Québec*, *supra* at paras 64-79 (Lamer CJC and Iacobucci J dissenting) and 115-16 (La Forest J)

42. In *Oldman River*, Justice La Forest, speaking for the Court, made it clear that giving the federal government plenary power over the environment would be irreconcilable with the federal division of powers "because no system in which one government was so powerful would be federal."

> *Oldman River*, *supra* at 63-64; Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 UTLJ 54 at 85

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

in *Oldman River*, both levels of government should regulate the aspects of the environment that fall within their respective enumerated powers.

Oldman River, *supra* at 65-69

44. Parliament can regulate many aspects of the environment under its enumerated powers over interprovincial undertakings, navigation and shipping, fisheries, public lands, and the criminal law. But it should not be given a plenary power over all aspects of a matter so broad as regulating greenhouse gas emissions. Given the range of provincially-regulated activities that generate greenhouse gases, granting Parliament such a power would dramatically and impermissibly alter the division of powers.

45. In the *Securities Reference*, the Supreme Court warned of the dangers of interpreting one level of government's power so broadly that they "erode the constitutional balance inherent in the Canadian federal state." It did so in the context of interpreting whether the general branch of the s. 91(2) trade and commerce power – a power that like the national concern doctrine "has the potential to permit federal duplication (and, in cases of conflict, evisceration) of the provincial powers over large aspects of property and civil rights and local matters" – gave Canada the power to enact a nation-wide securities regime. The Court concluded that "Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension."

Securities Reference, *supra* at paras 7, 61-62, and 70

46. The need to interpret federal heads of power to leave continued space for the operation of provincial heads of power reflects the co-equal sovereignty of the federal and provincial governments in Canada and the importance of allowing continued space for provincial experimentation and diversity: "As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence." Federalism requires "the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction."

Securities Reference, *supra* at paras 71-73

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

Securities Reference, *supra* at para 128

48. Unlike the Draft Federal Act to regulate national capital market systemic risk, upheld under the general branch of the federal trade and commerce power in the recent *Pan-Canadian Securities Regulation Reference*, the Act at issue here is not carefully limited to only deal with matters of truly national concern. On the contrary, the broad, undefined powers it grants to the Governor in Council allow the federal government to impose charges on any “fuel” (a term the Governor in Council can define as it sees fit) produced, consumed, or imported into Canada. The carbon-based energy inputs to every human activity are made subject to federal price regulation. The Governor in Council can also require virtually any facility that emits any kind of gas to comply with whatever emissions-trading regime it prescribes, make whatever reports it desires, and be subjected to whatever onerous compliance requirements it considers appropriate.

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

49. The Act is not a carefully limited and defined federal regime intended to apply only to a single, distinct, and indivisible matter without unduly interfering with provincial regulatory powers. It is a comprehensive attempt to give the federal Executive broad, uncontrolled powers to take measures to reduce greenhouse gas emissions throughout Canada, regardless of the impact of those emissions on national climate change targets and regardless of the impact on provincial heads of power. “National concern” should not be interpreted as granting Parliament the plenary power over greenhouse gas emissions that

would be required to uphold the Act. Doing so would result in a massive transfer of regulatory power from the provincial to the federal level and is incompatible with the federal nature of Canada's constitution.

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

50. The "charges" the Act imposes are neither valid regulatory charges nor valid taxation. The Act and its legislative history make it clear that Parliament intended to regulate greenhouse gases, not authorize the imposition of taxation. At the same time, however, the Act does not require the revenues it raises to be spent on reducing greenhouse gas emissions; the "charges" it imposes therefore lack the nexus with the Act's regulatory purpose required to be valid regulatory charges.

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

51. The Act cannot be supported under Parliament's section 91(3) power to make laws regarding "the raising of Money by any Mode or System of Taxation." The Act is a regulatory statute that Parliament never intended to treat as a taxation statute.

52. To be a constitutionally valid taxing statute, the Act must ***both*** fall within Parliament's section 91(3) power to enact taxes and comply with section 53 of the *Constitution Act, 1867*, which provides that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." As the Supreme Court of Canada has noted, section 53 reflects the central concept of parliamentary democracy dating back to the Glorious Revolution of 1688: "the Crown may not levy a tax except with the authority of Parliament or the legislature." To ensure that Parliamentary oversight of taxation is not circumvented, the power to tax must be exercised "expressly and unambiguously."

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

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

> *Re Insurance Act of Canada*, [1932] AC 41 at 53 (PC); *Canada (AG) v Ontario (AG) (Unemployment Insurance)*, [1937] AC 355 at 367 (PC); *Reference re Excise Tax Act*, [1992] 2 SCR 445 at 468-69; *Constitution Act, 1867*, ss 91(2A) and 94A; *Constitution Act, 1940*; *Constitution Act, 1951*; *Constitution Act, 1964*

54. An examination of the text and legislative history of the Act demonstrates that Parliament did not authorize the Governor in Council to collect carbon charges as general taxes, just as the Supreme Court found in *Confédération des syndicats* that Parliament had not authorized the Governor in Council to collect surplus EI premiums as general taxes.

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

> *Budget Implementation Act, 2018, No. 1*, *supra*, Parts 1, 2, 3, and 5

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

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

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

> **Mr. Joël Lightbound:** … Here is where I disagree with my esteemed colleague: we see this as a price on carbon pollution. My colleague calls it a tax, but it is actually a price on carbon pollution.
>
> Canada, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 279 (16 April 2018) at 18317

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

(2) The Act Does Not Impose Valid Regulatory Charges

59. Nor can the "charges" the Act imposes be seen as valid regulatory charges. Even if the national concern doctrine does give Parliament jurisdiction to regulate greenhouse gas emissions (which Ontario denies), the Act must also independently satisfy the requirements of section 53, including the requirement that there be a sufficient nexus between the revenues raised by the Act and its regulatory purpose.

60. In a series of judgments dealing with section 53 and the other constitutional provisions governing taxation, the Supreme Court has articulated a unified test for determining whether a charge that has not been "expressly and unambiguously" authorized by Parliament or a provincial legislature as a tax is constitutional.

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

61. This is a distinct constitutional requirement from the division of powers set out in sections 91 to 95 of the *Constitution Act, 1867*. If a federal law imposing charges is not a valid exercise of section 91(3), the law must to be constitutionally valid, (1) regulate a matter that falls within federal jurisdiction (which, as set out above, Ontario denies greenhouse gas emissions do) ***and*** (2) have a sufficient nexus between the charges and the regulatory scheme in order to satisfy section 53.

Connaught, *supra* at para 27

62. The Act does not have the required nexus as it does not require that the funds it raises be spent in connection with the Act's purposes. On the contrary, the federal government itself claims that over 90 per cent of the funds raised by the Act will be distributed to individuals as flat-rate, per capita refundable income tax credits. There is no requirement that the proposed tax credits be spent on actions that would mitigate climate change; on the contrary, taxpayers would be completely free to spend their tax refunds on anything, including activities that cause greenhouse gas emissions.

Climate Change Mitigation and Low-carbon Economy Act, 2016, *supra*, s 71; *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27, s 13

63. Ontario submits that the nexus the *Westbank* test requires between the funds raised by a charge and the regulatory scheme must include tying the use of the funds raised by the charge to the regulatory purposes animating the regulatory scheme. In the absence of such a nexus, a charge is unconstitutional.

64. To allow the nexus requirement to be met ***solely*** by alleging that the charge discourages undesirable behaviour while leaving the government imposing the charge free to spend the funds in a manner unconnected to any particular regulatory purpose would severely undermine the "no taxation without representation" principle which underlies section 53. If such a weak nexus were sufficient to uphold a regulatory charge, governments could raise funds for general purposes (i.e., tax) by levying any number of purportedly non-tax charges on behaviours it wishes to discourage (e.g. smoking, drinking alcohol, consuming unhealthy food, any activity which pollutes) without ever having to seek express and unambiguous legislative authorization to impose a tax.

65. It was for this very reason that the Supreme Court warned in the provincial context in *Allard*: "a power of indirect taxation in s. 92(9) [the provincial licensing power] extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) [the limitation of provincial taxation to direct taxes] meaningless." In the same way, allowing Parliament to levy regulatory charges without any link to the cost of achieving the regulatory purpose or any requirement that funds raised be used to further that purpose could render section 53 meaningless.

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

66. The Supreme Court has to this point, however, not decided this question and expressly declined to do so in *Connaught*. On the other hand, the Court has never authorized the use of revenue from a regulatory charge for general purposes (in the cases cited in the Court's discussion of this point in *Westbank*, the issue either did not need to be decided on the facts or was not the basis on which the Court decided the appeal).

> *Connaught*, *supra* at para 48; *British Columbia (AG) v Canada (AG) (Johnnie Walker)*, [1924] AC 222 (PC); *Cape Breton Beverages v Nova Scotia (AG)* (1997), 144 DLR (4th) 536 at 539-40 (NS SC), aff'd (1997), 151 DLR (4th) 575 (NS CA), leave to appeal to SCC dismissed [1997] SCCA No 403; *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] OMBD No 553 at paras 71 and 76-78. See also Gérard La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, Canadian Tax Paper No 65, 2nd ed (Toronto: Canadian Tax Foundation, 1981) at 185; *Reference re Exported Natural Gas*, *supra* at 1068-69

67. An *obiter* Federal Court of Appeal comment that charges which in themselves serve a regulatory purpose can be used to raise revenue beyond the costs of a regulatory scheme was wrongly decided and should not be followed. The Court did not mention the Supreme Court's express decision not to address the issue in *Connaught* or consider whether the authorities cited in *Westbank* actually support this proposition. The Court also did not consider the Supreme Court's caution in *Allard* that allowing regulatory charge revenues to be used for general purposes could render constitutional protections against taxation meaningless. The Supreme Court granted leave but the appeal was later abandoned.

> *Canadian Association of Broadcasters v Canada*, [2009] 1 FCR 3 at paras 49 (Ryer JA) and 103 (Létourneau JA), leave to appeal to SCC granted *sub nom. Vidéotron*

Ltée, Vidéotron (Régional) Ltée and CF Cable TV Inc v Her Majesty the Queen, [2008] SCCA No 423

68. The fact that the federal government claims that the Act is "revenue neutral" does not help the charges it imposes escape characterization as taxes. All tax revenues are used to fund government expenditures. Nothing is added to the characterization of a charge by legislatively designating its revenues to be used for particular expenditures, where the expenditures are unconnected to regulatory purposes. As Professor Hogg has suggested in the context of a federal carbon tax, "a tax that is revenue-neutral, that is, accompanied by reductions in other taxes, has as a major purpose the raising of money for general revenues, and should probably be characterized as a tax." The federal government itself claims that the vast majority of the Part 1 revenues will be used to provide a refundable credit on personal income tax returns, meaning the Act falls directly into Hogg's description.

Peter W. Hogg, *Constitutional Law in Canada*, 5th ed (Toronto: Thomson Reuters, 2016) at s 31.14, footnote 90a

69. In sum, by raising revenues that are not required to be spent on achieving regulatory purposes, the Act fails to impose a regulatory charge. There can also be no valid regulatory charge absent a valid regulatory scheme which falls under federal jurisdiction. To impose a valid tax, the primary purpose of the scheme cannot be the regulation of behaviour. For the reasons set out above, the Act ***is*** in pith and substance intended to regulate greenhouse gases. It therefore cannot be supported under Parliament's taxation power. Furthermore, a valid tax requires Parliament's clear and unambiguous authorization of ***taxation***. As discussed above, Parliament's approval of the Act was based on an express denial that it was intended to impose taxation. The Act is therefore unconstitutional in its entirety.

PART VI – RELIEF SOUGHT

70. Ontario agrees with the relief sought by Saskatchewan in its reply factum.

DATED at the City of Toronto, in the Province of Ontario, 24th day of January, 2019.

Josh Hunter | Padraic Ryan | Thomas Lipton

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2. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559
3. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555
4. *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371
5. *British Columbia (AG) v Canada (AG) (Johnnie Walker)*, [1924] AC 222 (PC)
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15. *Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3
16. *In re Board of Commerce*, [1922] 1 AC 191 (PC)
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20. *Ontario Home Builders' Assn. v York Region Board of Education*, [1996] 2 SCR 929

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22. *R. v Barnier*, [1980] 1 SCR 1124

23. *R. v Comeau*, 2018 SCC 15, [2018] 1 SCR 342

24. *R. v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 40

25. *R. v Hydro-Québec*, [1997] 3 SCR 213

26. *Re Insurance Act of Canada*, [1932] AC 41 (PC)

27. *Reference re Anti-Inflation Act*, [1976] 2 SCR 373

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29. *Reference re Excise Tax Act*, [1992] 2 SCR 445

30. *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783

31. *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48

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34. *Reference re Wartime Leasehold Regulations*, [1950] SCR 124

35. *Thomson v Thomson*, [1994] 3 SCR 551

36. *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134

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37. Dale Gibson, “Constitutional Jurisdiction over Environmental Management in Canada” (1973), 23 UTLJ 54

38. Gerald LeDain, “Sir Lyman Duff and the Constitution” (1974) 12 Osgoode Hall LJ 261

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43. *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12

44. *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27, s 13

45. *Constitution Act, 1867*, ss 53-54, 91-95, and 125-26

46. *Constitution Act, 1940*

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49. *Greenhouse Gas Emissions Information Production Order*, SOR/2018-214

50. *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186

51. *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213