Docket: CACV 3239

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 FOR SASKATCHEWAN UNDER *THE CONSTITUTIONAL QUESTIONS ACT*, 2012, SS 2012, C c-29.01

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Part I. INTRODUCTION

1. Greenhouse gases might pose the most difficult collective action problem the world has ever faced. The benefits of emissions are local, but the costs are global. When people burn fossil fuels in the production or consumption of goods and services, each jurisdiction – national or subnational – exports its greenhouse gases to every other. And they all import the consequences: for practical purposes, regardless of the extent of their own part in creating the problem.

2. The prospect of uncontrolled climate change requires that we treat the capacity of the atmosphere to hold greenhouse gases like the scarce, valuable resource it is. If total temperature increases are to be kept to 1.5°C or 2°C above pre-industrial averages -- or indeed to any target at all -- the world must ultimately reduce net emissions to zero. The global stock of greenhouse gases that can permissibly be added in the meantime must somehow be allocated. Those allocations have an economic value that individuals, industries, sub-national jurisdictions and nation states can be expected to quarrel over.

3. Under Canada's Constitution, provinces have legislative authority to regulate or price emissions by individuals and businesses within their borders. In 2008, British Columbia enacted one of the first carbon pricing schemes. In the intervening decade, emissions came down compared to what they would have been, while the province enjoyed the highest economic growth in the country. But because greenhouse gases do not respect borders -- while provincial legislation must -- British Columbia's actions will only counteract the negative effects of climate change on the property and civil rights of its residents if other jurisdictions respond in kind. If other provinces instead treat Canada's share of the atmosphere's capacity as an open-access resource, British Columbia will see no benefits. British Columbia has come up against the problem of provincial inability.

4. Fortunately, Canada is not a treaty arrangement between independent states, but a federation with two levels of co-ordinate sovereign governments.

Section 91 of the *Constitution Act, 1867* gives Parliament the power to make laws "for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." This general power lets Parliament address matters the provinces cannot, thereby ensuring that legislative jurisdiction under our Constitution is exhaustively distributed.

5. The courts long ago recognized dangers to provincial autonomy if this general power were given too broad a reading. They insisted that a "matter" must be defined narrowly. To be eligible for federal authority under the general power, it must have a "singleness, distinctiveness and indivisibility" that clearly distinguishes it from matters of provincial concern. The scale of the impact of assigning it to federal jurisdiction must be reconcilable with the fundamental distribution of legislative power under the Constitution. But they also insisted that all sovereign power is exhaustively distributed in Canada, so matters truly beyond provincial competence because of collective action dynamics must lie with Parliament. The people of Canada are not left without a means to address joint threats because one region might defect: our division of powers is not a suicide pact.

6. The Attorney General of British Columbia ("British Columbia") intervenes to argue the following:

a. The "matter" of the *Greenhouse Gas Pollution Pricing Act* (the "*Act*") should be defined narrowly as setting a minimum appropriate standard of stringency for greenhouse gas emission pricing in Canada. The backstop pricing schemes in the *Act* are ancillary to this fundamental purpose.

b. So defined, this "matter" is beyond provincial competence. No province can set a minimum national standard for pricing access to a global commons, but each province may suffer concrete harm without one.

c. Defined as setting minimum pricing standards, assigning the matter of the *Act* to Parliament is consistent with the general federal-provincial balance.

d. British Columbia agrees with Canada that the *Act* does not impose a tax, but a levy with a valid connection to a regulatory scheme. Greenhouse gas prices recover the value of access to an inherently scarce right, resource or privilege. Just as provincial Crown agents cannot use their immunity from taxation under s. 125 to undermine federal trade policy, they cannot allocate to themselves the scarce resource of greenhouse gas emissions without paying for it.

Part II. SUMMARY OF FACTS

The Atmosphere's Greenhouse Gas Capacity is a Global Commons

7. Greenhouse gases are so characterized because their presence in the atmosphere tends to increase average global temperature by absorbing and re-emitting infrared radiation from the sun.[1] Greenhouse gases mix in the global atmosphere, so that emissions anywhere raise concentrations everywhere.[2] There is thus no such thing as a purely intra-provincial emission of a greenhouse gas. The most common greenhouse gas is carbon dioxide, which is a by-product of burning fossil fuels for energy.[3]

8. In a 2018 Special Report, the Intergovernmental Panel on Climate Change (IPCC) concluded that, in order to keep global warming to 1.5°C over pre-industrial levels, global emissions of carbon dioxide would need to fall to about 45% of 2010 levels by 2030 and reach "net zero" (as much leaving the atmosphere as entering it) by 2050.[4] Canada committed to pursue efforts to meet the 1.5°C target in the 2015 Paris Agreement.[5]

9. While less ambitious targets would allow for more emissions and a later date to reach "net zero", the IPCC has said with "high confidence" that any target

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[1] UN Framework Convention on Climate Change, 1992, Art. 1, para. 5, **Book of Authorities of the Attorney General of British Columbia (BOA) Tab 29** Moffet Affidavit, Ex. H, p. 3.
[2] Moffet Affidavit, para. 8
[3] Moffet Affidavit, Ex. C, p. 4
[4] Moffet Affidavit, Ex. D, p. SPM-15
[5] Paris Agreement, Art. 2, para 1(a) **BOA Tab 27**, Moffet Affidavit, Ex. I, p. 22.

whatsoever (other than a baseline implying warming between 3.7 and 4.8°C by 2100) requires limiting cumulative greenhouse gas emissions, such that they eventually reach net zero and are constrained in the intervening decades.[6] The relationship between the atmosphere and the amount of greenhouse gases it can absorb consistent with any temperature target may be compared to filling a bathtub with water: however high the bathtub, it can only take a certain amount of additional water (net of the amount that drains) before it overflows.

10. Any control on climate change therefore requires a greenhouse gas budget. There is no free lunch. Every tonne of carbon dioxide equivalent emitted by one entity or jurisdiction is one less that can be emitted by others. This finite budget principle operates globally and nationally. The valuable nature of the ability to add to the remaining stock of permissible greenhouse gas emissions means Canada must ultimately agree with other countries on the terms on which each country takes its share. Equally, whatever Canada's budgeted contribution to twenty-first century greenhouse gas emissions, the lower the price set in one part of Canada, the higher the price in the rest.

11. In 2005, total Greenhouse Gas Emissions in Canada were 732 Megatonnes (Mt) carbon dioxide equivalent. [7] Canada has committed to a target of 30% below this level (or 512Mt) by 2030. [8] In 2016, they were 704 Mt, with about 60 Mt emitted in British Columbia.[9] So even if British Columbia ceased – immediately – to emit any greenhouse gases at all, Canada would not meet the target.

Economics Literature: Global Pollutants, Cross-Border Pollutants and Local Pollutants Distinguished

12. Economic analysis conceives of pollution through the lens of "externalities." An externality arises when the entity that enjoys the benefit of an activity does not pay the cost. From the perspective of economics, pollution is an externality carried

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[6] Moffet Affidavit, Ex. C, p. 19
[7] Blain Affidavit, para. 20-21.
[8] Moffett Affidavit, para. 44.
[9] Blain Affidavit, para. 20-21.

through an environmental medium (be it groundwater, freshwater bodies, oceans or the atmosphere) from the party who controls and benefits from it to the parties who suffer the costs. If it is not practical for all these parties to bargain or otherwise reach a cooperative solution, externalities lead to a "collective action problem" in which the total losses can exceed the private gains of the polluters. In the case where everyone both causes the pollution and suffers from it, but some pay less and others suffer more, this collective action problem can make almost everyone worse off. A "Pigovian charge" is a price paid by the polluter equivalent to the pollution's "social cost", thereby "internalizing" the externality.[10]

13. This can be done either by setting a price per unit of pollution and allowing the market to determine the quantity of pollution (a "pollution charge") or setting a total amount of pollution and allowing the market, through trading, to set a price (a "cap-and-trade" system). Policy preferences for a particular pricing system depend on a number of factors: economists emphasize relative "nonlinearities" in the marginal cost or marginal benefit of greenhouse gas reductions, along with political acceptability and administrative simplicity of each kind of scheme.[11]

14. Using this framework of "internalizing" "externalities", economists have considered the question of how the division of authority within a federation enables or frustrates finding an appropriate solution to pollution. Internalizing an externality is a public good of varying geographic scope. The crucial question is whether the jurisdiction internalizes both the costs and benefits of the pollution. When that happens, at least some of the economics[12] and law-and-economics[13] literature

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[10] William Baumol, "On Taxation and the Control of Externalities" 62: 3 *Am. Econ. Rev.* 307 (1972) Parker Affidavit, Ex. A; Maureen Cropper & Wallace Oates, "Environmental Economics: A Survey" 30 *J. of Econ. Lit.* 675 (1992) Parker Affidavit, Ex. B.

[11] M. Weitzman, "Prices vs. Quantities" 41 *Rev. Econ Stud.* 477 (1974) Parker Affidavit para. 3 Ex. "C"; W. Nordhaus, "Economic aspects of global warming" 107 (26) *PNAS* (2010) Parker Affidavit, Ex. D

[12] Wallace Oates & Robert Schwab, "Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?" 35 *J. of Pub. Econ 333* (1988) Parker Affidavit, Ex. E.

[13] Richard Revesz, "Federalism and Interstate Environmental Externalities" 144 *U. Penn. L. R.*: 2341 (1996) BOA Tab 28; Daniel Farber, "Environmental Federalism in a Global Economy" 83 *Virginia L. R.* 1283 (1997) BOA Tab 24; Robert Cooter & Neil Siegel, "Collective Action Federalism: A General Theory of Article 1, Section 8" 63 *Stanford L.R.* 115 (2010) BOA Tab 23.

suggests smaller jurisdictions will adopt more efficient policies – but when the costs are felt outside the jurisdiction that experiences the economic benefits, larger jurisdictions or binding agreements are necessary.

15. The economic literature on federalism therefore distinguishes between *local* pollutants (where the harms occur in the same jurisdiction as the emissions), *cross-border* pollutants (where the harms occur in one or two "downstream" jurisdictions) and *global* pollutants (where the harms occur everywhere, uncorrelated with the location of emissions). Global pollutants create the same type of collective action problem between states that is faced by individuals in relation to local pollutants: the effect of altruistic self-sacrifice can be undermined by free riders. As compared with cross-border pollutants, a negotiated solution is more difficult because a small number of holdouts can make it impossible. According to the literature submitted by British Columbia, sub-national governments will generally be most efficient at setting a price on local pollutants, but without a centrally-imposed minimum, they will underprice global pollutants.[14]

British Columbia Will Be Harmed If Other Jurisdictions Do Not Reduce Greenhouse Gases

16. British Columbia has submitted evidence of harms it has reason to believe it has suffered, and will suffer, as a result of climate change. One of these harms is the changes in ecosystems resulting in the loss of natural resources,[15] with the prominent example that of the pine beetle epidemic that devastated British Columbia's pine forests in the early part of this century.[16] There is reason to think climate change has resulted in longer and drier fire seasons, which risk public and private property and human life, while exposing provincial and local governments

[14] Cropper & Oates at pp. 695-5 Parker Affidavit para 2 Ex. B ; Roland Magnusson, "Efficiency of Non-Cooperative Emission Taxes in Perfectly Competitive Markets" 23:2 *Finnish Economic Papers* (2010) Parker Affidavit para 6, Ex. F

[15] Lesiuk Affidavit, Ex. B, pp. 20-43.

[16] Lesiuk Affidavit, Ex. B, pp. 42, 43, Ex. C.

to the expense of fighting these fires.[17] There is also reliable information available to British Columbia that melting of permafrost as a result of climate change may damage infrastructure in Northern British Columbia, especially for remote communities and Indigenous Peoples.[18] Ocean acidification caused by carbon dioxide emissions poses risks to bony fish and shell fish resources on the Pacific coast,[19] as does changes in temperature in spawning rivers and ocean surfaces.[20] Less snow and more rain could affect hydroelectric generation.[21] Sea level rise poses risk of unquantified property losses for coastal British Columbia.[22]

17. In addition to the harm of climate change, the failure to have minimum national price standards for greenhouse gas emissions can be expected to damage the competitiveness of industries located in jurisdictions – like British Columbia – that do have prices.[23] British Columbia has provided evidence that the competitiveness of its cement industry has been hurt by the difference between its carbon price and pricing in other provinces.[24] This creates a real potential of a "race to the bottom" if there is no federal action: each jurisdiction responds to competitive pressure by setting greenhouse gas prices below the level it would choose if others also took action.

Part III. POINTS IN ISSUE

18. British Columbia addresses (a) whether the matter of the *Act* is within the national dimension branch of the general power and (b) whether the backstop pricing mechanisms are taxes or regulatory charges.

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[17] Lesiuk Affidavit, Ex. D.
[18] Lesiuk Affidavit, Ex. F.
[19] Lesiuk Affidavit, Ex. G.
[20] Lesiuk Affidavit, Ex. B, pp. 29-35.
[21] Lesiuk Affidavit, Ex. H.
[22] Lesiuk Affidavit, Ex. E.
[23] Magnusson, "Efficiency of Non-Cooperating Emission Taxes" Parker Affidavit para 6 Ex. F; Moffet Affidavit, Tab P, pp. 34-36, Lesiuk Affidavit, Ex. J.
[24] T. Lesiuk Affidavit , Ex. K.

Part IV. ARGUMENT

MINIMUM NATIONAL STANDARD FOR GHG PRICING "MATTER" NOT ASSIGNED TO THE PROVINCES

19. Before it enumerates specific federal powers, section 91 of the *Constitution Act, 1867* gives Parliament legislative authority over "all Matters not assigned exclusively to the Legislatures of the Province." This "general power" is a solution to the desire of the confederating provinces, set out in the Preamble to the *Constitution Act, 1867*, to be "federally united" under a constitution "similar in principle to that of the United Kingdom." This was a historically-unprecedented mix of a *federal* division of sovereignty between central and sub-national governments with a *British* system of parliamentary supremacy.

20. As a result of the federal principle, Parliament and the provincial legislatures are supreme only with respect to matters that fall within their respective spheres of jurisdiction.[25] As a result of the principle of parliamentary sovereignty, legislative authority is *exhaustively* distributed: the whole of legislative power, whether exercised or merely potential, is distributed between Parliament and the provincial legislatures.[26] The framers of Confederation determined that, in contrast to the United States under the Tenth Amendment, the General Power for matters not otherwise distributed would be vested in the Dominion Parliament.[27]

21. The opening phrase of section 91 implements this principle of exhaustiveness by assigning to Parliament legislative jurisdiction over matters that are not within the enumerated powers of section 91 and are also not within the scope of provincial authority.[28] Canadian jurisprudence has identified three

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[25] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶ 53-56. **BOA Tab 18**

[26] *Hodge v. The Queen* (1883), 9 AC 117 (JCPC), p. 132 **Book of Authorities of the Attorney General of Saskatchewan (SKBA) Tab 13**; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79, ¶ 34. **BOA Tab 19**

[27] Speech of the Hon. John A. Macdonald to the Legislative Assembly of the Province of Canada, 6 February 1865 in ed. P.B. Waite, *The Confederation Debates in the Province of Canada, 1865.* McLelland and Stewart, 1963, p. 44. **BOA Tab 22**

[28] *Ontario (A.G.) v. Canada (A.G.),* [1896] AC 348 (JCPC) [*Local Prohibition*], pp. 360-361. **BOA Tab 10**

"branches" of the General Power: first, the "emergency branch" (over temporary emergencies beyond provincial competence to address); second, the "residual branch" (over matters that simply cannot be classified under any enumerated powers, even "property and civil rights"); third, the "national concern" or "national dimensions" branch.

22. The "national dimensions branch" arises because provincial legislative authority operates "in the province." The Privy Council therefore recognized that matters that have or obtain a "national dimension" such that they are not in any specific province must be within the general power.[29] This is a direct corollary of the principle of exhaustiveness: since there is no gap in the overall legislative sovereignty of the Canadian state, as a matter of logical necessity and democratic accountability alike, Parliament must be able to do so.

23. Properly understood, this branch of the general power cannot negatively affect provincial sovereignty since it can only be used to enact laws that provinces cannot. But it was recognized early on by the Privy Council in the *Local Prohibition* case that the general power could threaten provincial autonomy if the matters to which it applied were not defined narrowly.[30]

24. In the *Anti-Inflation Reference*, Justice Beetz, writing on behalf of the majority on this issue, adopted the views of Professors Le Dain and Lederman in two articles that argued that a "matter" said to be within the general power as a result of the national dimensions branch must be defined narrowly.[31] Justice Beetz rejected the idea that broad areas of policy such as "inflation" should be thought of as a "matter." That same caution has been consistently applied to other overbroad

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[29] *Local Prohibition,* p. 362.
[30] *In re Board of Commerce Act, 1919,* [1922] 1 AC 191, p. 198 **BOA Tab 16**;*Canada (A.G.) v. British Columbia (A.G.),* [1930] AC 111, p. 118 **BOA Tab 2**
[31] Gerald LeDain, "Sir Lyman Duff and the Constitution" 12:2 *Osgoode Hall L.J.* 261 (1974) **BOA Tab 25**; W. Lederman, "Unity and Diversity in Canadian Federalism", 53 *Can. Bar. Rev.* 596 (1975) **BOA Tab 26**;

designations such as "culture" or "the environment."[32]

25. In division-of-powers analysis, the first stage in analyzing the validity of a law is identifying its "matter": what the law is about in "pith and substance." This can obviously be done at varying levels of generality. The same law can be said to be "about" (a) the future of the world, (b) the environment, (c) global climate change, (d) pollution, (e) greenhouse gases, (f) pricing of greenhouse gases, and (g) setting minimum standards of stringency for pricing greenhouse gas emissions. Any of these could be argued to be matters beyond the competence of the provinces. But in the *Anti-Inflation Reference*, Justice Beetz held that broad definitions would endanger the system of federalism as one with co-ordinate, equal sovereigns.

26. The definitive statement of the test for a "matter" that is within the national dimensions branch is found in the majority judgment of Justice Le Dain, upholding federal legislative authority over marine pollution in the *Crown Zellerbach* decision:

> 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 legislative power under the Constitution;
>
> In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.[33]

27. The *Crown Zellerbach* test should be understood to involve two stages. First, at the *characterization* stage, the matter that is said to describe the impugned federal law must be defined with as much singleness, distinctiveness and indivisibility as possible. Provisions of the statute outside its core should be left to

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[32] *Anti-Inflation* **CBA Tab 26**; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146, 2002 SCC 31, ¶51 **SKBA Tab 16**; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, p. 37 **BOA 5**

[33] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, ¶33. **BOA Tab 13**

be considered under the ancillary powers doctrine. Second, at the *validity* stage, this narrowly-defined "matter" should be evaluated under the provincial inability and federal balance tests to determine whether it is within the general power. To be justified under the "national concern" or "national dimension" branch, the law must fit the most narrowly-tailored characterization of a true area of provincial inability.

28. From British Columbia's perspective, Canada makes the mistake of characterizing the "matter" of the *Act* as broadly as "greenhouse gases." At the characterization stage, Canada does not narrow the matter down to its most single, distinct and indivisible core – the setting of minimum standards of stringency for pricing access to Canada's share of global greenhouse gas emissions. The dissenting provinces, on the other hand, ignore the exhaustiveness principle. This treats the *Crown Zellerbach* test as a conjunctive requirement of demonstrating *both* provincial inability in relation to all aspects of a broadly-defined matter *and* the result will not upset the federal balance. If correct, this would mean that a properly-characterized matter could be beyond the competence of both levels of government – a result incompatible with exhaustiveness. This approach provides no answer for how to resolve the intrusion on the sovereignty of receiving provinces from pollution that originates in another province. It treats the provinces as competing independent states and tears the fabric of joint legislative sovereignty at the seam Canadians need most.

29. Instead, the question should be whether the matter of federal legislation – defined in as single, distinct and indivisible a way as possible so as to be reconcilable with the federal balance – is beyond the legal or effective competence of the provinces. This is the only approach that reconciles subsidiarity (the principle that matters should be addressed at the *effective* level of governance closest to the people) and exhaustiveness.

The Matter of the *Act* Is Setting Minimum Standards for Pricing Use of Canada's Share of Global Atmosphere's Greenhouse Gas Capacity

30. In British Columbia's submission, the pith and substance of the *Act* – its

core -- is not "climate change" or even "greenhouse gases" *in general*, but the discrete and indivisible matter of setting minimum standards of stringency for greenhouse gas pricing across Canada to avoid a "race to the bottom."

31. None of the provisions of the *Act* have a legal effect on the residents of a province unless the Governor in Council lists that province under Schedule 1 (in which case Part 1 applies) or Schedule 2 (in which case Part 2 applies).[34] In deciding whether to list a province, the Governor in Council acts for the purpose of "ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" and must consider, as the primary factor, "the stringency of provincial pricing mechanisms for greenhouse gas emissions."[35]

32. Although Saskatchewan has characterized this determination as "unfettered", it is in fact subject both to the scrutiny of the voters and judicial review in the Federal Court. Since a failure to be adequately stringent causes concrete damage to other provinces, *someone* must have the authority to determine stringency if it is to be meaningful. Parliament has chosen the Governor in Council to make this decision, as the body that is both politically accountable to the Canadian people and legally accountable to the courts.

33. The Governor in Council cannot require the legislature of a province with inadequate greenhouse gas pricing to enact any particular measures in its own name. The only effective remedy that Parliament *could* provide for a failure to meet a minimum level of stringency is a backstop system or systems of greenhouse gas pricing that will apply if that jurisdiction's own approach is inadequate. The bulk of Parts 1 and 2 of the *Act* set out such systems.

34. The *Act* would fulfil its purposes and have its desired effect if the backstop systems were never applied. In that case, all sub-national jurisdictions would have adequately stringent systems of pricing to meet the federal goal of minimizing harm

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[34] *Act,* s. 3 "listed province", s. 169 "covered facility". **SKBA Tab 1**
[35] *Act,* ss. 166, 189. **SKBA Tab 1**

on other parts of Canada and other countries. Each province or territory could decide what mechanism -- charge, cap-and-trade or some hybrid – to use, what emissions to cover, and whether to target average or marginal price – so long as the stringency requirement is met. If some provinces or territories instead choose to use the federal backstop – for any reason -- those jurisdictions have not lost sovereignty. Adopting a uniform solution is as legitimate an exercise of provincial autonomy as developing a unique one.[36] "Off the rack" may make more sense for a jurisdiction than a bespoke approach. Either way suits the "pith and substance" of the *Act* equally well.

35. In British Columbia's submission, therefore, the "matter" of the *Act* is confined to setting minimum standards for pricing use of Canada's share of the global atmosphere's greenhouse gas capacity.

36. Under the ancillary powers doctrine, measures that would otherwise lie outside a level of government's competence are valid if these measures constitute an integral part of a legislative scheme that comes within that level of government's jurisdiction. If the "intrusion" into the jurisdiction of the other order of government is "serious", the overlap must be necessary for the core of the scheme. If the intrusion is not so serious, it need only be functionally related to the core.[37] In this case, a backstop pricing mechanism is necessary for the effectiveness of the valid federal scheme. It would therefore be upheld regardless of how serious an intrusion it was found to be. But since the backstop can be avoided by any province willing to put in place an adequate system of pricing on its own, the intrusion is as minimal as possible.

Setting Minimum National Pricing Standards Is Beyond Provincial Ability

37. Since provinces can only enact laws "in the province", setting a national standard is obviously beyond their powers. On its own, this is not enough to meet the "provincial inability" test. A "national standard" for a provincially-regulated

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[36] *Reference re Pan-Canadian Securities*, 2018 SCC 48. **BOA Tab 18**
[37] *Quebec (AG) v. Lacombe*, [2010] 2 SCR 453, 2010 SCC 38, ¶ 32-46. **BOA Tab 12**

activity where the principal effects of inaction are felt within the boundaries of the province – whether motivated by a desire for uniformity or by a desire to see a particular policy result -- would not do what provinces were *unable* to do, but what they have *decided* not to do. It would, to use Justice Beetz's words in the *Anti-Inflation Reference,* be a mere "aggregate" of provincial standards.[38] So national standards for curriculum, investor protection, or residential development, for example, would not be justified under the General Power.

38. However, where the effects of one province's inaction are felt in other provinces (or other countries), a minimum standard is no longer an aggregate of individual provincial standards, but becomes a "unity" necessary to protect the federation from devolving into a war of all against all. Provinces are *unable* to address such a collective action problem.

39. The issue is not the importance of the policy issue, but whether inaction in one province has a significant effect on others. So opioid *treatment*, although obviously of vital importance, is not a matter to which the "national dimensions" branch applies because failure of one province to provide addiction treatment would not demonstrably "endanger the interests of another province."[39] (As this example suggests, the question is not whether inaction has incidental effects on other provinces, but whether these are outweighed by the primary impact on the non-acting province.) By contrast, a failure to prevent opioid *trafficking* from one province does endanger the interests of others, and was therefore found to be within the national dimensions branch in the days before it was considered to be within the criminal law power.[40]

40. There is thus a constitutional distinction between local pollutants and cross-border or global pollutants. The collective action problem inherent in global pollutant makes the lack of a minimum standard an indivisible matter. This has been found by *all* Supreme Court justices who have opined on the issue.

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[38] *Anti-Inflation Reference*, p. 458. **CBA Tab 26**
[39] *Schneider v. R.*, [1982] 2 SCR 112, p. 131. **BOA Tab 21**
[40] *R. v. Hauser*, [1979] 1 SCR 984. **BOA Tab 14**

41. The 1976 *Interprovincial Co-operatives* case arose in the context of toxic discharges into interprovincial rivers. Manitoba enacted a statute allowing damages for and injunctions against discharges in upstream provinces, whether those provinces authorized the discharge or not. All justices agreed that provincial jurisdiction lay at the mercy of the common law conflicts-of-law rules (although they disagreed about what those were). All also agreed that only the federal Parliament could change those conflict rules and that it could do so under the national dimensions branch of the general power.[41]

42. In *Crown Zellerbach,* despite splitting in the result, all justices on the court agreed that the general power provides some basis for federal authority in relation to global pollutants. Justice Le Dain allowed a permitting scheme for any dumping into marine waters. Justice La Forest, in dissent, held that the dumping of *toxic* chemicals that would affect the oceans would be within federal authority, but drew the line at a permitting scheme for inert wood waste. However, it was common ground that true global pollutants (which is what greenhouse gases clearly are) would create a collective action problem that Parliament could resolve through the general power.

43. In *Hydro-Québec*, Chief Justice Lamer and Justice Iacobucci (dissenting but not on this point) held that a crucial criterion of the national dimensions branch is "whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province." They held that regulation of diffuse, persistent and seriously toxic chemicals, such as PCBs, would have such effects, but that not all the substances regulated by the federal statute in issue in that case were diffuse, persistent and seriously toxic.[42] Justice La Forest for the majority upheld the impugned legislation under the criminal law power and found it unnecessary to address the national dimension branch.[43] Justice La Forest

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[41] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477. **CBA Tab 17**

[42] *R. v. Hydro-Québec*, [1997] 3 SCR 213 [*Hydro- Québec*], ¶ 76, Lamer CJ and Iacobucci J (dissenting). **BOA Tab 15**

[43] *Hydro Québec*, ¶ 110. **BOA Tab 15**

subsequently stated for a unanimous court that the national dimensions branch embraced the power to address conflicts in provincial policies that crossed territorial boundaries.[44]

44. While competent to restrict or price greenhouse gas emissions that take place within its borders, British Columbia is constitutionally powerless to price emissions that take place in Saskatchewan or Ontario. In the case of local pollutants, this inability would accord with the fundamental design of a federal system, since British Columbians would not be materially affected by health or environmental effects in those provinces: it would be up to the residents of Saskatchewan or Ontario to decide what, if anything, ought to be done about the problem. But in the case of global pollutants, affected British Columbia residents cannot hold Saskatchewan or Ontario's government to account, although the consequence of inaction are visited upon them. These are precisely the types of issues for which we have a federal level of government.

Provincial Jurisdiction over Emission-Reduction Measures Remains Intact

45. There is no contradiction between an aspect of an issue being within federal competence under the "national dimensions" branch of the general power and other aspects being within provincial competence. Indeed, the "double aspect doctrine" was first declared in relation to the general power.[45] Provinces and the federal Parliament share jurisdiction over land use decisions in the capital region, advertisements carried on radio and television, drinking on airplanes and use of documents in cross-jurisdictional litigation.[46]

46. It is true that where a matter falls within the general power, Parliament's

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[44] *Hunt v. T & N PLC*, [1993] 4 SCR 289, para. 60, **BOA Tab 6**

[45] *Ontario (AG) v. Canada Temperance Federation*, [1946] 2 DLR 1 (PC), p. 5, **BOA Tab 11** citing *Russell v. The Queen* (1882), 7 AC 829 (PC) **SKBA Tab 32**, *Hodge v. The Queen* (1883), 9 AC 117 **SKBA Tab 13**, and *Ontario (AG) v. Canada (AG)*, [1896] AC 348 (PC) **BOA Tab 10**.

[46] *Munro v. National Capital Commission*, [1966] SCR 663 **BOA TAB 9**; *Re Regulation & Control of Radio Communication in Canada*, [1932] 2 DLR 81 (JCPC) **BOA Tab 17**; *Irwin Toy Ltd. v. Quebec (AG)*, [1989] 1 SCR 927 **BOA Tab 7**; *Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292 **BOA Tab 8**; *Air Canada v. Ontario (LCB)*, [1997] 2 SCR 581 **BOA Tab 1**; *Hunt* **BOA TAB 6**.

authority has been said to be "plenary and exclusive, including with respect to intra-provincial aspects of that matter."[47] This does not mean the double aspect doctrine is less applicable: with the exceptions of immigration and agriculture, *all* legislative authority under the *Constitution Act, 1867* is "plenary" and "exclusive."[48] This is compatible with a large degree of effective concurrency because what is exclusive is authority over the abstract "matter", not over concrete persons, things, acts or omissions – all of which are often subject to legislation by both levels of government.[49] Parliament can regulate a carbon emission to ensure that there is a national minimum standard for pricing; provinces can regulate them as an aspect of property and civil rights in the province.

Setting Minimum Standards for Pricing Use of Atmosphere's Greenhouse Gas Capacity Does Not Endanger Balance of the Federation

47. In its Reply, Saskatchewan paints an alarming picture of the consequences for provincial autonomy if the *Act* is found to be constitutional. By Saskatchewan's reasoning, if Canada has jurisdiction over greenhouse gases, it will be able to micromanage every activity that involves or offsets the emission of greenhouse gases. This would, on Saskatchewan's account, amount to federal authority over almost everything. Saskatchewan makes comparisons to 1970s-era federal wage-and-price controls, which would have given the federal government authority over the terms of every private-sector transaction in the country.

48. But the *Act* does not provide for comprehensive command-and-control regulation over all activities emitting or offsetting greenhouse gases. It provides for a backstop pricing scheme, which only takes effect if and when the Governor in Council determines that a province or territory's own measures are inadequate. If the "matter" of the *Act* is setting minimum standards for pricing access to a global commons, it at most incidentally affects the sovereignty of low-price provinces, while furthering national interests and facilitating international efforts. The better

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[47] *Crown Zellerbach,* ¶ 34.**BOA Tab 13**
[48] *Hodge*, p. 132. **SKBA Tab 13**
[49] *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, 2007 SCC 22, ¶ 30. **SKBA Tab 9**

analogy to measures to control inflation would not be wage-and-price controls, but rather the Bank of Canada's control over interest rates and aggregate money supply or the way federal and provincial authority have been reconciled – by agreement – in the area of agricultural supply management, by providing federal authority to set overall production quotas while provinces allocate them.[50]

A PRICE FOR ACCESS TO A SCARCE RESOURCE IS NOT A TAX

49. Not all levies by government are taxes in a constitutional sense. Early on, the Privy Council ruled that the Federal Parliament could make provincial Crown agents pay excise duties, even though they are immune to taxes. [51] The key issue in determining whether a levy is a "tax" or a "regulatory charge" is whether it is, in pith and substance or dominant purpose, connected or unconnected to a regulatory scheme. Connection can come in a number of forms: cost recovery is only one. British Columbia endorses Canada's argument that the backstop pricing schemes are primarily aimed at changing behaviour to further a regulatory goal.[52]

50. British Columbia further argues that the *Act* fits into another form of connection, namely the recovery of value of access to a right, privilege or resource made scarce for regulatory (i.e., non-revenue) reasons. Examples include broadcast licenses and special business licenses. Where the right to a scarce good is a traditional property right, it is called a "proprietary charge". It is well-established that proprietary charges are not taxes, regardless of whether the value recovered exceeds the costs of the regulatory scheme.[53]

51. But the use of pricing to allocate access to inherently scarce public resources is not limited to those that are understood as property in the traditional, legal sense. In *620 Connaught,* the Supreme Court of Canada upheld a business

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[50] *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292, 2005 SCC 20, ¶ 4-8. **BOA Tab 4**

[51] *British Columbia (AG) v. Canada (AG)*, [1923] 4 DLR 669 [*Johnny Walker*]. **CBA Tab 4**

[52] *Westbank First Nation v. B.C. Hydro*, [1999] 3 SCR 134, ¶ 29. **SKBA Tab 36**

[53] *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 SCR 131, 2008 SCC 7, ¶ 49. **SKBA Tab 4**

licence fee charged as a condition of operating in a national park that it decided not to characterize as a proprietary charge. Among the "connections" found to the regulatory scheme was that limiting development, and thus the number of businesses within the park, allowed the licensees to participate in a restricted market in which they are not subject to unlimited competition.[54] The Federal Court of Appeal followed up on this aspect of *Connaught* and upheld Part II fees under the Broadcast Licensing Fee Regulations on the grounds that access to broadcasting was limited and valuable for reasons that were ultimately regulatory: it did not matter that the revenues exceeded the costs and were used for other purposes.[55] This approach is consistent with *Johnny Walker*: in that case Parliament decided to make access to imported liquor scarce to protect Canadian producers. In allocating that scarcity by charging for it, Parliament was not creating a tax, but a regulatory levy.

52. If global climate is to be stabilized at all, access to the global commons of greenhouse gas stocks in the atmosphere must be treated as a finite and valuable resource. Canada's share of this global commons must inevitably itself be allocated. If a business or individual in Ontario accesses this global resource for "free", businesses or individuals in other provinces, such as British Columbia, necessarily pick up the tab.

53. An important constitutional implication of this characterization is whether Parliament can apply its law to provincial Crown agents under s. 125 of the *Constitution Act, 1867*. The purpose of that provision is to prevent appropriation for federal purposes of the value of assets belonging to provinces (or *vice versa*). As established in the *Johnny Walker* case, one level of government may not undermine the regulatory purposes of levies of the other – in that case, the international trade objectives of a tariff to protect domestic industry and raise revenue. Provinces should not be able to undermine legitimate national climate

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[54] *620 Connaught Ltd.*, ¶ 34.

[55] *Canadian Assn. of Broadcasters* v. *Canada*, 2008 FCA 157, ¶64, Ryer JA, ¶103, Letourneau JA,, ¶ 109-110. **BOA Tab 3**

policies by engaging in those emissions through provincial Crown agents.

54. In any event, Canada is correct that the *Act* would still be constitutional if the backstop pricing mechanisms are considered taxes. There is no constitutional principle that federal taxes must be the same across the country and no difficulty with delegating details and mechanism so long as the delegation is "express and unambiguous."[56] Finding that a province or area does not have sufficient stringency in its greenhouse gas pricing mechanisms is a "detail and mechanism", since it does not involve the "structure of the tax, the tax base, and the principles for its imposition," but rather the application of those principles.[57]

PART V. RELIEF

55. British Columbia therefore asks that this Court answer the question posed by Order-in-Council 194/2018 in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"Gareth Morley"

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

Victoria, British Columbia
January 24, 2019.

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[56] *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, ¶ 74. **SKBA Tab 18**

[57] *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, ¶ 88, 91 **SKBA Tab 11**; *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49, ¶ 127. **BOA Tab 20**

Part VI. Authorities

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