Court of Appeal for Saskatchewan **Citation: 2019 SKCA 40**

Docket: CACV3239 **Date: 2019-05-03**

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

Before:	Richards C.J.S., Jackson, Ottenbreit, Caldwell and Schwann JJ.A.
Disposition:	The majority of the Court is of the opinion that the *Greenhouse Gas Pollution Pricing Act* is not unconstitutional in whole or in part. The minority of the Court is of the opinion that the *Act* is wholly unconstitutional.
Majority reasons by:	The Honourable Chief Justice Richards
In concurrence:	The Honourable Madam Justice Jackson The Honourable Madam Justice Schwann
Minority reasons by:	The Honourable Mr. Justice Ottenbreit and The Honourable Mr. Justice Caldwell
Appeal Heard:	February 13–14, 2019
Counsel:	Mitch McAdam, Q.C., and Alan Jacobson for the Attorney General of Saskatchewan Sharlene Telles-Langdon, Brooke Sittler and Neil Goodridge for the Attorney General of Canada Joshua Hunter, Padraic Ryan and Thomas Lipton for the Attorney General of Ontario

William Gould for the Attorney General of New Brunswick

Gareth Morley for the Attorney General of British Columbia

David Thera, Q.C., and Robert Affleck for Saskatchewan Power Corporation and SaskEnergy Incorporated

Bruce Hallsor, Q.C., and Alexander Shalashniy for Canadian Taxpayers Federation

Ryan Martin and Steven Dollansky for United Conservative Association

Jeffrey Grubb, Q.C., and Khurrum Awan for Agricultural Producers Association of Saskatchewan Inc.

Lisa DeMarco and Jonathan McGillivray for International Emissions Trading Association

Jennifer King and Michael Finley for Canadian Public Health Association

Amir Attaran and Matt Hulse for Athabasca Chipewyan First Nation

Jacqueline Wilson and Theresa McClenaghan for Canadian Environmental Law Association and Environmental Defence Canada, Inc.

Stuart Wuttke and Victor Carter for Assembly of First Nations

Joshua Ginsberg and Danielle Gallant for David Suzuki Foundation

Stewart Elgie and Nathalie Chalifour for Ecofiscal Commission of Canada

Nathan Hume for Intergenerational Climate Coalition

Larry Kowalchuk and Taylor-Anne Yee for Climate Justice Saskatoon; National Farmers Union; Saskatchewan Coalition for Sustainable Development; Saskatchewan Council for International Cooperation; Saskatchewan Electric Vehicle Club; The Council of Canadians: Prairie and Northwest Territories Region; The Council of Canadians: Regina Chapter; The Council of Canadians: Saskatoon Chapter; The New Brunswick Anti-Shale Gas Alliance; and Youth of the Earth

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Richards C.J.S.

I. THE QUESTION POSED

[1] This is a reference pursuant to s. 2 of *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01. By way of Order in Council 194/2018, the Lieutenant Governor in Council has asked the Court for an advisory opinion on the following question:

> The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?

[2] The *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*Act*], came into force on June 21, 2018. It varies in some small particulars from Part 5 of Bill C-74, as referred to in Order in Council 194/2018. I understand the Lieutenant Governor in Council to be concerned with the *Act* as it presently stands and will proceed on that basis. All of the participants in these proceedings took the same approach.

[3] As explained below, and in answer to the question posed by the Lieutenant Governor in Council, the *Act* falls within the legislative authority of Parliament. It is not unconstitutional in whole or in part.

II. OVERVIEW

[4] The factual record presented to the Court confirms that climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time. The pressing importance of limiting such emissions is accepted by all of the participants in these proceedings.

[5] The *Act* seeks to ensure there is a minimum national price on GHG emissions in order to encourage their mitigation. Part 1 of the *Act* imposes a charge on GHG-producing fuels and combustible waste. Part 2 puts in place an output-based performance system for large industrial facilities. Such facilities are obliged to pay compensation if their GHG emissions exceed applicable limits. Significantly, the *Act* operates as no more than a backstop. It applies only in

those provinces or areas where the Governor in Council concludes GHG emissions are not priced at an appropriate level.

[6] The sole issue before the Court is whether Parliament has the constitutional authority to enact the *Act*. The issue is not whether GHG pricing should or should not be adopted or whether the *Act* is effective or fair. Those are questions to be answered by Parliament and by provincial legislatures, not by courts.

[7] The *Constitution Act, 1867* distributes legislative authority between Parliament and the provincial legislatures. Broadly speaking, a statute is valid if its essential character falls within a subject matter allocated to the legislative body that put the statute in place. Neither level of government has exclusive authority over the environment. As a result, Parliament can legislate in relation to issues such as GHGs so long as it stays within the four corners of its prescribed subject matters and the provinces can do the same so long as they stay within their prescribed areas of authority.

[8] The Attorney General of Saskatchewan [Saskatchewan] challenges the *Act* by submitting it imposes taxes in the constitutional sense of the term. This would normally be legally unobjectionable because Parliament enjoys a broad taxing authority. However, Saskatchewan contends the *Act* is invalid because the Governor in Council determines the provinces where it operates. This is said to offend the principle of federalism in that the application of the *Act* depends on whether a province has exercised its own jurisdiction in relation to pricing GHG emissions to a standard considered appropriate by the Governor in Council. Saskatchewan also says the *Act* runs afoul of s. 53 of the *Constitution Act, 1867*. Section 53 requires, in effect, that taxes be authorized by legislative bodies themselves, not by executive government or otherwise.

[9] Saskatchewan's arguments on this front cannot be accepted. The principle of federalism is not a free-standing concept that can override an otherwise validly enacted law. Rather, it is a value to be taken into account when interpreting the Constitution. The s. 53 argument cannot be sustained either because, in constitutional terms, the levies imposed by the *Act* are regulatory charges, not taxes. In any event, even if they were taxes, the *Act* does not offend s. 53. Parliament has clearly and expressly authorized the Governor in Council to decide where the *Act* will apply.

[10] Saskatchewan submits, by way of an alternative line of argument, that the *Act* is unconstitutional because it is concerned with property and civil rights and other matters of a purely local nature falling within exclusive provincial legislative authority. The Attorney General of Canada [Canada] responds by seeking to uphold the *Act* as a valid exercise of Parliament's jurisdiction under the national concern branch of its "Peace, Order, and good Government" [POGG] power. The national concern branch of POGG applies to matters of national consequence that have a singleness, distinctiveness and indivisibility clearly distinguishing them from matters coming within provincial jurisdiction and, as well, a scale of impact on provincial jurisdiction that is compatible with the basic division of powers between Parliament and the legislatures under the Constitution. Canada contends it should be recognized, under the national concern branch, as having jurisdiction over "the cumulative dimensions of GHG emissions". This approach must be rejected because it would allow Parliament to intrude so deeply into areas of provincial authority that the balance of federalism would be upset. Further, it would hamper and limit provincial efforts to deal with GHG emissions.

[11] However, Parliament does have authority over a narrower POGG subject matter – the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area. The *Act* is constitutionally valid because its essential character falls within the scope of this POGG authority.

[12] Various intervenors suggest the *Act*, or aspects of it, can be sustained under such federal heads of power as trade and commerce, the emergency doctrine, criminal law and treaty powers. Canada has chosen not to make these submissions itself but says it does not object to the *Act* being upheld on any of these grounds. At the end of the day, none of these arguments are viable in light of how Parliament has chosen to frame the *Act*.

[13] As explained below, it follows from all of this that the *Act* is not unconstitutional either in whole or in part.

III. BACKGROUND

A. The greenhouse gas issue

[14] GHGs are gases that absorb and re-emit infrared radiation. Carbon dioxide is the most recognizable GHG.

[15] The general character of the GHG phenomenon and the basic science of climate change are not contested by any of the participants in this Reference. In simplest terms, planet Earth absorbs energy from sunlight. When that energy is emitted, GHGs capture some of it. This slows the escape of such energy into space and, over time, heats the atmosphere and the surface of the earth. These higher temperatures disrupt global climate patterns.

[16] The broad contours of the impact of anthropogenic emissions of GHGs and of the nature of the climate change issue are summarized in *Climate Change 2014 Synthesis Report Summary for Policymakers* [*Climate Change 2014*]. It was prepared by the Intergovernmental Panel on Climate Change [IPCC], which was established by the United Nations Environmental Programme and the World Meteorological Organization. The IPCC, as described by John Moffet, Assistant Deputy Minister with Environment and Climate Change Canada, in his affidavit of October 25, 2018, is "the leading world body for assessing the most recent scientific, technical, and socio-economic information produced worldwide relevant to understanding climate change, its impacts and potential future risks, and possible response options". *Climate Change 2014* concludes as follows:

(a) "Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems" (at 2).

(b) "Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen" (at 2).

(c) "Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century" (emphasis in original, at 4).

(d) "Changes in many extreme weather and climate events have been observed since about 1950. Some of these changes have been linked to human influences, including a decrease in cold temperature extremes, an increase in warm temperature extremes, an increase in extreme high sea levels and an increase in the number of heavy precipitation events in a number of regions" (at 7).

(e) "Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems. Limiting climate change would require substantial and sustained reductions in greenhouse gas emissions which, together with adaptation, can limit climate change risks" (at 8).

(f) "Surface temperature is projected to rise over the 21st century under all assessed emission scenarios. It is *very likely* that heat waves will occur more often and last longer, and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level to rise" (emphasis in original, at 10).

(g) "Climate change will amplify existing risks and create new risks for natural and human systems. Risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development" (at 13).

(h) “Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (*high confidence*). ...” (emphasis in original, at 17).

None of these conclusions were challenged or put in issue by the participants in this Reference.

[17] Climate change impacts affecting Canada and Canadians include thawing permafrost, increases in extreme weather and extreme weather events such as forest fires, degradation of soil and water resources, increased frequency and severity of heat waves, and expansion of the ranges of vector-borne diseases. Predictions show that Canada’s temperature, particularly in the Arctic, will warm at a faster rate than that of the world as a whole. See: Affidavit of John Moffet at paras 18–26.

B. International efforts to address climate change

[18] The *United Nations Framework Convention on Climate Change* [*Framework Convention*] was ratified by Canada in December of 1992 and came into force internationally in March of 1994. The objective of the *Framework Convention*, as described in Article 2, is to achieve the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.

[19] Canada’s commitments under the *Framework Convention* include a commitment to adopt “national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases” (Article 4 at para 2(a)) with the aim of “returning [GHG emissions] individually or jointly to their 1990 levels” (Article 4 at para 2(b)).

[20] The *Framework Convention* established a Conference of the Parties [COP], which is the decision-making body of the *Convention*. All states that are parties are represented at the COP.

[21] The third session of the COP [COP 3] took place in Kyoto in 1997. The resulting *Kyoto Protocol* observed that the GHG emission reduction targets established by the *Framework Convention* were inadequate and established binding GHG reduction commitments for developed country parties. Canada ratified the *Kyoto Protocol* in 2002 and committed to reduce its GHG

emissions for 2008–2012 to an average of six percent below 1990 levels. Canada withdrew from the *Kyoto Protocol* in 2012.

[22] COP 15 took place in Copenhagen in 2009. The *Copenhagen Accord*, agreed to by 114 of the 194 parties to the *Framework Convention*, declared that "climate change is one of the greatest challenges of our time" and recognized the scientific view that, to achieve the objective of the *Convention*, the increase in global temperature should be below two degrees Celsius. Canada joined the *Copenhagen Accord* and pledged to reduce its GHG emissions by 17 percent from its 2005 levels by 2020.

[23] COP 21 was held in Paris in 2015. The resulting *Paris Agreement* was ratified by Canada in October of 2016 and entered into force in November of 2016. Currently, the *Paris Agreement* has been ratified by 179 states and the European Union.

[24] The preamble of the *Paris Agreement* reflects the COP's assessment of the urgency of addressing climate change. It includes the following terms:

> *Recognizing* that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions,
>
> *Also recognizing* that deep reductions in global emissions will be required in order to achieve the ultimate objective of the Convention and *emphasizing* the need for urgency in addressing climate change,
>
> …
>
> *Emphasizing* with serious concern the urgent need to address a significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.

[25] To repeat, the aim of the *Paris Agreement* is to strengthen the global response to the threat of climate change by "[h]olding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels" (Article 2 at para 1(a)). In order to achieve this goal, the parties "aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties" (Article 4 at para 1).

C. Climate change initiatives in Canada

[26] Prior to Canada signing the *Paris Agreement*, the Prime Minister and all provincial and territorial premiers [First Ministers] met in Vancouver to discuss climate change issues. The result was the March 3, 2016, *Vancouver Declaration on Clean Growth and Climate Change* [*Vancouver Declaration*]. First Ministers recognized the call in the *Paris Agreement* for significant reductions in GHG emissions and committed to "implement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives" (at 1).

[27] The *Vancouver Declaration* spoke to increasing the level of ambition in relation to limiting GHG emissions, promoting clean economic growth, and increasing action on adaptation and resilience. In the section on GHG mitigation, the *Declaration* observed that carbon pricing mechanisms were being used in Canada and elsewhere to "drive the transition to a low carbon economy" (at 3). The *Declaration* also indicated that "the provinces and territories have the flexibility to design their own policies to meet emission reductions targets, including their own carbon pricing mechanisms" (at 3). The *Declaration* went on to provide for the establishment of a Working Group on Carbon Pricing Mechanisms. The Working Group was to "provide a report with options on the role of carbon pricing mechanisms in meeting Canada's emissions reduction targets, including different design options taking into consideration existing and planned provincial and territorial systems" (at 7).

[28] The Working Group prepared a *Final Report*. It observed in the "Context" section that many experts regard carbon pricing as "a necessary policy tool for efficiently reducing GHG emissions" (at 5) and that there was a widespread international trend toward carbon pricing. The *Final Report* went on to describe various carbon pricing mechanisms and to explore design parameters for such mechanisms. It identified three options for carbon pricing: (a) a single broad-based pricing mechanism for the entire country; (b) broad-based pricing mechanisms in all jurisdictions but with flexibility of instrument choice; and (c) a range of broad-based pricing mechanisms in some jurisdictions with the remaining jurisdictions instituting other mechanisms or policies to meet specific GHG reduction targets within their jurisdictions (at 44).

[29] The federal government released a document entitled *Pan-Canadian Approach to Pricing Carbon Pollution* on October 3, 2016. The approach outlined in the document was grounded both on the proposition that economy-wide carbon pricing was the most efficient way to reduce GHG emissions and a recognition that several jurisdictions including British Columbia, Ontario and Québec had already introduced carbon pricing regimes. The approach proposed by the government involved a pan-Canadian "benchmark" for carbon pricing. The benchmark involved a requirement that pricing regimes apply to essentially the same emission sources as British Columbia's carbon tax. The required stringency of the benchmark, for an explicit price-based system, was that carbon pricing should start at a minimum of $10 per tonne in 2018 and rise by $10 per year to $50 per tonne in 2022. The provinces with cap-and-trade systems would have to ensure that emission reduction targets were in line with Canada's overall reduction target. As well, the federal government's approach was stated to involve a "backstop". This was the idea that the federal government would introduce an explicit price-based carbon pricing system in jurisdictions that did not meet the benchmark.

[30] First Ministers convened on December 9, 2016, to adopt the *Pan-Canadian Framework on Clean Growth and Climate Change* [*Pan-Canadian Framework*]. It addressed carbon pricing as well as matters concerning adaptation, clean technology and innovation issues. In relation to carbon pricing, the *Framework* said the provinces and territories had the flexibility to design their own policies to meet emission reductions targets and that the approach should be flexible and recognize already implemented carbon pricing policies in some provincial jurisdictions. It annexed the federal benchmark announced in October of 2016.

[31] It is also worth observing here that the *Pan-Canadian Framework* proceeded on the basis that GHG pricing was a necessary, but not sufficient, response to the GHG problem. As a result, the *Pan-Canadian Framework* also outlined extensive complementary actions in relation to electricity generation, construction practices, transportation, industry, forestry, agriculture and waste management. It also addressed financing for clean technology research and innovations.

[32] In May of 2017, the federal government released a document entitled *Technical Paper on the Federal Carbon Pricing Backstop* [*Technical Paper*]. It outlined the components of the proposed carbon pricing system and sought feedback from stakeholders. Further information was

provided in *Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark*, a document published by the federal government in August of 2017. *Supplemental Benchmark Guidance* followed in December of 2017.

[33] The Government of Saskatchewan did not accept the federal government's proposed carbon pricing scheme and did not adopt the *Pan-Canadian Framework*. In December of 2017, Saskatchewan released its own climate change strategy. *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy* outlined the steps the Province plans to take in order to address climate change. This strategy does not include a broad-based carbon tax or levy. This was explained as follows at page 1:

> We wholeheartedly support efforts to reduce greenhouse gases. But those efforts must be effective and they must not disadvantage one region of Canada more than another. A federal carbon tax is ineffective and will impair Saskatchewan's ability to respond to climate change.
>
> Our opposition to the federal government's carbon tax should not be seen as reluctance to act. Rather, it is a recognition that we must act, and act decisively, with all our economic strength. For Saskatchewan, mitigation is not enough. Our agriculture and resource-rich province must also focus on climate adaptation and resilience in order to be effective.

The *Strategy* includes a plan to impose sector-specific output-based performance standards on facilities emitting more than 25,000 tonnes of CO_2 equivalent per year and to obligate facilities that emit more than the regulated standard to take compliance actions.

D. The basic architecture of the *Act*

[34] The federal government proceeded with the legislative steps necessary to establish minimum national standards of price stringency of GHG emissions. The *Act* was introduced in the House of Commons in March of 2018 as Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12 (Bill C-74).

[35] The *Act* came into force on June 21, 2018. It has four parts.

[36] Part 1 implements a fuel charge. It applies to 22 GHG-producing fuels listed in Schedule 2 of the *Act*. These include such things as gasoline, kerosene, fuel oil, propane, coke oven gas, and methanol. The Governor in Council may add to, or delete from, this list (s 3, definition of "fuel"; s 17(1)).

[37] The charge under Part 1 applies to fuels that are produced, delivered or used in a listed province (ss 17, 18, 21(1), 34 and 35), brought to a listed province from another place in Canada (ss 19(1) and 20(2)) or imported into Canada at a place in a listed province (ss 19(2) and 20(3)). Generally, a registered distributor will pay the fuel charge. The registered distributors will typically be fuel producers or wholesale fuel distributors. Part 1 also imposes a charge on the burning of combustible waste used to generate heat or energy (s 25).

[38] The amount of the charge for each fuel is set out in Schedule 2 of the *Act*. For 2019, the specified rates represent $20 per tonne of CO_2 equivalent emitted by each fuel. The rates rise to a total of $50 per tonne of CO_2 equivalent in 2022.

[39] The Part 1 charge is not payable on fuels delivered to specified persons. Such persons include farmers and fishers in respect of qualifying fuels (s 17(2)). Further, the charge is not payable on fuels delivered to industrial facilities subject to the output-based performance standards under Part 2 of the *Act*. This is because GHG emissions for such facilities are priced under Part 2.

[40] Part 1 also provides specific rules for determining the fuel charge applicable to certain interjurisdictional air, marine, rail and road concerns (ss 28–35).

[41] The fuel charge is administered by the Minister of National Revenue acting through the Canada Revenue Agency. Part 1 sets out a variety of administrative rules dealing with filing obligations, filing periods and so forth. It also prescribes penalties and means of recovery.

[42] Part 2 of the *Act* establishes output-based performance standards for GHG emissions by large industrial facilities. It applies to “covered facilities”. These are facilities either designated by the Minister or meeting criteria specified in the regulations (s 169). Mr. Moffet indicates in his affidavit that the initial intention is that the output-based performance standards will apply primarily to facilities with annual CO_2 equivalent emissions of 50 kt or more annually (at para 111). See: *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213. As noted, covered facilities are exempt from the Part 1 fuel charge.

[43] The annual GHG emissions limits for covered facilities will employ an emissions intensity standard established by regulation. The output-based standard for an industry will be prescribed as a percentage of the GHGs emitted on average by the facilities in the industrial sector for a given unit of product.

[44] Part 2 requires a covered facility to provide compensation for the portion of its GHG emissions that exceeds its annual limit (s 174). This can be done in one of three ways: (a) by submitting surplus credits earned in the past or acquired from other facilities; (b) by paying an excess emissions charge; or (c) a combination of both. If a facility emits less than its annual limit, it will receive credits that it can bank and use for future compliance obligations or sell to other regulated facilities (s 175).

[45] Part 2 also includes a variety of administrative enforcement provisions.

[46] Part 3 of the *Act*, which is not challenged in this proceeding, authorizes the Governor in Council to make provincial laws applicable to federal works and undertakings, federal lands, Indigenous lands, internal waters of Canada, the territorial sea, Canada's exclusive economic zone, and the continental shelf. It falls within the jurisdiction of Parliament.

[47] Part 4 of the *Act* requires the Minister of Environment to make reports to Parliament. There is no suggestion that it is unconstitutional.

E. The application of the *Act*

[48] Both Part 1 and Part 2 apply only in provinces or areas listed by the Governor in Council in Schedule 1 of the *Act*. These listings are to be made 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" (ss 166(2) and 189(1)). In making an order listing a province or area, the *Act* requires the Governor in Council to take into account, as the "primary factor", the stringency of provincial pricing mechanisms for GHG emissions (ss 166(3) and 189(2)).

[49] The Minister of National Revenue must distribute the revenues raised under Part 1 and Part 2 in a listed province. That distribution may be made to the listed province itself, to prescribed persons in that province, or to a combination of both (ss 165(2) and 188(1)).

[50] The Governor in Council, for purposes of Part 1 of the *Act*, has listed Ontario, New Brunswick, Manitoba and Saskatchewan. A modified fuel levy will also apply in Yukon and Nunavut. See: SOR/2019-79. For purposes of Part 2 of the *Act*, the Governor in Council has listed Ontario, New Brunswick, Manitoba, Prince Edward Island, Yukon and Nunavut. See: SOR/2018-212. Part 2 applies only partially in Saskatchewan because the provincial government has implemented its own output-based performance standards system for large industrial facilities. See: SOR/2018-213.

IV. ANALYSIS

[51] Saskatchewan advances two main lines of argument in seeking to have the *Act* found unconstitutional. The first is that the principle of federalism prevents Parliament from enacting a statute applicable in only some provinces because of how those provinces have chosen to exercise their legislative authority. Saskatchewan's second argument is that the *Act* imposes a tax and, because it allows the Governor in Council to decide where it applies, the *Act* offends the requirement in s. 53 of the *Constitution Act, 1867* that bills imposing taxes must originate in the House of Commons. Saskatchewan goes on to deny that, as contended by Canada, the *Act* can be sustained under Parliament's authority under the national concern branch of POGG. It also denies, as suggested by some intervenors, that the *Act*, or features of it, can be supported under Parliament's authority in relation to trade and commerce, emergencies, criminal law or treaties.

[52] In light of the arguments presented by Saskatchewan, Canada and the various intervenors, it is appropriate to assess the constitutional validity of the *Act* by considering the following main issues:

(a) Does the principle of federalism render the *Act* unconstitutional?

(b) Does the *Act* impose taxes in contravention of s. 53 of the *Constitution Act, 1867*?

(c) Is the *Act* sustainable under the national concern branch of POGG?

(d) Can the *Act* be upheld under heads of jurisdiction identified by the intervenors?

[53] Each of these matters must be addressed in turn. However, before turning to them, it may be useful to emphasize three basic points relevant to the required analysis.

[54] First, "the environment" is not a legislative subject matter that has been assigned to either Parliament or the provincial legislatures under the *Constitution Act, 1867*. Rather, as the Supreme Court put it in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64, the environment is "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty". Justice La Forest explained this as follows in *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*]:

> 112 In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River, supra*, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, "the *Constitution Act, 1867* has not assigned the matter of 'environment' *sui generis* to either the provinces or Parliament" (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (*ibid.* at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.
>
> (Emphasis added)

[55] The second general point is that the standard methodology for deciding the constitutional validity of a law applies, of course, to laws touching on or implicating the environment. This methodology involves a two-stage process. To begin, it is necessary to determine the "pith and substance" of the law in question. This involves identifying the essential character or dominant characteristic of the law through an examination of both its purpose and its effect. Legislative history, Parliamentary debates and other such extrinsic material may be considered in addressing the question of purpose. The "mischief" that the legislation is aimed at curing may also be considered. Assessing the effect of a law focuses on how the law will operate and how it will affect Canadians. See, for example: *Reference re Firearms Act*, 2000 SCC 31 at paras 16–18, [2000] 1 SCR 783.

[56] In the next step of the analysis, the pith and substance of the legislation is slotted into the roster of legislative powers found in ss. 91 and 92 of the *Constitution Act, 1867*. This is not a precise science and may involve an interpretation of the scope of the power. As the Supreme Court observed in *Reference re Firearms Act* at paragraph 26, "[l]aws mainly in relation to the jurisdiction of one level of government may overflow into, or have 'incidental effects' upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other". A law is valid only if it falls within the jurisdiction of the enacting legislature.

[57] The third and final general point to note here is that the efficacy of a law in accomplishing its goals does not bear on the division of powers analysis. The division of powers issue is whether the law in question falls within the jurisdiction of Parliament or the provincial legislatures. It is not whether the law is a sound policy initiative. Justice La Forest, dissenting but not on this point, explained as follows in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 44 [*RJR-MacDonald*]:

> … the wisdom of Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate. The goal in a pith and substance analysis is to determine Parliament's underlying purpose in enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 358 (*per* Wilson J.) and *Morgentaler*, *supra*, at p. 487:
>
> > Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.
>
> …

[58] With this background confirmed, I turn to the arguments that have been advanced about the constitutional validity of the *Act*.

A. Does the principle of federalism render the *Act* unconstitutional?

[59] Saskatchewan submits the principle of federalism is an "overarching limit" on Parliament's powers. It then argues Parliament is not constitutionally entitled to exercise its legislative authority in ways that offend the principle of federalism. While not going so far as to contend all federal statutes must have uniform application across the country, Saskatchewan

argues Parliament cannot condition the application of laws on how provinces have chosen to exercise their own legislative jurisdiction. Thus, so the argument goes, the *Act* cannot stand because it applies only in those provinces that have not adopted GHG pricing regimes considered appropriate by the Governor in Council.

[60] It is useful to begin by underlining that, as Saskatchewan concedes, there is no recognized constitutional requirement that laws enacted by Parliament must apply uniformly from coast to coast to coast. To the contrary, a number of decisions have upheld federal laws with uneven geographic application. For example, in *Russell v The Queen* (1882), 7 App Cas 829 [*Russell*], the Privy Council sustained an Act allowing the Governor in Council, after a petition from the electors of a city or county, to apply alcohol prohibitions to that city or county. In *Lord's Day Alliance of Canada v British Columbia (Attorney General)*, [1959] SCR 497, the Supreme Court upheld a legislative scheme that allowed provincial laws to provide exceptions to federal bans on certain activities. In *R v Burnshine*, [1975] 1 SCR 693, dealing with a challenge under the *Canadian Bill of Rights*, the Supreme Court upheld a federal law that gave special sentencing options to judges in British Columbia. Justice Martland, for the majority, said a requirement that laws apply uniformly in all areas of Canada would represent a "substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers" (at 705). Justice Laskin, as he then was, noted in dissent that "[a]s a matter of legislative power only, there can be no doubt about Parliament's right to give its criminal or other enactments special applications, whether in terms of locality of operation or otherwise" (at 715). *R v Furtney*, [1991] 3 SCR 89, also warrants mention. It dealt with *Criminal Code* charges for counselling the violation of bingo lotteries. Justice Stevenson observed, at pages 104–105, that Parliament may "incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely the existence of provincial legislation". See also: *R v S. (S.)*, [1990] 2 SCR 254 at 289–290; *R v Turpin*, [1989] 1 SCR 1296 at 1333–1335; *Coughlin v Ontario (Highway Transport Board)*, [1968] SCR 569 at 575; *Hydro-Québec* at para 153.

[61] I turn, then, to the notion of federalism. It is one of the fundamental organizing principles of the Canadian Constitution. See: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 57. This is so because the *Constitution Act, 1867* divides political power between the federal and provincial orders of government by assigning jurisdiction with respect to some subject

matters to Parliament and assigning jurisdiction with respect to other subject matters to the provincial legislatures. See: *Maritime Bank of Canada (Liquidators) v Receiver-General of New Brunswick*, [1892] AC 437 (PC) at 441–442. Provincial legislatures and Parliament are sovereign within their own realms. Thus, the federalism principle recognizes the autonomy of provincial legislatures to independently develop their own political and policy priorities. As indicated in *Re The Initiative and Referendum Act*, [1919] AC 935 (PC) at 942, the aim of the *Constitution Act, 1867* was not "to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority".

[62] However, all of this said, federalism is not a free-standing constitutional imperative that somehow independently trumps the distribution of powers prescribed by the *Constitution Act, 1867*. Rather, it is a value that informs how the Constitution, and especially how the division of powers prescribed by the *Constitution Act, 1867*, is to be understood and interpreted. Thus, by way of illustration, the breadth of Parliament's jurisdiction over trade and commerce under s. 91(2) of the *Constitution Act, 1867* has been heavily concerned with "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 659 [*General Motors*]). As explained in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 100, the concern in this regard has been that an aggressive interpretation of the trade and commerce power could overwhelm provincial authority in respect of matters of a local nature and property and civil rights.

[63] A recent illustration of the federalism principle in action can be found in *R v Comeau*, 2018 SCC 15, [2018] 1 SCR 342. There, the Supreme Court was required to consider the impact of s. 121 of the *Constitution Act, 1867* – which provides that all articles of manufacture from any province shall be "admitted free" into each of the other provinces – on a New Brunswick restriction on the possession of out-of-province liquor. After observing that foundational principles underlying the Constitution may aid in its interpretation, the Court said this about the federalism principle:

> [78] Federalism refers to how states come together to achieve shared outcomes, while simultaneously pursuing their unique interests. The principle of federalism recognizes the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": *Reference re Secession of Quebec*, at para. 58; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 5. The tension between the centre

> and the regions is regulated by the concept of jurisdictional balance: *Reference re Secession of Quebec*, at paras. 56-59. The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests. The same concern has led to, for example, the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine.
>
> (Emphasis added)

[64] Another recent case, *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693, is also instructive here even though it deals with the concept of cooperative federalism (coordinated action between or among governments) as opposed to the principle of federalism per se. It arose out of the federal government's decision to abolish the long-gun registry. Québec announced its decision to create its own gun registry and asked the federal authorities for their data connected to Québec. Canada refused this request and Québec then sought a declaration that it had a right to obtain the data, relying on the unwritten constitutional principle of cooperative federalism. The Supreme Court ruled against Québec, finding that the principle of cooperative federalism could not prevail over otherwise valid federal legislation. Justices Cromwell and Karakatsanis, writing for the majority, said this:

> [20] In our respectful view, the principle of cooperative federalism does not assist Quebec in this case. Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.
>
> [21] We conclude that the principle of cooperative federalism does not prevent Parliament from exercising legislative authority that it otherwise possesses to dispose of the data.
>
> (Emphasis added)

See also: *Reference re Firearms Act* at para 48; *Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC 23 at para 39, [2016] 1 SCR 467; *Reference re Pan-Canadian Securities Regulation* at para 18.

[65] Notwithstanding these authorities, Saskatchewan suggests the strength of its federalism argument is revealed by asking what would happen if a national government, spurned by the electors in a particular province, implemented a tax aimed solely at that province in order to, in effect, punish the electors in question. Saskatchewan submits that, in such a circumstance, the principle of federalism would have to be invoked to invalidate the law. This line of argument is not convincing. The easiest and most doctrinally regular answer to Saskatchewan's hypothetical problem lies in the doctrine of colourability, not in the principle of federalism. In other words, the punitive law envisioned by Saskatchewan would be struck down not because it offended the principle of federalism but because, in pith and substance, it was not a "tax" within the meaning of s. 91(3) of the *Constitution Act, 1867*.

[66] There is little legal merit in Saskatchewan's specific concern about Parliament conditioning the application of a federal law on whether a province has chosen to exercise its own jurisdiction. This is because of a very simple point. Parliament can only act within its own sphere of legislative authority. Thus, if it can make a law applicable in a province in light of provincial legislative inaction, that necessarily means it enjoyed the authority to make the law applicable all along. Parliament cannot somehow acquire additional authority because of a provincial decision not to act in relation to a particular matter. Parliament either has legislative authority to act or it does not. There is no constitutional magic in the fact a province has failed to move in a particular policy area.

[67] This fundamental reality is perhaps somewhat obscured in areas like the regulation of GHG emissions where the constitutional boundaries between federal and provincial authority might be somewhat unclear and where there is at least some room for both levels of government to legislate. Nonetheless, the basic point remains the same. The scope of Parliament's constitutional authority is not dependent on how or whether a province has exercised its own exclusive jurisdiction. Conversely, and putting the doctrine of paramountcy to the side, the scope of a province's constitutional authority is not dependent on how Parliament has or has not exercised its jurisdiction.

[68] Saskatchewan has referred to no judicial authority which in any way directly supports the idea that the principle of federalism can or should independently render unconstitutional an otherwise valid law. Its argument on this front cannot succeed.

B. Does the *Act* impose taxes in contravention of s. 53 of the *Constitution Act, 1867*?

[69] Subsection 91(3) of the *Constitution Act, 1867* empowers Parliament to raise money "by any Mode or System of Taxation". In turn, s. 53 of the *Constitution Act, 1867* requires that bills imposing a tax must originate in the House of Commons. It reads as follows:

> 53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

[70] Saskatchewan acknowledges Parliament's broad authority to impose taxes. However, it argued in its factum that Part 1 of the *Act* imposes an unconstitutional tax because of the discretion enjoyed by the Governor in Council in deciding where Part 1 applies. It contended this discretion offends not only the principle of federalism but s. 53 of the *Constitution Act, 1867* as well. In oral argument, Saskatchewan extended the reach of its submissions on this point and, for the first time, took the position that Part 2 of the *Act* also imposes a tax and that it too is unconstitutional by virtue of non-compliance with s. 53. Canada takes the position that the levies imposed pursuant to the *Act* are regulatory charges, not taxes.

[71] In order to deal with these arguments, it is important to turn first to the controlling legal principles. I will then consider whether either Part 1 or Part 2 impose levies that are "taxes" in the constitutional sense of the term. Finally, it will be necessary to examine how s. 53 fits into the analysis.

1. Basic principles

[72] The broad characteristics of a tax were stated in *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357 to be: (a) a levy enforceable by law; (b) imposed under the authority of the legislature; (c) levied by a public body; and (d) made for a public purpose.

[73] However, there is a difference between taxes on the one hand and regulatory charges, including service charges, on the other. The leading case on this distinction is *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*]. There, the Supreme Court elaborated on the point previously made in *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004 at 1070, that a levy is a tax if its "primary purpose is the raising of revenue for general [governmental] purposes" and that this stands in contrast to a "levy [imposed] primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme".

[74] Justice Gonthier, writing for the Court in *Westbank*, explained that, in order for charges to be imposed for regulatory purposes or to be otherwise incidental to a regulatory scheme, it is first necessary to identify a regulatory scheme. He provided a non-exhaustive list of factors to consider when determining if there is such a scheme in the required sense. Not all of these factors need to be satisfied for such a scheme to exist.

[75] The first factor is whether there is a complete and detailed code of regulation. Such schemes are usually characterized by complexity and detail. The second factor is a specific regulatory purpose aimed at affecting behaviour. As Gonthier J. indicated, "a regulatory scheme must 'regulate' in some specific way and for some specific purpose" (at para 26). The third factor is actual or properly estimated costs of the regulation. Thus, for example, the levy found to be a regulatory charge in *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929, was said to have been "meticulously limited" to recoup only actual costs. Significantly, although a regulatory charge may exist to offset the costs of the regulatory scheme itself, "the regulatory charges themselves may be the means of advancing a regulatory purpose" (at para 29). See also: *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 72, [2008] 3 SCR 511 [*Confédération*]. The fourth and final factor identified in *Westbank* as a consideration in determining whether a governmental levy is a regulatory charge is the existence of a relationship between the regulation and the person being regulated.

[76] In broader and more essential terms, *Westbank* confirms that, in deciding whether a levy is a tax or a regulatory charge, the fundamental point is as follows:

> 30 In all cases, a court should identify the *primary* aspect of the impugned levy. This was the underlying current of the earlier cases on s. 125, which focussed on the "pith and substance" of the charge: "*Johnnie Walker*" case [(1922), 64 SCR 377, aff'd [1924] AC 222]; *Re Exported Natural Gas Tax* [[1982] 1 SCR 1004]. Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.
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> (Italics emphasis in original; underline emphasis added)

[77] With this background in place, it is now possible to turn to the particulars of the *Act*.

2. Does Part 1 impose a tax or a regulatory charge?

[78] Saskatchewan argues, correctly, that the fact the levy imposed under Part 1 is referred to in the *Act* as a "charge" does not answer the question of whether it is a tax. The characterization of a levy for constitutional purposes involves an analysis of its substance. The label applied to a levy is not determinative. The Supreme Court has, for example, found probate "fees" (*Eurig Estate (Re)*, [1998] 2 SCR 565 [*Eurig Estate*]) and employment insurance "premiums" (*Confédération*) to be taxes.

[79] Saskatchewan goes on to contend that the fuel charge under Part 1 bears the hallmarks of a tax in that payments must be made to the state under the compulsion of the law. Further, says Saskatchewan, Part 1 is administered by the Minister of National Revenue, the monies in question are paid into the Consolidated Revenue Fund and disputes with respect to the payment of the charge are adjudicated by the Tax Court of Canada. In this broad sense, the fuel charge does have several features that tend to give it the appearance of a tax. However, getting to the root of the constitutional status of the charge requires a deeper look and, as part of that look, the application of the approach mandated by *Westbank*.

[80] As for the first *Westbank* factor, Part 1 is properly characterized as being a complete and detailed code of regulation. This is because Part 1 (a) identifies the fuel subject to the charge, (b) specifies the amount of the charge with a view to influencing decisions bearing on GHG emissions, (c) sets out very specific rules about the application of the charge in various

circumstances including, for example, when fuel is brought into a listed province, when fuel is in transit through a listed province and when fuel is held in supply tanks, (d) lays down specific rules with respect to certain inter-jurisdictional air, marine, rail and road carriers, (e) specifies reports, returns and payments, and (f) goes on to provide, more generally, for the administration and enforcement of the scheme. Further, and importantly, Part 1 dovetails into the regulatory regime established in Part 2 in that the fuel charge is not applicable to covered facilities. Thus, in combination, Parts 1 and 2 operate as an inter-locking regime.

[81] Turning to the second *Westbank* factor, it is readily apparent that Part 1 has a specific regulatory purpose which seeks to affect the behaviour of individuals. As explained above, the *Act* is the product of a long line of initiatives and agreements tracing back to the *Framework Convention* in 1992. The *Act* treats GHG pricing as a core element of the initiative to mitigate GHG emissions and its self-evident regulatory purpose is to attach a minimum national cost to GHG emissions so as to incentivize behavioural changes that will reduce such emissions.

[82] The third *Westbank* factor – actual or properly estimated costs of the regulation – has no application to Part 1. The levy that Part 1 imposes is not designed or intended to raise funds to defray the costs of regulation. Rather, Part 1 is an example of a scheme where the charge itself is the means of advancing a regulatory purpose.

[83] This brings the analysis to the fourth *Westbank* factor, the relationship between the regulation and the person being regulated. This too is a somewhat uninstructive inquiry in situations where, as here, the charge itself is the instrument by which the regulatory purpose is realized. In such circumstances, the person being regulated will necessarily have a connection with the regulation by virtue of paying the charge.

[84] In summary, therefore, the *Westbank* factors indicate that the charges imposed pursuant to Part 1 are part and parcel of a regulatory regime.

[85] In addition to the specific matters identified in *Westbank*, there are two further, and important, considerations that suggest the charges imposed under Part 1 are not taxes. The first is that the Minister of National Revenue must distribute the amount raised by the charges to the

province, or persons in the province, from which that amount was raised. Subsection 165(2) of the *Act* says this:

> (2) For each province or area that is or was a listed province, the Minister must distribute the net amount for a period fixed by the Minister, if positive, in respect of the province or area. The Minister may distribute that net amount
>
> (a) to the province;
>
> (b) to persons that are prescribed persons, persons of a prescribed class or persons meeting prescribed conditions; or
>
> (c) to a combination of the persons referred to in paragraphs (a) and (b).

"Net amount" in s. 165(2) means the charges levied in a province or area less any amounts refunded, rebated or remitted in respect of those charges (s 165(1)). On the face of the *Act*, therefore, it would appear that the whole of the funds collected by virtue of the fuel charge must be distributed by the Minister.

[86] Saskatchewan suggests this feature of the *Act* is of little significance because, it submits, tax revenues are also returned to the public. This happens through various payments and grants, through the provision of programs and services, and through the construction of public works. This, of course, is broadly true. Governments do not typically hoard their tax revenues. But, there is a difference between regular tax revenues and monies raised pursuant to the *Act*. A dollar taken in by way of taxes can be used by the Government of Canada for *any* purpose in *any* part of the country or, indeed, the world. By contrast, monies raised under the *Act* must be returned to the listed province, persons in that province, or a combination of both. Fuel charge and combustible waste revenues raised in Saskatchewan could not be employed by the federal government, and at the discretion of the Governor in Council, to build a bridge or to offset the federal government's cost of making old age security payments. Rather, they must be returned, in the form of cash so to speak, to the province or prescribed persons in the province. This in itself is perhaps not wholly determinative of the status of the charge imposed by the *Act*. However, it certainly does serve to distinguish the charges from what would typically be seen as a tax.

[87] The second broad consideration here is equally important. It is this. The *Act* could fully accomplish its objectives, i.e., the establishment of minimum national standards of price stringency for GHG emissions, without raising a cent. In other words, if every province put in

place a level of GHG pricing acceptable to the Governor in Council, the *Act* would not be brought into operation anywhere in the country and, as a result, it would generate no revenue. This tells the tale. A taxing statute is one that, in pith and substance, is designed and intended to raise revenue for general purposes. See: *Re Exported Natural Gas Tax* at 1070; *Westbank* at para 30. It is difficult to see how the *Act*, which is ultimately wholly disinterested in generating revenue, can nonetheless be seen as a law with a *primary purpose* of raising revenue for general purposes.

[88] To repeat, the central task of a court attempting to identify the pith and substance of a charge is to determine whether the primary purpose of that charge is "to tax, i.e., to raise revenue for general purposes" or "to finance or constitute a regulatory scheme" or "to charge for services directly rendered". In the circumstances here, the primary purpose of the Part 1 fuel charge is not to raise revenue for general purposes. Rather, the fuel charge is the centrepiece of a regulatory plan to increase the cost of GHG emissions and thereby mitigate them.

[89] In the end, and considering all of the relevant aspects of this issue, it must be concluded that Part 1 of the *Act* does not impose a tax in the constitutional sense of the term.

3. Does Part 2 impose a tax or a regulatory charge?

[90] The charge payable under Part 2 is prescribed by s. 174 of the *Act*. A person responsible for a covered facility that emits GHGs in a quantity exceeding the applicable emissions limit must provide compensation to the Minister. As noted earlier, s. 174(2) stipulates this may be done either by the remittance of compliance units earned from emitting fewer GHGs than the prescribed limit in the past, by paying an excess emissions charge, or by a combination of both. The amount of the charge is specified in column 2 of Schedule 4. It is set at the same level as the fuel charge in Part 1 of the *Act*, i.e., $10 per tonne of CO_2 equivalent in 2018, increasing by $10 per year until it reaches $50 per tonne in 2022.

[91] With this brief background in place, it is appropriate to turn to the *Westbank* analysis. As for the first *Westbank* factor, the excess emissions charge is obviously part and parcel of a detailed code of regulation. Part 2 establishes the output-based performance standards for GHG emissions by large industrial facilities. In this regard, it specifies such things as registration requirements and GHG reporting obligations and goes on to require covered facilities to measure

their emissions output against a GHG limit. The excess emissions charge fits closely into this overall scheme given that it stands as one way in which a person may provide the required compensation for exceeding an emissions limit.

[92] The second *Westbank* factor asks whether there is a specific regulatory purpose aimed at affecting behaviour. Again, this is beyond dispute. Part 2 aims to affect the behaviour of large emitters by imposing economic incentives for them to limit and reduce GHG emissions.

[93] The third *Westbank* factor concerns actual or properly estimated costs of the regulation. As is the case with the Part 1 fuel charge, this factor has no application to the obligation to pay compensation under Part 2. It is not intended to raise funds to defray the costs of regulation. Instead, the excess emissions charge itself, because it increases the cost of GHG emissions, is the means of advancing the regulatory purpose.

[94] As for the fourth *Westbank* factor, I repeat my earlier comment made in connection with Part 1. This factor engages awkwardly when the charge in issue is itself the regulatory tool. Nonetheless, there is an undeniable connection here between those persons being regulated, i.e., those persons required to pay excess emissions charges, and the regulation. It exists by virtue of the payments themselves. There is also a connection, perhaps more in the sense of what is contemplated in *Westbank*, because the operations of large industrial facilities "cause the need for the regulation".

[95] In light of all of this, the *Westbank* analysis points clearly to a conclusion that compensation collected pursuant to Part 2 of the *Act* is tightly integrated into a regulatory scheme.

[96] Moreover, just as with the fuel and combustible waste charges under Part 1, it is important to note that the excess emissions charge is not intended to raise revenues for general purposes. Rather, by virtue of s. 188 of the *Act*, the Minister of National Revenue must distribute such revenues either to the province where the covered facility is located, or to persons in that province, or to a combination of both. Further, the objective of Part 2 can be realized without the Minister of National Revenue collecting any funds by way of the charge if provinces implement adequate regimes of their own. In other words, if provinces were to put sufficiently rigorous

emission standards in place, Part 2 would not come into operation. In any event, even when Part 2 does apply, the operator of a facility can pay any required compensation to the Minister by way of credits, not cash. And, if all covered facilities stay below their prescribed emissions limits, no compensation of any sort is payable. This is not the statutory profile of a tax, i.e., of a levy that has a *primary purpose* of raising revenue for general purposes.

[97] Taking all of the relevant factors into account, it is evident that the excess emissions charge imposed under Part 2 of the *Act* is not a tax.

4. If Part 1 or 2 does impose a tax, is s. 53 of the *Constitution Act, 1867* offended?

[98] In light of the conclusion that the *Act* does not impose taxes, it is not strictly necessary to consider the arguments based on s. 53 of the *Constitution Act, 1867*. However, in the interest of completeness, I will deal with the impact of s. 53 should the *Act* be seen as imposing a tax.

[99] As noted above, s. 53 requires that bills "for imposing any Tax or Impost" must originate in the House of Commons. In interpreting s. 53, the Supreme Court has focussed on its root constitutional purpose. Thus, in *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7 at para 4, [2008] 1 SCR 131 [*Connaught*], the Court indicated that s. 53 gives effect to the basic democratic principle that the Crown may levy taxes only with the consent of elected representatives. Justice Major explained this as follows in *Eurig Estate*:

> 30 In my view, the rationale underlying s. 53 is somewhat broader. The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
>
> 31 In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."
>
> 32 The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation. As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.
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> (Emphasis added)

As stated in *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15 at para 74, [2001] 1 SCR 470, "[t]he animating principle [of s. 53] is that only the legislature can impose a new tax *ab initio*".

[100] Saskatchewan does not challenge Parliament's legislative authority to enact the *Act* under its s. 91(3) taxation power. Indeed, it takes the initiative in arguing that the levies imposed by the *Act* fall under s. 91(3). Saskatchewan's real point lays one step down the road from this characterization of the *Act*. It takes issue with the authority of the Governor in Council to determine the provinces and areas to which the *Act* will apply. This authority is said to make the *Act* non-compliant with s. 53.

[101] The relevant sections of the *Act* concerning the Part 1 fuel charge, ss. 166(2) and (3), read as follows:

> (2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.
>
> (3) In making a regulation under subsection (2), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

Subsections 189(1) and (2) use the same language in conferring an authority on the Governor in Council to decide the provinces and areas where Part 2 of the *Act* will apply.

[102] Saskatchewan's submissions on the s. 53 issue are not persuasive. The situation concerning the Governor in Council's authority to determine where the *Act* will apply is readily distinguishable from the one considered in *Eurig Estate*, the key authority invoked by Saskatchewan on this wing of its argument. In *Eurig Estate*, the *Administration of Justice Act* authorized the Lieutenant Governor in Council to make regulations requiring the payment of

"fees" in respect of anything done by any person in the administration of justice. In purported reliance on this authority, the Lieutenant Governor in Council put in place a regulation setting out a schedule of *ad valorem* charges that had to be paid in order to obtain a grant of probate. The majority of the Supreme Court found the probate charge to be a tax, not a fee, because (a) it was enforceable by law, (b) it was levied by a public body, (c) it was intended for public purposes, and (d) there was no connection between the amount of the levy and the cost of the service of granting letters probate. Justice Major then went on to find the probate levy to be non-compliant with s. 53, and hence unconstitutional, because it sought to impose a tax "without clear and unambiguous authorization from the legislature to do so" (at para 41).

[103] This is not the situation with respect to the *Act*. Subsections 166(2) and 189(1) expressly provide that the Governor in Council may amend Schedule 1 and, in so doing, make Parts 1 and 2 of the *Act* applicable to a province or area. Indeed, those provisions are the centerpiece of the backstop feature of the *Act*. In other words, while placing a measure of discretion in the hands of the Governor in Council, the *Act* leaves no doubt that the Governor in Council is authorized to exercise that discretion and to decide if Part 1 or Part 2 should operate in respect of any given province or area. In making a decision in this regard, the Governor in Council does not impose a tax "on its own accord", to use the words of Major J. in *Eurig Estate*.

[104] Nor is this a circumstance where, to reference paragraph 32 of *Eurig Estate*, taxation powers are claimed to arise "incidentally in delegated legislation". The Governor in Council is specifically authorized, in the *Act* itself, to amend Schedule 1 and thereby extend the application of the *Act*. Read in context, this is a clear and unambiguous authorization to adjust the reach of the *Act* and to impose the obligation to pay the levies in issue. As a consequence, this situation is also different than the one considered in *Confédération*. In that case, the Supreme Court found charges collected under certain provisions of the *Employment Insurance Act* to be unconstitutional because, in the absence of a clear delegation of taxing authority from Parliament, the Governor in Council had used those provisions to collect funds for general purposes.

[105] The breadth of the discretion conferred by the *Act* on the Governor in Council to determine where the *Act* should apply was referred to by Saskatchewan in its submissions but not

raised as a distinct issue. In any event, I am not persuaded that this aspect of the scope of the Governor in Council's authority is constitutionally problematic. Its discretion in this regard is confined in three ways and is far from open ended. First, ss. 166(2) and 189(1) provide that the Governor in Council may only add or delete a province or area from Schedule 1 "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that [it] considers appropriate". Second, ss. 166(3) and 189(2) provide that, in exercising this authority, the Governor in Council must take into account "as the primary factor" the stringency of provincial pricing mechanisms for GHG emissions. Third, and more generally, basic administrative law principles preclude the Governor in Council from making decisions about the application of the *Act* to provinces or areas if those decisions are based on irrelevant considerations or reasons at odds with the purpose of the *Act*. See: *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 24, [2013] 3 SCR 810.

[106] Another possible dimension of the s. 53 issue involves the suggestion that the delegation of authority to the Governor in Council in relation to the particulars of the Part 1 fuel charge is so wide that, while express, it nonetheless offends s. 53. The point, as I understand it, is that the very generous authority enjoyed by the Governor in Council under Part 1 would allow it, in effect, to cut a new tax out of whole cloth. The key sections of the *Act* underpinning this concern are ss. 26, 166 and 168. They are reproduced in Appendix A.

[107] The response to these concerns has several layers. First, the governing case law indicates that, so long as a taxing authority is delegated expressly and unambiguously, it may be exercised to establish the "details and mechanisms" of the tax. See: *Confédération* at para 92; *Eurig Estate* at para 30. Although they are broadly worded, the sections of the *Act* in issue here would seem to be aimed at enabling the Governor in Council to do this very thing: to work out and establish some of the details and mechanisms of the fuel charge scheme that are not addressed by the *Act* itself.

[108] Second, and more fundamentally, if regulations made pursuant to the provisions noted above did, in fact, attempt to implement a wholly or substantially new tax, then the obvious legal response would be to strike down those regulations because they offend s. 53 of the *Constitution Act, 1867* or because they are *ultra vires* the *Act* in administrative law terms. The invalidity of

the regulations would not impact the constitutionality of the *Act* just as (a) in *Connaught*, where the validity of the business licence fees imposed under s. 24 of the *Parks Canada Agency Act* was not seen as affecting the validity of s. 24 itself, and (b) in *Eurig Estate*, where the validity of the probate fee imposed under s. 5 of the *Administration of Justice Act* was not considered to impugn the validity of s. 5.

[109] Third, I note that, even assuming *arguendo* that there is a problem with the constitutional validity of the sections of the *Act* conferring wide regulation-making authority on the Governor in Council, this would seem to be a circumstance where the doctrine of severance could be engaged or the offending wording would be read down so as to avoid constitutional problems. In other words, any problems with these provisions could be addressed while leaving the fuel charge and combustible waste regime under Part 1 intact.

[110] In summary, therefore, it is not apparent how the authority granted to the Governor in Council by virtue of ss. 26, 166 and 168 can render the *Act*, or more particularly Part 1 of the *Act*, unconstitutional.

[111] In the end, Saskatchewan's argument about the application of s. 53 of the *Constitution Act, 1867* cannot succeed. The charges in issue here are not taxes in the constitutional sense of that term. However, if the charges are characterized as taxes, they do not violate s. 53. This is not a case where the levies in question are imposed *ab initio* by the Governor in Council or imposed by the Governor in Council of its own accord.

C. Is the *Act* sustainable under the national concern branch of POGG?

[112] Saskatchewan contends that, if the *Act* is not an invalid tax, it is nonetheless unconstitutional because it must be seen as concerning property and civil rights or other matters within exclusive provincial jurisdiction. Canada's argument in reply, and its key position in these proceedings, is that the *Act* is a valid exercise of Parliament's authority under the national concern branch of POGG. Canada is supported in this position by several intervenors.

[113] In order to address these arguments, it will be useful to begin by confirming the basic principles informing the POGG analysis. That done, I will consider the pith and substance of the

Act and then turn to the identification of the matter said to come within Parliament's POGG authority. All of this done, it will be possible to make a final determination about whether the *Act* can be sustained under the national concern branch of POGG.

1. Basic principles

[114] 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 …

The POGG power is usually considered to have three branches: the "gap" branch, the "national concern" branch and the "emergency" branch. See: Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf (2018-Rel 1) 5th ed Supp, vol 1 (Toronto: Thomson Reuters, 2016) at c 17.1.

[115] The national concern branch has a deep history running back to *Russell*. Its contours began to clearly emerge when Lord Watson wrote as follows at page 361 of *Attorney-General for Ontario v Attorney-General for the Dominion*, [1896] AC 348 (PC):

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

[116] For present purposes, it is sufficient to pick up the jurisprudential story with *Re: Anti-Inflation Act*, [1976] 2 SCR 373. A majority of the Supreme Court upheld that Act on the basis of the emergency doctrine of POGG. Justice Beetz disagreed on the point and therefore went on to consider the national concern doctrine. He wrote for himself and de Grandpré J. but his analysis was endorsed by a majority of the Court. Justice Beetz concluded that "containment and reduction of inflation" did not qualify as a basis of federal jurisdiction because it was totally lacking in specificity and was no more than an aggregate of several subjects, some of which formed a substantial part of provincial jurisdiction (at 458). He suggested a subject needed to have a "degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form" (at 458). In addition, Beetz J. stressed that, in considering the national concern doctrine, it was necessary to have

regard to the extent to which a new power would allow Parliament to touch on what had been recognized to be provincial jurisdiction and thus upset the equilibrium of the Constitution (at 458).

[117] *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 [*Crown Zellerbach*], is now the leading case in this area. Justice Le Dain, writing for the majority of the Court, surveyed the relevant jurisprudence and, drawing significantly on what Beetz J. had said in *Re: Anti-Inflation Act*, summarized the law as follows at pages 431–432:

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

These are the principles that must inform the analysis of Canada's argument about the national concern branch of POGG.

2. The pith and substance of the *Act*

[118] Consideration of whether the *Act* can be sustained under the national concern branch begins with the identification of its pith and substance. This, of course, is the first step in any division of powers inquiry. It is not linked specifically to POGG or the national concern question. As explained above, both the purpose and effect of the *Act* are relevant in determining its pith and substance. Let me begin with the question of purpose.

[119] In very general terms, the *Act* is self-evidently aimed at GHG pricing. This is revealed by several considerations. The first is the broad context in which it was enacted. That context can be

traced directly back to the *Framework Convention* ratified by Canada in 1992 and the *Kyoto Protocol*, the *Copenhagen Accord* and the *Paris Agreement*, which followed. All had the same central objective, i.e., the limitation of global GHG emissions. The *Act* is the product of Canada's efforts to meet its commitments under the *Paris Agreement*.

[120] All of this noted, the relevant legislative history also reveals, in more particular terms, that the purpose of the *Act* is to ensure minimum national standards of price stringency for GHG emissions. This is apparent from (a) the *Vancouver Declaration*, which referenced the use of carbon pricing mechanisms to address climate change and established a Working Group on Carbon Pricing Mechanisms, (b) the *Final Report* of the Working Group, (c) the federal government's *Pan-Canadian Approach to Pricing Carbon Pollution* that concluded economy-wide carbon pricing was the most efficient way to reduce GHG emissions and proposed a pan-Canadian benchmark approach, and (d) the federal government's *Technical Paper* on the backstop and its related *Supplemental Benchmark Guidance* paper.

[121] This focus on pan-Canadian GHG pricing is also apparent in the preamble of the *Act*. It expressly links the *Act* to the impact of anthropogenic GHG emissions on climate change, the *Framework Convention* and Canada's commitments under the *Paris Agreement*. The preamble then goes on to provide as follows:

> Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;
>
> Whereas behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;
>
> Whereas the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change;
>
> Whereas greenhouse gas emissions pricing reflects the "polluter pays" principle;
>
> Whereas some provinces are developing or have implemented greenhouse gas emissions pricing systems;
>
> Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;
>
> And whereas it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada[.]
>
> (Emphasis added)

[122] The substantive provisions of the *Act*, in both Part 1 and Part 2, reflect this goal or purpose of establishing minimum national standards of price stringency for GHG emissions. They do not dictate specific maximum levels of GHG reductions either generally or by reference to particular classes of individuals or operations. Nor do they directly impose a GHG emissions price across the country. Rather, the *Act* serves only as a backstop in the sense that it defers to the regulatory efforts of the provinces and comes into play only when those efforts do not meet minimum standards.

[123] Of course, when Part 1 or Part 2 applies in a province or area, it does not dictate a GHG emission price and then impose that price inflexibly or blindly across the board to each and every emission source. Part 1, for example, exempts fuel used by farmers and fishers from the fuel charge and it makes special provision for fuel charges payable by interjurisdictional transportation undertakings. These sorts of qualifications and nuances in the application of a minimum price do not undermine the pith and substance of the *Act.* This is because a GHG pricing system must be able to accommodate the underlying economic and other realities of the circumstances in which it operates. Accordingly, all things considered, it is appropriate to describe the purpose of the *Act* as a whole as being the establishment of minimum national standards of price stringency for GHG emissions.

[124] Not surprisingly, the effect of the *Act* is consistent with this purpose. As explained earlier, Part 1 imposes a charge on GHG-producing fuels and Part 2, in effect, puts a price on the GHG emissions above prescribed levels for large industrial operations. Both Parts apply only in those provinces that, in the assessment of the Governor in Council, have failed to put acceptable pricing standards in place.

[125] Thus, to conclude and confirm on this point, the pith and substance of the *Act* is best seen as being the establishment of minimum national standards of price stringency for GHG emissions.

3. The POGG “matter” in issue

[126] It is now necessary to turn to the POGG issue itself and, to begin, the question of how to describe or characterize the matter said to fall within the national concern branch. However, before doing that, let me detour briefly to underline the significance of finding a subject matter to

be one coming within the national concern branch of POGG. The point is basic. Any such conclusion means the matter in question comes within the authority of Parliament and Parliament alone. As La Forest J. explained at paragraph 115 of *Hydro-Québec*, "[d]etermining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament". See also: *Re: Anti-Inflation Act* at 444. This means that invoking the national concern branch of POGG is necessarily a delicate business. It carries with it the real potential of significantly altering the way powers are allocated between Parliament and the provincial legislatures and, hence, of altering the balance of federalism itself.

[127] In its factum, Canada took the position that the matter of national concern in issue here is "GHG emissions". To quote from paragraph 87 of the factum, "GHG emissions are a quintessential matter of national concern". Saskatchewan and several intervenors reacted to this by pointing out that recognizing a general Parliamentary authority over GHG emissions would open the door to federal regulation of an extraordinarily broad swath of life, upset the constitutional balance and thereby be offside the test prescribed in *Crown Zellerbach*. This was said to be so because almost every kind of human action generates GHG emissions.

[128] The significance of Saskatchewan's argument was not that recognizing GHG emissions as a matter of federal authority would give Parliament *comprehensive* jurisdiction over every GHG-producing activity. Rather, it was that the production of GHGs is so intimately and broadly embedded in every aspect of intra-provincial life that a general authority in relation to GHG emissions would allow Parliament's legislative reach to extend very substantially into traditionally provincial affairs. A general legislative authority over GHG emissions would, for example, presumably include such things as (a) the specification of materials and production techniques used in manufacturing and processing, (b) the control of any variable affecting the fuel efficiency of vehicles including tire pressure, engine size and speed limits on highways, (c) the determination of construction and insulation standards for buildings of all sorts, (d) the content of livestock feeds and the size of livestock operations, and (e) the prescription of matters affecting electricity consumption such as the hours of operation of business and service providers. Given the absolutely pervasive nature of GHG emissions, the boundaries of possible regulation in respect of such emissions are limited only by the imagination.

[129] The other side of the jurisdictional coin is also important here. Because any Parliamentary authority over GHG emissions would be exclusive, recognizing such authority would foreclose provinces from legislating directly in relation to such emissions. Canada and some of the intervenors attempt to discount this concern by pointing to the double aspect doctrine. They contend its application would prevent provinces from being frozen out of the field of GHG regulation should Canada succeed in having GHG emissions brought under the national concern branch of POGG. This view is substantially misplaced.

[130] As Peter Hogg explains in *Constitutional Law of Canada* at chapter 5.1(g), the double aspect doctrine applies when the federal and provincial characteristics of a law are roughly equal in importance with the result that both Parliament and a provincial legislature may enact laws of that kind. The classic example is highway safety where provincial laws on the subject have been upheld as being in relation to "Property and Civil Rights in the Province" (s 92(13)) and federal laws have been upheld as being in relation to "Criminal Law" (s 91(27)). At present, when GHG emissions are not recognized as being a matter coming within exclusive federal jurisdiction, there is plenty of scope for the double aspect doctrine to operate. A province can regulate GHG emissions by enacting laws in relation to property and civil rights, for example, and Parliament can regulate GHG emissions by, for instance, passing laws in relation to taxation. But, if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions.

[131] In other words, the problem is not only that recognizing federal jurisdiction over something as broad as GHG emissions would give Parliament wide authority in positive terms. It is that, in negative terms, provincial legislatures would be significantly denied the authority to deal with GHG emissions. Provinces could address such emissions only to the extent laws enacted in relation to provincial matters such as property and civil rights had an *incidental* impact on them. As the Supreme Court observed in *Reference re Securities Act*, 2011 SCC 66 at para 66, [2011] 3 SCR 837, "the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter (in the way, for example, s. 95 of the *Constitution Act, 1867* does for agriculture and immigration)" (emphasis in original).

[132] It is true of course that, in recent years, the Supreme Court's jurisprudence has promoted a flexible federalism tending to allow for interplay and even overlap between federal and provincial powers. But, the doctrinal tools used to promote flexible federalism have limits. They cannot "sweep designated powers out to sea". See: *Reference re Securities Act* at para 62.

[133] Let me return now to the main track of the analysis and the question of the characterization of the POGG matter at issue in these proceedings. There is a great deal of merit in the concerns raised by Saskatchewan and its supporting intervenors as to the impact that bringing "GHG emissions" under the national concern branch would have on the balance of federalism. Put simply, an unqualified jurisdiction in relation to such emissions would lead Parliament deeply into areas of historically exclusive provincial authority.

[134] In oral argument, Canada reacted to these concerns by changing its position and asserting that the matter to be included under Parliament's POGG authority should not be "GHG emissions" but rather "the *cumulative dimensions* of GHG emissions". Perhaps because it was introduced so late in the day, the "cumulative dimensions" idea was not well developed. Canada referred to cumulative atmospheric concentrations, cumulative global and national impacts and the cumulative effect of emissions from each province but did not fully explain these notions. Nonetheless, Canada's submission did, in its own way, represent an effort to avoid what all of the participants in these proceedings appeared to see as undesirable: a result that would restrict or preclude provincial efforts to address GHG emissions and GHG pricing.

[135] The "cumulative dimensions" concept advanced by Canada appears to carry with it something of the approach developed by the Supreme Court in connection with the regulation of the securities industry. That approach endorsed the notion of "systemic risk" as a tool for distinguishing, in the trade and commerce context, between matters that are national in scope and those that are local or intra-provincial. See: *Reference re Securities Act*; *Reference re Pan-Canadian Securities Regulation*.

[136] On the face of things, this idea has some attraction. But, a substantial difficulty lies just below the surface. There is no practical or operational break point between individual GHG emissions and *cumulative* GHG emissions. The reality is that the latter is no more than the direct and simple sum of the former. Regulating cumulative emissions is only possible through the

regulation of specific or individual emissions. Thus, recognizing federal authority over "the cumulative dimensions of GHG emissions", if that authority is to be meaningful, amounts to the same thing as recognizing Parliamentary authority over "GHG emissions" in the general sense.

[137] In the result, therefore, there is no difference of consequence between jurisdiction over "GHG emissions" and jurisdiction over "the cumulative dimensions of GHG emissions".

[138] Where does this lead? All things considered, it is not possible to conclude "GHG emissions" or, as Canada puts it in oral argument, "the cumulative dimensions of GHG emissions" fall within federal jurisdiction by virtue of the national concern doctrine. Even assuming a matter framed in this way has the sort of singleness, distinctiveness and indivisibility demanded by the *Crown Zellerbach* test, the fundamental distribution of legislative power under the *Constitution Act, 1867* would be upset if it were allocated to Parliament. As a result, this approach to federal jurisdiction in respect of GHG emissions does not survive the second part of the test prescribed by *Crown Zellerbach*. It follows that the POGG argument advanced by Canada cannot succeed.

[139] But, this does not end the inquiry. There is an alternative way to characterize the subject matter said to come under the national concern branch. As the Attorney General of British Columbia [British Columbia] suggests, it can also be seen as being in the nature of "the establishment of minimum national standards of price stringency for GHG emissions". "Stringency" in this context must be taken to embrace not just the charge per unit of GHG emission but also the scope or breadth of application of the charge in the sense of the sorts of fuels, operations and activities to which the charge applies. It must also include the authority to put in place such regulatory regimes as are necessary to operationalize a minimum pricing program and to make those regimes workable and appropriate in the economic and business environments where they apply. On that understanding of things, there is a good deal to recommend this approach.

[140] It might be useful to begin, however, by acknowledging that framing federal jurisdiction in this way could appear, at first blush, to involve a rather tight or narrow formulation of the matter in question. This is because the reach of the national concern doctrine is often described in more generalized subject matter terms. The obvious examples are: "aeronautics" (*Johannesson*

v Rural Municipality of West St. Paul (1951), [1952] 1 SCR 292 [*Johannesson*]; "atomic energy" (*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327); and "marine pollution" (*Crown Zellerbach*). Seen from this angle, "the establishment of minimum national standards of price stringency for GHG emissions" might seem to be a somewhat constricted characterization of a POGG subject matter. But, this ultimately does not detract meaningfully from the approach advanced by British Columbia.

[141] First, identifying an area of jurisdiction by using terminology such as "the establishment of ..." is wholly consistent with the Constitution. There are several examples of this very thing in the enumeration of matters assigned to Parliament and the provincial legislatures by the *Constitution Act, 1867*: "The Establishment, Maintenance, and Management of Penitentiaries" (s 91(28)); "The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province" (s 92(6)); and "The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals" (s 92(7)).

[142] Second, although marine pollution, aeronautics and atomic energy might come to mind first when thinking about how to characterize matters falling within the scope of the national concern branch, not all matters coming within that branch have been described in that same style. In *Munro v National Capital Commission*, [1966] SCR 663 [*Munro*], the matter said to be of national concern was identified as follows at page 671:

> I find it difficult to suggest a subject matter of legislation which more clearly goes beyond local or provincial interests and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance. Adopting the words of the learned trial judge, it is my view that the Act "deals with a single matter of national concern".
>
> (Emphasis added)

[143] Third, and more fundamentally, the real point is that the national concern doctrine is not designed to bring matters of some predetermined breadth under Parliamentary authority. Rather, it is concerned with matters which have, to use the words of Lord Watson, "attain[ed] such dimensions as to affect the body politic of the Dominion". The challenge in the application of the national concern doctrine is to delimit its reach. In this regard, there is no constitutional logic in

requiring all matters falling within its scope to have the same general complexion or breadth. If a narrowly definable matter is of national consequence and satisfies the *Crown Zellerbach* test, it should be no less eligible for inclusion under the national concern branch of POGG than broadly defined matters. Indeed, given the potentially disruptive impact of the national concern doctrine on the balance of federalism, there is much to recommend casting matters narrowly so long as that narrow cast still meets the *Crown Zellerbach* criteria and is not so confining as to preclude Parliament from having a meaningful or effective scope of authority.

[144] Finally, it is important to remember what lies behind the legal issues before the Court. The record indicates climate change has emerged as a major threat, not just to Canada, but to the planet itself. As Viscount Sankey famously observed in *Edwards v Attorney-General for Canada* (1929), [1930] AC 124 (PC) at 136, the *Constitution Act, 1867* is "a living tree capable of growth and expansion within its natural limits" and, as La Forest J. noted in *Hydro-Québec* at paragraph 86, "the Constitution must be interpreted in a manner that is fully responsive to emerging realities". If it is necessary to apply established doctrine in a slightly different way to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem to be entirely appropriate. It is also in keeping with what the Supreme Court has said about the utility of, where possible, allowing both Parliament and the provincial legislatures jurisdictional room to act in relation to the environment. See: *Hydro-Québec* at para 154. The choices of whether and how to use the tools available to Parliament or a legislature will, of course, be made by elected officials, not by judges.

4. Application of the *Crown Zellerbach* test

[145] Let me now deal, in more focussed terms, with the consideration of whether the establishment of minimum national standards of price stringency for GHG emissions can be sustained as a matter of federal jurisdiction under the national concern branch of POGG.

[146] The broad starting point concerns whether this matter is something of genuine national importance. On this front, there was no suggestion in the submissions made to the Court that the general question of GHG emissions, and the related problem of climate change, are anything other than issues of superordinate consequence. In light of this, it is not necessary to rehearse all of the considerations serving to confirm the significance and impact of GHG emissions.

[147] What then of the idea of minimum national standards of price stringency for GHG emissions? Significantly, the factual record before the Court indicates that GHG pricing is not just part and parcel of an effective response to climate change. It indicates that GHG pricing is regarded as an *essential* aspect or element of the global effort to limit GHG emissions. The following unchallenged features of the record are noteworthy in this regard:

(a) "There is widespread international consensus that carbon pricing is a necessary measure, though not a sufficient measure, to achieve the global reductions in GHG emissions necessary to meet the *Paris Agreement* targets" (Moffet affidavit at para 46).

(b) "A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way" (High-Level Commission on Carbon Prices, *Report of the High-Level Commission on Carbon Prices* (Washington, DC: World Bank, 2017) at 1).

(c) "There is a widespread trend in favour of carbon pricing … Overall, 67 jurisdictions … are putting a price on carbon" (Moffet affidavit at para 49).

(d) "The existing literature is highly convergent in finding that carbon prices that have been implemented around the world have been successful in reducing greenhouse gas emissions" (Nicholas Rivers affidavit affirmed October 5, 2018, at para 6(b)).

[148] In light of this, it is difficult to suggest GHG emissions prices and the more specific question of minimum national standards of price stringency for GHG emissions are anything other than matters of sufficient consequence to warrant consideration for inclusion under the national concern branch of POGG.

[149] With all of this by way of background or context, it is appropriate to turn now to the analysis expressly mandated by *Crown Zellerbach*. That analysis begins with the question of whether the establishment of minimum national standards of price stringency for GHG emissions has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. This question can readily be answered in the affirmative.

[150] The *Framework Convention* defines “greenhouse gases” as “those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation” (Article 1 at para 5). In his affidavit, Mr. Moffet provides this additional explanation:

> 31. Carbon dioxide, which has the molecular formula CO_2, is the gas most commonly understood by the general public to be a GHG. However, scientists have identified other GHGs, which are mostly, but not always, carbon containing gases. The [*Framework Convention*] requires reporting on emissions of seven GHGs: CO_2, methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3).

[151] Schedule 3 of the *Act* lists some 33 chemicals, more than the number referred to by Mr. Moffet, as being GHGs. However, there appears to be no disagreement about what is, or is not, a GHG. Certainly no such concerns were raised by any of the participants in these proceedings. In the result, it can be said that GHGs are a very particular type of environmental pollutant, a pollutant defined by a specific set of scientific or chemical characteristics. There is nothing in their nature that raises any concerns whatsoever about singleness, distinctiveness and indivisibility. They are readily identifiable and distinguishable from other gases.

[152] Further, there are no apparent difficulties in drawing distinctions between the authority to establish minimum national standards of price stringency for GHG emissions and other aspects of the regulatory world that might be concerned with such emissions. The *Act*, as a manifestation of the POGG matter under consideration, illustrates the point. There was no suggestion by Saskatchewan or its supporting intervenors of any operational problem in identifying the boundaries that circumscribe the scope of application of the *Act* or of any murkiness or lack of clarity in how the *Act* intersects with provincial areas of responsibility. Simply put, this is not a situation of the sort that troubled La Forest J. in *Crown Zellerbach* when he argued against recognizing marine pollution as a matter of national concern because, in his view, there was no clear demarcation between salt and fresh water.

[153] As part of the singleness, distinctiveness and indivisibility inquiry mandated by *Crown Zellerbach*, it is also relevant to consider, as Le Dain J. put it at page 432, “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”. In the present context, that would be the effect on extra-provincial interests of a failure by individual provinces to adopt minimum prices for GHG emissions.

[154] In general terms, the obvious reality is that GHG emissions do not respect provincial boundaries. As a result, the failure of one province to take action in respect of such emissions will have impacts on other provinces. In this broad sense, the situation with respect to GHG emissions parallels the situation with respect to (a) marine pollution as considered in *Crown Zellerbach* (where the failure of one province to protect its waters would lead to the pollution of the waters of other provinces), (b) the national capital region as dealt with in *Munro* (where the failure of cooperation between Ontario and Québec affected the country at large), and (c) aeronautics as considered in *Johannesson* (where the failure of a province to adopt standardized air traffic procedures and protocols would endanger the residents of other provinces). See: Hogg, *Constitutional Law of Canada* at c 17.3(b).

[155] More particularly, it is self-evident that, in dealing with GHG pricing, each province may only legislate intra-provincially. This means every province, individually, is directly vulnerable in at least two ways to the failure of other provinces to adequately price such emissions. To begin, a province must deal with the climate change impact caused by the failure of other provinces to adequately address GHG emissions or emissions pricing. Of course, given the relative insignificance of any province's emissions as compared to global emissions as a whole, this concern is perhaps more theoretical than real. A more concrete concern for an individual province is that the failure of other Canadian jurisdictions to adopt minimum GHG pricing could result in what is known as "carbon leakage". This is a phenomenon where GHG pricing increases the cost of production, and thereby affects competitiveness, leading businesses to shift jobs or investments to lower GHG cost jurisdictions. The question of how this concern plays out in practical terms among provinces is not well developed in the record. However, a study by Canada's Ecofiscal Commission in November of 2015 entitled *Provincial Carbon Pricing and Competitiveness Pressures* filed by British Columbia, and based on data analysis for four provinces, suggests these pressures are significant for only a few sectors.

[156] All of this said, a good deal of the real significance of individual provincial failures to price GHG emissions to a minimum level plays out on a different plane. Climate change is a global problem and, accordingly, it calls for a global response. Such a response can only be effectively developed internationally by way of state-to-state negotiation and agreement. This, of course, is the story of the *Framework Convention*, the *Kyoto Protocol*, the *Copenhagen Accord*,

and the *Paris Agreement*. In participating in these international processes, Canada is expected to make national commitments with respect to GHG reduction or mitigation targets. Those commitments are self-evidently difficult for Canada, as a country, to meet if not all provincial jurisdictions are prepared to implement GHG emissions pricing regimes – regimes that, on the basis of the record before the Court, are an essential aspect of successful GHG mitigation plans. This is not to suggest Parliament must somehow enjoy a comprehensive treaty implementation power in relation to the GHG issue. But, it is to say that the international nature of the climate change problem necessarily colours and informs an assessment of the effects of a provincial failure to deal with GHG pricing.

[157] It is true that the provinces, acting individually but cooperatively, could agree on a minimum national price for GHG emissions and thereby accomplish the same goal as the one sought by the *Act*. But this is not the point here. The point is that provinces could always withdraw from such arrangements and there is, accordingly, no assurance that coordinated provincial action would lead to a sustained approach to minimum GHG pricing. See: *Reference re Securities Act* at paras 120–121.

[158] Taking all of the foregoing into account, establishing minimum national standards of price stringency for GHG emissions can properly be seen as a matter that satisfies the *Crown Zellerbach* "singleness, distinctiveness and indivisibility" requirement.

[159] The second consideration in the *Crown Zellerbach* analysis is whether recognizing federal authority over the establishment of minimum national standards of price stringency for GHG emissions would have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. This question too can be answered in the positive.

[160] The scope of federal intrusion into the realm of provincial authority is the key distinction between a matter framed as being about minimum national pricing standards and one framed in terms of jurisdiction over GHG emissions generally or over the cumulative dimensions of such emissions. The authority to establish minimum national standards of price stringency does not empower Parliament to reach into areas of otherwise intra-provincial authority to regulate things like highway speeds and the content of livestock feeds simply because they have an impact on

GHG emissions. Rather, the establishment of minimum national standards of price stringency is no more than just that. Once the relevant standards are established, individual consumers and businesses are free to choose how they will respond, or not, to the price signals sent by the marketplace.

[161] Just as significantly, limiting federal jurisdiction to the matter of the establishment of minimum national standards of price stringency leaves plenty of room for provincial action in relation to GHG emissions. Unlike recognizing Parliamentary authority over GHG emissions generally or over the cumulative dimensions of GHG emissions, this approach does not put at risk the constitutional validity of provincial initiatives to price GHGs, either through carbon taxes or cap-and-trade systems.

[162] It can be seen, therefore, that recognizing a federal authority to establish minimum national standards of price stringency for GHG emissions satisfies the *Crown Zellerbach* requirement that bringing a matter under the national concern doctrine must not have an impact on provincial jurisdiction that is irreconcilable with the fundamental distribution of legislative powers envisioned by the Constitution.

[163] By way of a bottom line on this issue, the establishment of minimum national standards of price stringency for GHG emissions is a matter falling within federal jurisdiction by virtue of the national concern branch of POGG.

5. The validity of the *Act*

[164] Having worked through both the pith and substance of the *Act* and the scope of Parliament's jurisdiction in relation to GHG pricing, it is now possible to determine the validity of the *Act*. As explained earlier, this involves an inquiry as to whether the pith and substance of the *Act* comes within a head of federal authority. The answer to that inquiry is self-evident in light of the foregoing analysis. The pith and substance of the *Act* is about establishing minimum national standards of price stringency for GHG emissions. Parliament has jurisdiction over this subject matter by virtue of the national concern branch of POGG. It follows that the *Act* is constitutionally valid. This, of course, is precisely the same kind of analysis that, for example, would lead a court to say, because the pith and substance of the *Bank Act*, SC 1991, c 46, is

banking, and because Parliament has jurisdiction over "banking" by virtue of s. 91(15) of the *Constitution Act, 1867*, therefore the *Bank Act* is constitutionally valid.

D. Can the *Act* be upheld under heads of jurisdiction identified by the intervenors?

[165] Intervenors supporting the validity of the *Act* advance various grounds on which they suggest the *Act*, or features of it, can be found to be upheld. Canada does not make any of these arguments itself. However, perhaps not surprisingly, Canada advises that it would not object if the Court upheld the *Act* on one or more of these other grounds. With that, and in the interest of completeness, I turn to briefly consider these additional arguments.

1. The general trade and commerce power

[166] The intervenors Canadian Environmental Law Association and Environmental Defence Canada, Inc. submit that Part 2 of the *Act* falls within Parliament's jurisdiction over trade and commerce as per s. 91(2) of the *Constitution Act, 1867*. The intervenor International Emissions Trading Association goes further to contend the *Act* as a whole can be sustained by the trade and commerce power.

[167] Subsection 91(2) confers on Parliament the authority to make laws in relation to "[t]he Regulation of Trade and Commerce". Despite this broad language, it is well settled that federal authority in relation to this subject is confined to (a) interprovincial and international trade and commerce, and (b) "general regulation of trade affecting the whole dominion". See: *Reference re Securities Act* at para 75. The second branch of s. 91(2), what has become known as the "general" trade and commerce power, is at issue here.

[168] In *General Motors*, the Supreme Court identified five non-determinative considerations to be taken into account when answering whether a subject matter comes within the general branch of s. 91(2):

(a) Is the law a part of a general regulatory scheme?

(b) Is the scheme under the oversight of a regulatory agency?

(c) Is the law concerned with trade as a whole rather than with a particular industry?

(d) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?

(e) Would a failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?

[169] The Court explained in *Reference re Securities Act* that these considerations play into the division of powers analysis in the following way:

> [109] The *General Motors* indicia invite the Court to examine the legislative scheme through the lens of five interrelated inquiries to determine whether, viewed in its entirety, it addresses a matter of genuine national importance and scope that goes to trade as a whole in a way that is distinct from provincial concerns. The inquiry focuses on the nature of the proposed scheme and its purpose and effects, intended and actual. It is contextual, grounded in the record and the legislative facts. …

[170] The intervenors who invoke the general trade and commerce power to sustain the *Act* submit that, seen in context, it satisfies the five *General Motors* indicia. As for the first indicium, it is contended that the *Act* as a whole sets out a general regulatory scheme directed at reducing GHG emissions. Second, it is argued that there is a general regulatory agency in the person of the Minister of the Environment and Climate Change who has ultimate responsibility for the *Act*. Third, the intervenors who rely on s. 91(2) argue that the *Act* is directed at trade as a whole because it does not target a particular industry and because it implements international commitments to reduce GHG emissions. As for the fourth *General Motors* indicium, it is argued that the provinces, acting on their own, would not be able to implement a national scheme of the sort found in the *Act*. Finally, and with respect to the fifth *General Motors* indicium, it is contended that the scheme of the *Act* would be jeopardized if one or more provinces were left outside of its reach.

[171] There are some reasonably self-evident difficulties with several aspects of this argument but I find it unnecessary to examine them in detail. This is because the trade and commerce argument advanced by the intervenors cannot succeed for a very basic reason. The *Act*, in its pith and substance, does not concern trade and commerce. It concerns the mitigation of GHG emissions and, more specifically, the establishment of minimum national standards of price stringency for such emissions. In this regard, I take the same general view as did Lamer C.J.C.

and Iacobucci J. in *Hydro-Québec* when they dismissed an argument that the *Canadian Environmental Protection Act* could be sustained under the trade and commerce power:

> 82 We reject these submissions for two main reasons. First, it is clear that the "pith and substance" of the impugned legislation does not concern trade and commerce, even if trade and commerce may be affected by the application of these provisions. The interveners Pollution Probe et al. seem to recognize this insofar as they submit that the trade and commerce power merely provides "supplemental authority" for upholding the Interim Order and the enabling provisions.
>
> 83 Secondly, even if it could be assumed that certain parts of s. 34(1) of the Act were aimed at the regulation of trade and commerce (e.g. those paragraphs dealing with importing and exporting), the remainder of s. 34(1) would, based on the arguments adduced above, be *ultra vires* Parliament and would have to be struck down. Assuming that the "trade and commerce" elements could be saved, therefore, they would have to be "severed" from the paragraphs of s. 34(1) that would be struck down. It is not altogether clear that this could be done, particularly since the portion of the statute remaining after severance must be capable of standing independently of the severed portion. In this case, the paragraphs are too "inextricably bound" to be able to survive independently (see Hogg, *supra*, at p. 15-21). For these reasons, we cannot agree with the interveners' submission that the impugned legislation can be justified as an exercise of the federal trade and commerce power.
>
> (Emphasis in original)

The majority of the Court did not consider the general trade and commerce power.

[172] There can be no doubt, of course, that the *Act* has economic impacts or, indeed, that it attacks the GHG problem by using economic tools. The charge imposed pursuant to Part 1 will raise fuel costs and the output-based performance standards system established by Part 2 will affect business decisions and create tradeable offset credits. But, all of this is wholly incidental to the core purpose and effect of the *Act* – the establishment of minimum national standards of price stringency to promote the mitigation of GHG emissions. Although their comments were not offered with the precise details of the *Act* in mind, I agree with the observations made by Shi-Ling Hsu and Robin Elliot in "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54 McGill LJ 463 at 490:

> … At bottom, it seems that the trade and commerce power is intended to vest the federal government with jurisdiction over economic matters. This is especially true with respect to the second branch of that head of power, the "general" trade and commerce branch. The leading case on that branch, *City National Leasing*, uses the word "economic" repeatedly. If *City National Leasing* were not limited to economic cases, there would be little to distinguish the trade and commerce power from the national concern branch of the POGG provision. While Professor Elgie has argued that emissions trading serves an economic purpose by seeking to concentrate compliance costs among those that can

> reduce emissions at the lowest cost, there is no denying that both cap-and-trade programs and emissions-intensity programs have an environmental objective as their core purpose.
>
> (Footnotes omitted)

[173] In the end, it must be concluded that neither the *Act* as a whole nor Part 2 of the *Act*, in particular, can be sustained by Parliament's trade and commerce power.

2. Treaty powers

[174] Ecofiscal Commission of Canada and International Emissions Trading Association suggest Canada's power to implement treaties may provide the necessary authority to sustain the *Act*. They submit that, because the *Act* is intended to assist Canada in meeting its obligations under the *Paris Agreement*, it falls within this federal authority.

[175] This line of argument cannot succeed. Section 132 of the *Constitution Act, 1867* grants Parliament the power to enact legislation necessary to implement "[t]reaties between the Empire and such Foreign Countries". However, its scope was significantly limited by the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario*, [1937] AC 326 [*Labour Conventions*].

[176] Writing in *Labour Conventions*, Lord Atkin reached three critical conclusions. First, treaties are not self-executing. In other words, they do not have the force of law by virtue of their ratification. Implementation requires legislative action. Second, s. 132 authorizes only the performance of obligations arising by virtue of treaties between the British Empire and foreign countries. It does not, and cannot, extend to authorize the performance of treaties between Canada and foreign countries. Third, there is no such thing as "treaty legislation". Whether the federal government or the provinces have jurisdiction to implement a treaty is determined by considering the distribution of legislative powers found in ss. 91 and 92 of the *Constitution Act, 1867*. In the words of Lord Atkin, "[t]he Dominion could not, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth" (at 327).

[177] For these reasons, there is no federal treaty implementation power that can be relied upon in the present matter. Federal jurisdiction to implement legislation in accordance with Canada's *Paris Agreement* commitments must be found in the *Constitution Act, 1867*.

3. Criminal law power

[178] A number of intervenors, including Canadian Public Health Association, Athabasca Chipewyan First Nation, Canadian Environmental Law Association, Environmental Defence Canada, Inc., Ecofiscal Commission of Canada, Intergenerational Climate Coalition, and International Emissions Trading Association, suggest the *Act* can be sustained under Parliament's criminal law power.

[179] Subsection 91(27) of the *Constitution Act, 1867* gives Parliament jurisdiction in respect of "[t]he Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters". As a general proposition, legislation can fall within the ambit of s. 91(27) if it features a valid criminal law purpose backed by a prohibition and a penalty. See: *RJR-MacDonald* at para 28; *Reference re Firearms Act* at para 27.

[180] Accordingly, the first step in deciding if the *Act* might be classifiable as criminal law is to determine whether it has a valid criminal law purpose. The touchstone in this inquiry is Rand J.'s observation in *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at 50 [*Margarine Reference*]: "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law". In *Hydro-Québec*, La Forest J., for the majority, made it clear that the protection of the environment is a public purpose falling within Rand J.'s formulation. He concluded stewardship of the environment is a fundamental societal value and that "Parliament may use its criminal law power to underline that value" (at para 127).

[181] Consequently, a federal law aimed at the reduction of GHG emissions could be seen as having a valid criminal law purpose. This, of course, is a different and broader purpose than the one identified and discussed above in respect of the *Act*. However, in order to facilitate an analysis of the criminal law argument, it will be useful to proceed on the assumption that the purpose of the *Act* can be framed, at least in the alternative, as involving a valid criminal law purpose.

[182] With that word about purpose, it is appropriate to turn to the second step of the criminal law analysis: the issue of prohibitions and penalties. In this regard, it is necessary to consider the terms of the *Act* itself in order to appreciate the particulars of the intervenors' s. 91(27)

submissions. It is useful to begin with Part 1 and the charges on fuel and combustible waste. For present purposes, the heart of this regime appears to be found in ss. 17(1) and 25. They read as follows:

> 17 (1) Subject to this Part, a particular registered distributor in respect of a type of fuel that delivers, at a particular time, fuel of that type in a listed province to another person must pay to Her Majesty in right of Canada a charge in respect of the fuel in the listed province in the amount determined under section 40. The charge becomes payable at the particular time.
>
> …
>
> 25 Subject to this Part, every person that, at a particular time, burns combustible waste in a listed province for the purposes of producing heat or energy must pay to Her Majesty in right of Canada a charge in respect of the combustible waste and the listed province in the amount determined under section 41. The charge becomes payable at the particular time.

[183] There are also various allied provisions that create obligations to pay the charge in the context of such things as use of fuel by a registered distributor, bringing fuel into a listed province, fuel production, diversion of fuel from covered facilities and diversion of fuel by registered users, farmers and fishers. See: ss. 18, 19, 20(2)–(3), 21, 22, 23, 24 and 24.1. None of these provisions involves a prohibition of any sort. They do no more than impose a positive obligation to pay the relevant charges.

[184] Part 1 does create a number of offences. However, they are concerned only with ensuring compliance with the scheme created by Part 1, not with the prohibition and punishment of any threat to the environment. I refer here, for example, to s. 123 (failing to file a return), s. 126 (failing to register), s. 128 (failing to answer a demand), s. 129 (failing to provide information), and s. 131 (making false statements). In sum, these provisions are also regulatory in nature.

[185] The only arguable exception to all of this is s. 135 of the *Act*. It creates an offence, and prescribes a penalty, for intentionally failing to pay a charge:

> 135 Every person that intentionally fails to pay a charge as and when required under this Part is guilty of an offence punishable on summary conviction and liable, in addition to any penalty or interest otherwise provided, to
>
> > (a) a fine not exceeding the aggregate of $1,000 and an amount equal to 20% of the amount of charge that should have been paid;
> >
> > (b) imprisonment for a term not exceeding six months; or
> >
> > (c) both a fine referred to in paragraph (a) and imprisonment for a term not exceeding six months.

[186] The thrust of the intervenors' submission is that s. 135 grounds Part 1 in Parliament's criminal law jurisdiction because the purpose of the charges in question is to increase the price of GHG emissions so as to thereby incentivize steps to reduce such emissions and hence mitigate climate change, a valid criminal law purpose. Accordingly, so the argument goes, making the failure to pay the charge an offence serves to protect the environment. In taking this approach, the intervenors who advance it draw on the jurisprudence establishing that Parliament may use indirect means to achieve its criminal law ends and that a direct and total prohibition of the "evil" in issue is not a necessary feature of a valid exercise of the criminal law power. See: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 SCR 1123, and *RJR-MacDonald*.

[187] The argument concerning Part 2 of the *Act* is to a similar effect. The essential core of Part 2 is s. 174. Subsection 174(1) provides that a person responsible for a covered facility that emits GHGs in a quantity exceeding the applicable emissions limit must pay compensation for the excess emissions. Subsection 174(2) indicates this can be done either by way of an excess emissions charge, the remittance of compliance units to the Minister, or a combination of both. These provisions are set out below:

> 174 (1) A person that is responsible for a covered facility that emits greenhouse gases in a quantity that exceeds the emissions limit that applies to the covered facility during a compliance period must, in accordance with the regulations, provide compensation for the excess emissions by the increased-rate compensation deadline.
>
> (2) The compensation is to be provided, at a rate set out in subsection (3) or (4), by means of
>
> (a) a remittance of compliance units to the Minister or a person specified in the regulations in lieu of the Minister;
>
> (b) an excess emissions charge payment to Her Majesty in right of Canada; or
>
> (c) a combination of both.

Notably, there is no prohibition in any of this. A covered facility may emit whatever volume of GHGs its operator chooses. The only "sanction" for exceeding an emissions limit is the obligation to provide the Minister with the required amount of compensation.

[188] However, Part 2 also includes a number of offence provisions. Overall, like the offence provisions in Part 1, they are concerned with ensuring compliance with the underlying regulatory scheme rather than with the proscription of the "evil" of GHG emissions. Thus, for example,

s. 232(1) makes it an offence to knowingly make a false or misleading statement to an enforcement officer or analyst, obstruct an enforcement officer or analyst, or knowingly destroy, mutilate, conceal or otherwise dispose of records.

[189] Paragraph 233(1)(a) is somewhat different and, as a result, it stands as the key to the intervenors' criminal law argument. It is a general provision that says every person commits an offence who contravenes any provision of Part 2:

> 233 (1) Every person commits an offence who
>
> > (a) contravenes any provision of this Part, other than a provision the contravention of which is an offence under paragraph 232(1)(a)[.]

Consequently, s. 233(1)(a) has the effect of making it an offence not to pay the compensation for excess emissions required by s. 174(1). Subsection 233(2) sets out penalties for this offence.

[190] As is the case with s. 135, it is argued that s. 233(1)(a) engages Parliament's criminal law power because, by sanctioning failures to pay compensation in respect of excess GHG emissions, the section helps ensure the cost of such emissions is increased and thereby incentivizes industrial operations to reduce or limit them with the follow-on effect of mitigating climate change. In this way, it is suggested, s. 233(1)(a) anchors Part 2 in the criminal law.

[191] While the intervenors' arguments about the criminal law power are by no means devoid of merit, at the end of the day they cannot succeed. The legislative scheme put in place by the *Act* is distinguishable from those at issue in the Supreme Court decisions the intervenors use to build their submissions. Although those decisions have extended the reach of s. 91(27) to include laws with a regulatory flavour or dimension, they have not pushed the relevant doctrine so far as to bring the *Act* within the reach of Parliament's criminal law power.

[192] *RJR-MacDonald* is the decision most useful to the intervenors. It upheld a federal legislative initiative targeted at the detrimental health effects caused by tobacco consumption. The law in question did not attempt to directly ban the consumption or manufacture of tobacco products. Rather, it prohibited their advertisement, their promotion and their sale without a printed health warning on the packaging. This indirect approach to dealing with an evil does, of course, have arguable parallels to the situation at issue here, i.e., rather than proscribing GHG emissions, the *Act* uses the indirect power of price and market forces to mitigate them. But, the

critical gap in this analogy is that, unlike the legislation at issue in *RJR-MacDonald*, the operational center of the *Act* does not prohibit anything. It merely attaches a cost to GHG emissions. Consumers, businesses and institutions are free to emit as they please subject only to the payment of the charges in question.

[193] *Hydro-Québec* concerned the *Canadian Environmental Protection Act*. It featured an administrative process for identifying toxic substances. However, once identified, those substances were subject to prohibitions. This is the point for present purposes. The key bottom line of the legislation was prohibitions and penalties not, as here, financial charges with no prohibitions of any sort on GHG emissions themselves. The specific order at issue in *Hydro-Québec* provided that "[t]he quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day" (at para 5). This reflects a very different approach to the problem of noxious chemicals than the one employed in the *Act*.

[194] *Reference re Firearms Act* involved a situation where the applicable legislation prescribed a scheme of licences and registrations. But, at the bottom line, the *Firearms Act* and the *Criminal Code* set out prohibitions backed by penalties: Section 112 of the *Firearms Act* prohibited the possession of a firearm without a registration certificate. Section 91 of the *Criminal Code* prohibited the possession of a firearm without a licence and a registration certificate. Again, this is different than the *Act* where the heart of the substantive regime is not a prohibition but a charge designed to put a price on GHG emissions so as to incentivize changes in behaviour.

[195] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, featured a three-way split on the Supreme Court about the reach of the criminal law power and the extent to which it could sustain prohibitions qualified by exceptions or subject to regulatory or licencing requirements. Nonetheless, the point for present purposes is that the *Act* turned on the prohibition, either absolute or qualified, of various practices. This too is unlike the situation at hand.

[196] The regime put in place by the *Act* is also different than the one considered in *Syncrude Canada Ltd. v The Attorney General of Canada*, 2016 FCA 160, a case where the Federal Court of Appeal upheld regulations made pursuant to the *Canadian Environmental Protection Act*. The

regulations required two percent of the content of diesel fuel to be renewable fuel. The Court held that, by displacing the combustion of fossil fuels and thereby reducing GHG emissions, the regulation had been made in pursuance of a valid criminal law purpose. Given that it was coupled with a statutory prohibition against producing, importing or selling a fuel that did not meet prescribed standards and a penalty for not complying with the prohibition, the regulation was upheld as being in relation to criminal law. Thus, unlike in the present case, there were prohibitions against the sale of fuel that did not meet a prescribed standard.

[197] In order to maintain a proper set of bearings on the criminal law issue, it is useful to note what the Supreme Court said in *Reference re Firearms Act*, not necessarily by way of a description of a formal test for constitutional validity, but by way of a summary of its analysis:

> 4 We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. …

[198] It is not possible to make a similar statement about the *Act*. In other words, to paraphrase the passage from *Reference re Firearms Act* just quoted, it is not possible to say "the *Act* in 'pith and substance' is directed to protecting the environment through prohibitions and penalties … While it has regulatory aspects, they are secondary to its primary criminal law purpose". To the contrary, the essence of the *Act*, as explained above, is to ensure minimum national standards of price stringency for GHG emissions. As its preamble says, "it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada". This, not prohibitions, is what the *Act* is about. In other words, while it might be possible to see the *Act* as having a valid criminal law purpose, it does not turn on prohibitions and penalties.

[199] In the end, it is not possible to accept the submissions that the *Act* can be sustained under Parliament's criminal law power.

4. The emergency power

[200] Athabasca Chipewyan First Nation, David Suzuki Foundation, and Intergenerational Climate Coalition submit the *Act* can be sustained under the "emergency" branch of the POGG power. The key hallmark of this power is that it operates only in relation to legislation of a temporary nature. See: *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 427, 437 and 461; *Crown Zellerbach* at 432.

[201] The intervenors contend that the national peril posed by climate change is an emergency and that the *Act* is required only in the short term to set in motion a transition to a low carbon future. David Suzuki Foundation analogizes the *Act* to war-time powers, saying that neither wars nor climate change run on fixed timetables. It suggests legislation enacted to deal with an emergency will be valid until the emergency abates and no longer.

[202] These arguments cannot prevail. Climate change is doubtless an emergency in the sense that it presents a genuine threat to Canada. However, the factual record before the Court cannot sustain a view that the climate change challenge is in any way short run or that the *Act* is intended to have, or is expected to have, a life of limited duration. This is unlike wars as typically understood. They are conflicts of uncertain length but nonetheless conflicts with an endpoint. Notwithstanding that the *Paris Agreement* sets goals to be accomplished by 2030, Canada does not suggest the *Act* will operate in anything other than an indefinite or long-term timeframe.

5. Section 35 of the *Constitution Act, 1982*

[203] Athabasca Chipewyan First Nation submits the constitutional validity of the *Act* does not turn exclusively on the *Constitution Act, 1867* and, in this regard, it points to s. 35 of the *Constitution Act, 1982*, which recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". Athabasca Chipewyan First Nation contends that, because the *Act* mitigates threats to Aboriginal and treaty rights, its validity is supported by s. 35. Assembly of First Nations also supports the *Act*, suggesting the federal government is constitutionally bound to address the impact of GHG emissions on First Nations people. It also suggests the concept of the honour of the Crown requires the federal government to address the role of First Nations in implementing GHG regulatory schemes.

[204] It is not possible to deal fully with these submissions in the context of this proceeding because the factual record bearing on them is simply too thin. In any event, neither Athabasca Chipewyan First Nation nor Assembly of First Nations suggests the *Act* is unconstitutional.

E. A final issue

[205] The intervenors Saskatchewan Power Corporation [SaskPower] and SaskEnergy Incorporated [SaskEnergy] are Crown corporations declared in their constituting legislation to be agents of the Crown in right of Saskatchewan. See: *The Power Corporation Act*, RSS 1978, c P-19, s 3(3); *The SaskEnergy Act*, SS 1992, c S-35.1, s 6.

[206] In their submissions, SaskPower and SaskEnergy contend the *Act* imposes taxes on them in a way that runs afoul of s. 125 of the *Constitution Act, 1867*. Section 125 provides that "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation". SaskPower and SaskEnergy also point to s. 92A(1)(c) of the *Constitution Act, 1867* which provides that provincial legislatures may exclusively make laws in relation to the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy". SaskPower and SaskEnergy contend they are immune from the *Act* by virtue of both s. 125 and s. 92A. In its final oral submissions, Saskatchewan took the same position and submitted the Court should find the *Act* to be inapplicable to SaskPower and SaskEnergy.

[207] In the context of these proceedings, this argument is problematic. The law recognizes a clear distinction between the constitutionality of a law, on the one hand, and its constitutional applicability on the other. A law that is unconstitutional is wholly void and of no force or effect. A law that is constitutionally inapplicable is valid, but is not operative in relation to specific entities.

[208] The *applicability* of the *Act* is not part of the question posed by the Lieutenant Governor in Council. It has asked the Court for an opinion as to whether the *Act* is "unconstitutional in whole or in part", not for an opinion as to whether the *Act* is constitutionally inapplicable in certain situations or in relation to SaskPower and SaskEnergy in particular. If the Lieutenant Governor in Council had been concerned with the constitutional applicability of the *Act* to SaskPower and SaskEnergy, it presumably would have formulated a question in relation to that

issue. Canada understood the situation in this same way and therefore made no submissions about the applicability of the *Act*.

[209] In these circumstances, it would not be appropriate to offer an opinion about the application of the *Act* to SaskPower and SaskEnergy.

V. CONCLUSION

[210] The advisory opinion offered in response to the question posed by the Lieutenant Governor in Council is as follows: "The *Greenhouse Gas Pollution Pricing Act* is not unconstitutional either in whole or in part".

"Richards C.J.S."

Richards C.J.S.

I concur. "Jackson J.A."

Jackson J.A.

I concur. "Schwann J.A."

Schwann J.A.

Ottenbreit and Caldwell JJ.A.

I. INTRODUCTION

[211] In this reference brought by the Lieutenant Governor in Council under s. 2 of *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, the Court is asked to provide an advisory opinion on the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*Act*], under the *Constitution Act, 1867*.

[212] We have read the opinion of Chief Justice Richards and, while there is much with which we concur, we must respectfully part company as to the pith and substance of the *Act*. Our conclusion in that regard leads our analysis under Parliament's 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" [POGG] in a different direction.

[213] In our opinion:

(a) Part 1 of the *Act* is invalid, being an unconstitutional delegation of Parliament's law-making power under s. 91(3) of the *Constitution Act, 1867* and being contrary to s. 53 of the *Constitution Act, 1867*.

(b) The *Act* cannot be sustained as a valid exercise of Parliament's other enumerated law-making powers under s. 91 of the *Constitution Act, 1867* nor can it be sustained under POGG.

II. THE *CONSTITUTION ACT, 1867*

[214] The *Constitution Act, 1867* divides all law-making power in Canada between Parliament and the Provincial legislatures. This is both the heart and the lifeblood of Confederation. The balance of power struck under the *Constitution Act, 1867* was critical to the formation of Canada and remains critical to our continued confederation. In *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 SCR 837 [*2011 Securities Reference*], the Supreme Court of Canada wrote *per curiam*:

> [7] It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. Accepting Canada's interpretation of the general trade and commerce power would disrupt rather than maintain that balance. Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension.

Later in the *2011 Securities Reference*, the Court wrote:

> [60] As Dickson C.J. pointed out, a restrained approach to doctrines like federal paramountcy is warranted. This point was reiterated by Binnie and LeBel JJ. in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, where the Court said:
>
> > The [constitutional] doctrines [developed by the courts] must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity [and] they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism" (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56, at para. 10). [para. 24]
>
> [61] While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.
>
> [62] In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.

[215] Under Canadian federalism, our federal and provincial governments treat each other as equals or partners (and as adversaries, at times) who together provide good governance by engaging in intergovernmental dialogue that leads to harmonised laws and agreements as to cooperation between or among the federal and provincial levels of government (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 17–19, 428 DLR (4th) 68 [*2018 Securities Reference*]). This is the way in which Canadian federalism brings to bear the totality of law-making power on an issue of governmental concern (*R v Comeau*, 2018 SCC 15 at paras 78–82, [2018] 1 SCR 342). The balance carefully struck in the *Constitution Act, 1867* is what makes this possible and what makes it necessary. Although there is a natural tendency to do so, it is existentially dangerous to Confederation to disrupt this balance (Eugénie Brouillet,

"Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR (2d) 601 at 602):

> Within contemporary federations, a tendency towards the centralization of powers can be seen to result from judicial review based upon the distribution of powers. This trend is apparently characteristic of democratic societies. According to Tocqueville, "… the intellect of democratic nations is peculiarly open to simple and general notions. Complicated systems are repugnant to it, and its favorite paradigm is that of a great nation composed of citizens all resembling the same pattern, and all governed by a single power." This results in "a natural tendency in every organized society to strengthen its centre". This proclivity towards centralization of power and enforced standardization raises crucial questions in a federative context. At the theoretical and normative levels, the federative principle requires a balance between the forces tending towards diversity and those pushing towards unity and, therefore, a balance in the exercise of the legislative powers of the federal and federated levels of government. These powers are, in fact, the primary legal manifestation of the twin desires for unity and diversity.
>
> Canada is no exception to this trend towards the concentration of powers. In 1949, the abolition of the right of appeal to the Judicial Committee of the Privy Council made the Supreme Court of Canada the court of last resort in all matters. From this point on, the federative stance of the Judicial Committee, careful to preserve the balance between the powers of the two levels of government by protecting the autonomy of the federal and provincial parliaments within their areas of jurisdiction, was gradually eroded by a centralizing interpretation of powers, leading to a federative imbalance. The Supreme Court's reasoning in decisions involving the distribution of powers are increasingly founded on considerations that promote efficiency over diversity.
>
> (Footnotes omitted)

[216] Parliament and the Provincial legislatures are sovereign within their own heads of power or spheres of jurisdiction. Canadian federalism enshrines the principle of autonomy at each level of government so as to permit independent development and promotion of local and national political and policy priorities within the enumerated heads of power. The object of the *Constitution Act, 1867* was not to "weld the provinces into one, nor to subordinate Provincial Governments to a central authority" (*Re The Initiative and Referendum Act*, [1919] AC 935 (PC) at 942).

[217] Jurisdictional disputes between the Provincial legislatures and Parliament that are based on differing priorities and policies bring instability to the balance of power. In circumstances such as this reference, the necessity to maintain the proper balance between federal and provincial interests is acute. As to the role of the Courts in these constitutional disputes, the Supreme Court advised in the *2011 Securities Reference*:

> [55] Inherent in a federal system is the need for an impartial arbiter of jurisdictional disputes over the boundaries of federal and provincial powers (*Reference re*

> *Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124). That impartial arbiter is the judiciary, charged with "control[ling] the limits of the respective sovereignties" (*Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741). Courts are guided in this task by foundational constitutional principles, which assist in the delineation of spheres of jurisdiction. Among these, the principle of federalism "has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution" (*Secession Reference*, at para. 57).

A. The division of powers

[218] The division of law-making power in Canada largely occurs under s. 91 and s. 92 of the *Constitution Act, 1867*, although ss. 93 to 95 also set out law-making powers. In the constitutional lexis, s. 91 and s. 92 contain broad terms. The framers of the *Constitution Act, 1867* used phrases like "The Regulation of Trade and Commerce" and "The raising of Money by any Mode or System of Taxation" to describe federal law-making powers and phrases like "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" for the law-making powers of the Provincial legislatures.

[219] This reference calls upon the Court to examine the *Constitution Act, 1867* to determine whether the *Act*, or its constituent Parts, comes within any of the enumerated law-making powers of Parliament or falls under Parliament's POGG power. The crucial point here is that *all* law-making power is found within the text of the *Constitution Act, 1867*, and is assigned, chiefly under s. 91 and s. 92, to either Parliament or the Provincial legislatures.

B. Sections 91 and 92

[220] Courts that are called upon to scrutinise the constitutionality of a law must first have regard for the introductory language of s. 91 and s. 92 of the *Constitution Act, 1867*:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, [Parliament's heads of power omitted].

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, [the Provincial legislatures' heads of power omitted].

[221] Although the framers of our Constitution were more longwinded under s. 91, the introductory language of both s. 91 and s. 92 is an harmonious articulation of four conceptual principles that underpin the division of law-making power between Parliament and the Provincial legislatures, namely:

(a) law-making powers are exercisable *in relation to* matters;

(b) *matters* come within classes of subjects;

(c) *classes of subjects* are enumerated, and are thereby assigned to Parliament or the Provincial legislatures, under s. 91 and s. 92; and

(d) all law-making powers so assigned are *exclusive* to the assignee.

[222] Because the *Constitution Act, 1867* does not define the word *matter* or explain what is meant by the making of a law *in relation to* a matter, the courts have given meaning to those conceptual principles. A *matter* is a notional construct imagined by a court to rationalise or explain how a particular law comes within the 31 classes of subjects assigned to Parliament under s. 91, or fits under POGG, or comes within the 16 classes of subjects assigned to Provincial legislatures under s. 92. This is not, however, to say that matters are merely the constructs of the courts.

[223] When constructing a matter, the courts must have regard for the classes of subjects enumerated under s. 91 and s. 92 because most matters will *come within* one of those classes of subjects. And, all matters "not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" fall under Parliament's POGG power. Moreover, as each government exercises *exclusive* or plenary law-making power over all matters coming within their enumerated classes of subjects (and, for Parliament, those matters that fall under POGG), the classes of subjects serve to limit the breadth or scope of a matter. This reference poses the perfect example.

[224] In this reference, the *environment* is an intellectual construct that is too "abstruse" to be examined as a matter within the constitutional dialectic "without considerable overlap and uncertainty" (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 [*Oldman River*]). This is because characterising the environment as a matter in constitutional terms would be to inappropriately treat an abstract concept as if it were a concrete one. In past jurisprudence, courts have ruled that the environment does not itself come within any of the classes of subjects assigned to Provincial legislatures or any of the classes of subjects assigned to Parliament. Justice La Forest explained this in *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*]:

> [112] In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River, supra*, made it clear that *the environment is not, as such, a subject matter of legislation under the Constitution Act, 1867*. As it was put there, "the *Constitution Act, 1867* has not assigned the matter of 'environment' *sui generis* to either the provinces or Parliament" (p. 63). *Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial* (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, *what must first be done is to look at the catalogue of legislative powers listed in the Constitution Act, 1867 to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (ibid. at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.*
>
> (Emphasis added)

[225] The *exclusivity* principle that runs through s. 91 and s. 92 affects the courts' construction of matters in another way. Again, using the environment as the example, if the environment were a constitutionally acceptable matter, either Parliament or the Provincial legislatures would have the exclusive power to make laws in respect of it. The courts have recognised that such a result would undermine Confederation by disproportionately shifting the balance in law-making power toward one of Parliament or the Provincial legislatures. In *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 [*Moses*], the Supreme Court wrote, with respect to the federal exercise of jurisdiction over the environment:

> [120] An inquiry into which level of government has environmental jurisdiction over the Project must begin with the oft-repeated observation that the environment is not a matter over which one level of government has exclusive jurisdiction. As La Forest J. said in *Oldman* (at p. 63):

> I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.
>
> [121] Legislation on environmental matters must therefore be related to at least one constitutional head of power. The inquiry into whether federal jurisdiction can be validly invoked turns on whether the activity or, as in this case, the project can be viewed as having a federal aspect. Thus, federal jurisdiction will be validly exercised, and federal environmental legislation will apply to the extent that the legislation is "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction": *Oldman*, at p. 72. Federal legislation concerning the environment has been upheld on the bases, for example, of the national concern branch of the s. 91 peace, order, and good government power (*R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401) and of the s. 91(27) criminal law power (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

[226] As this suggests, to avoid the error of hypostatisation, the courts have constructed more constitutionally-palatable notions of a matter so as to shoehorn a federal environmental law into a federal class of subjects or to minimise the damage done to the balance of power under POGG when carving a matter out of Provincial heads of power. For example, in *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 [*Crown Zellerbach*], the Court found the matter of "dumping of substances in marine waters" was narrow enough to fall within POGG.

[227] Another interpretive principle that requires understanding is that of laws being made *in relation to* a matter. Again, to assist with the understanding of *in relation to*, the courts have constructed counterpart concepts of a law being *ancillary to* or *incidental to* a matter (*British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para 28, [2005] 2 SCR 473; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28, [2007] 2 SCR 3 [*Canadian Western Bank*]). A law made *in relation to* a matter is a law that addresses the essence of the matter. A law that is *ancillary to* a matter is one that may affect the matter in an incidental way, but not in any essential way. The point here is that a court must determine the central or predominant focus of the federal law so as to determine whether the law is *in relation to* a *matter* coming within one of the *classes of subjects* enumerated in s. 91.

[228] The Supreme Court has said that a law is in relation to a matter when its "essential character" (*Reference re Firearms Act (Can.)*, 2000 SCC 31 at para 15, [2000] 1 SCR 783 [*Firearms Reference*]), its "main thrust" (*2011 Securities Reference* at para 63), or its *pith and substance* are all about the matter in question. Justices LeBel and Deschamps, in *Reference re*

Assisted Human Reproduction Act, 2010 SCC 61, [2010] SCC 61 [*Reproduction Reference*], set out a number of the other ways the judiciary has explained what is meant by pith and substance:

> [184] ...The identification of the pith and substance focusses on the rule applicable to the facts or conduct. The pith and substance is identified by considering both the rule's purpose and its effects: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 53-54. Several expressions have been used to describe the purpose of a rule: "dominant purpose" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29), "leading feature or true character" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-82), and "dominant or most important characteristic" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63). We will use the expression "dominant purpose", which incorporates all the necessary nuances.

In addition, the term *pith and substance* has been described as "the essence of what the law does and how [it does] it" (*Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para 16, [2009] 1 SCR 624) and as a law's "true meaning or essential character, its core" (*Firearms Reference* at para 16).

[229] Regardless of its characterisation, Gascon J. described the role the pith and substance analysis plays in a division of powers dispute in *Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC 23, [2016] 1 SCR 467 [*Rogers*], in these terms:

> [87] ... It is well established that the analysis with respect to the constitutional validity of an impugned measure involves two steps: "The first step is to determine the 'pith and substance' or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the *Constitution Act, 1867* in order to determine whether the law comes within the jurisdiction of the enacting government" (*Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15). If the law or measure comes within the jurisdiction of the government that enacted or adopted it, it is valid (*ibid.*; P. J. Monahan and B. Shaw, *Constitutional Law* (4th ed. 2013), at pp. 123-24).

[230] There are, therefore, two steps to determining whether a law is valid: (1) its characterisation and (2) its classification. Justice Gascon explained the first part of the pith and substance analysis in *Rogers*, where he said:

> [88] A measure's pith and substance is determined by identifying the "matter" to which it relates in light of its true purpose and its effects (Hogg, at p. 15-7; *Reference re Firearms Act*, at para. 16; *CWB*, at paras. 26-27). To determine the purpose of the impugned measure, a court must consider "both intrinsic evidence, such as purpose clauses, and extrinsic evidence, such as Hansard or the minutes of parliamentary committees" (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53). As for the effects of the impugned measure, both the legal effects and the practical consequences of applying it

> must be taken into account (Hogg, at pp. 15-16 and 15-17; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23; *Kitkatla Band*, at para. 54). To determine how the purpose of the impugned measure is intended to be achieved, the court must understand and define its "total meaning" (*Reference re Firearms Act*, at para. 18, citing W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40).

[231] After analysing the purpose of legislation and its effect to determine its dominant or most important characteristic—its main thrust—the second part of the pith and substance analysis asks whether the legislation so characterised falls under a head of power of the government that enacted it—this is the classification stage (*Firearms Reference* at para 15). The Supreme Court in the *Firearms Reference* noted that sometimes classification is a difficult thing to do:

> [26] The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669, "overlap of legislation is to be expected and accommodated in a federal state". Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have "incidental effects" upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.

[232] If the pith and substance of legislation can properly be classified as falling under a head of power assigned to the adopting level of government, then the legislation will be found *intra vires* and valid. However, the Court in the *Firearms Reference* sounded a cautionary note about this, emphasising the need to maintain a just and workable balance between the federal and provincial levels of government in the process of classification:

> [48] In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. In support of its submission, Alberta cites the work of D.M. Beatty, who suggests applying considerations of rationality and proportionality from the *Canadian Charter of Rights and Freedoms* s. 1 cases to questions of legislative competence: *Constitutional Law in Theory and Practice* (1995). It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867*. This said, however, it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; see also *General Motors of Canada Ltd. v. City National Leasing*, *supra*. The courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation that does not conform with the requirements of the criminal law: see *Boggs*, *supra*, and the *Margarine*

> *Reference*, *supra*. The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

[233] In this reference it is particularly important to understand that the *efficacy* of a law in accomplishing its goals does not bear on the division of powers analysis. The issue is only whether the law in question falls within the jurisdiction of Parliament or the Provincial legislatures. It is not whether the law is a sound policy initiative. Justice La Forest, dissenting, but not on this point, put the issue this way in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald*]:

> [44] … the wisdom of Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate. *The goal in a pith and substance analysis is to determine Parliament's underlying purpose in enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways*; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 358 (*per* Wilson J.) and *Morgentaler*, *supra*, at p. 487:
>
> > Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.
>
> (Emphasis added)

C. Pith and substance

[234] We turn now to ascertain the pith and substance of the *Act*, i.e., its main thrust, considering its purpose and its legal and practical consequences based on the intrinsic and extrinsic evidence available in that regard.

1. Characterisation

a. Background

[235] In the broadest of terms, Parliament's purpose in enacting the *Act* is to mitigate anthropogenic greenhouse gas [GHG] emissions. In its factum, the Attorney General of Canada submits the pith and substance of the *Act* is to "incentivise the behavioural changes necessary to reduce Canada's GHG emissions by ensuring that GHG emissions pricing applies throughout Canada". In terms of its operation, the *Act* aims to reduce GHG emissions by imposing a charge on fuel and combustible waste [fuel levy] and by establishing an *output-based pricing system*

[OBPS] that imposes a levy on heavy industrial facilities that emit GHGs on the basis of their GHG emissions above an industry standard.

[236] GHGs are gases that absorb and re-emit infrared radiation, the most prevalent of which is carbon dioxide [CO_2]. GHGs are a significant contributor to climate change. For this reason, the parties and intervenors all agree that the governments of Canada and the Provinces must take steps to mitigate the anthropogenic emission of GHGs. Because none of the Attorneys General dispute the causative effect anthropogenic GHGs have on climate change or the attendant and existential necessity of mitigating anthropogenic GHG emissions, the proof or truth of these facts is not at issue. That is, they are proven and true.

[237] In policy terms, the *Act* is the product of the federal government's efforts to meet Canada's commitments under the *Paris Agreement* (AG-Can Record, Moffet Affidavit vol 2, Tab I). This is apparent from the terms of the March 3, 2016, *Vancouver Declaration on Clean Growth and Climate Change* (AG-SK Record, Tab 1 [*Vancouver Declaration*]), where First Ministers of Canada recognised the necessity of reducing anthropogenic GHG emissions and committed their respective governments to "[i]mplement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives".

[238] A working group established under the *Vancouver Declaration* to report on carbon-pricing mechanisms later identified in its undated *Final Report* (Moffet Affidavit, vol 2, Tab P [*Final Report*]) three possible mechanisms for applying a broad-based price to carbon: (i) carbon taxes; (ii) cap-and-trade; and (iii) performance standards systems (*Final Report* at 8). The *Final Report* notes that "[h]ybrid approaches are also possible where different systems are used to cover different sectors or where systems overlap" (at 8). After identifying the three possible mechanisms, the *Final Report* explains (at 9):

> - Carbon taxes (such as the existing tax in British Columbia) put a price on GHG emissions and allow economic agents to change their behaviour in response to the price, thus determining which GHG reductions will take place. The regulated price creates certainty for actors deciding on whether to invest in emissions reduction technologies, meaning that all actors who are able to reduce emissions at a lower cost to avoid paying the tax are likely to do so. Because uncertainty exists about how economic agents will respond, to achieve a specific emissions reduction goal, governments may need to adjust the price (tax rate) over time.

> Carbon taxes can be applied to GHG emissions from fossil fuel combustion by taxing fuels based on their carbon intensity. A carbon tax could be designed to apply more broadly to also include non-combustion emissions (e.g., venting and industrial processes), which could increase administrative and compliance costs.
>
> - Cap-and-trade systems (such as the existing systems in Quebec and Ontario) limit the total amount of GHG emissions by imposing a cap on emissions (both combustion and non-combustion) that is progressively lowered each year over a given period of time, thus providing certainty about the total emissions from a prescribed set of emitters. The broader the coverage, the more efficient cap-and-trade programs become. Emissions allowances are typically distributed to regulated/registered entities through a combination of auction, sales at a fixed floor price, and free allocation. Price controls and the ability to bank allowances can mean that emissions in a given year remain somewhat uncertain, although certainty remains over the different compliance periods.
> - Performance standard systems or baseline-and-credit systems (such as the existing and proposed Alberta systems for major emitters) operate by applying intensity targets that set a limit on GHG emissions (both combustion and non-combustion) per production unit, which can be analogous to how allowances are freely allocated in a cap-and-trade system. Targets can be set at a facility or product level. Facilities that do not meet their emissions intensity standards can use a variety of compliance instruments, such as purchasing credits issued to more efficient facilities (i.e., that had emissions below the standard), purchasing offset credits, paying a fixed price to government, etc. Under a performance standard system, GHG emissions levels are largely dependent on changes in levels of production. Because uncertainty exists about how economic agents will respond, to achieve a specific emissions reduction goal, governments may need to adjust the price or standards over time.

[239] Following this, on October 3, 2016, the federal government released its *Pan-Canadian Approach to Pricing Carbon Pollution* (AG-SK Record, Tab 2 [*Pan-Canadian Approach*]). The document proposed an approach to carbon pricing using an economy-wide benchmark price for carbon as the most efficacious way of reducing anthropogenic GHG emissions. As can be seen, sometime between the *Final Report* and the *Pan-Canadian Approach*, the terminology of carbon taxation shifted to one of carbon pricing. Under the *Pan-Canadian Approach*, the federal government would impose a single price on carbon throughout Canada but implement it differently in each Province based on the *stringency* of the local carbon-pricing regime. The benchmark price would apply to specific sources of anthropogenic GHG emissions and would start, in 2018, at a rate of $10 per tonne, rising each year thereafter by $10 per tonne to reach $50 per tonne in 2022. Importantly, the *Pan-Canadian Approach* involved a so-called *backstop*, namely, if a Province failed to impose a local carbon-pricing regime or failed to impose one of sufficient *stringency*, the federal government would enforce its benchmark carbon-price in that

Province by imposing its own carbon-pricing regime, or such part thereof as might be necessary to meet its assessment of proper stringency.

[240] The First Ministers later reconvened and adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* (AG-SK Record, Tab 4 [*Pan-Canadian Framework*]), under which the Provinces would have the flexibility to implement their own anthropogenic GHG mitigation strategies, provided such strategies were in the nature of a carbon-pricing mechanism, and the federal benchmark carbon-pricing regime would recognise the local carbon-pricing mechanisms so implemented. The Saskatchewan government refused to sign the *Pan-Canadian Framework* because, in a nutshell (AG-SK Record, Tab 6, June 30, 2017, correspondence from Scott Moe, Saskatchewan's (then) Minister of Environment, to Catherine McKenna, Canada's Minister of Environment and Climate Change):

> The Government of Saskatchewan is taking action to reduce greenhouse gas (GHG) emissions and create a cleaner, low carbon future. We support the Government of Canada's commitments under the Paris Agreement and the importance of sub-national actions to address climate change. However, the proposed federal carbon price, to be imposed on provinces through a federal backstop, is not the correct mechanism to achieve this target.
>
> Saskatchewan believes in direct action and investment that will result in meaningful emission reductions. These actions do not have a broad-based uniform price; however, unlike a carbon tax, these actions will generate the required emission reductions.
>
> **Focus on real reductions**
>
> In order to be effective, policies designed to lower GHG emissions should result in real and significant reductions. In the absence of this outcome, mitigation policies simply represent an economic cost with little to no benefit.
>
> The proposed federal backstop, which includes explicit carbon pricing via a carbon tax, is one such ineffective policy. Recent research has clearly demonstrated that a carbon tax will not reduce GHG emissions to a significant degree. This is due to inelastic fuel consumption markets that exist in Saskatchewan and across Canada. This means that even if the price goes up, businesses and consumers will continue to buy the same amount of fuel because it is a necessary cost. The result is a carbon tax that increases costs on businesses and households without delivering substantial GHG emission reductions.

The Saskatchewan government also questioned the constitutionality of the then proposed *Act*.

b. Preamble to the *Act*

[241] Nonetheless, the federal government moved to establish a benchmark price for carbon by enacting the *Act*, which came into force on June 21, 2018, being enacted under the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12. The foregoing background is generally confirmed in the Preamble to the *Act* by its reference to the *Pan-Canadian Framework.*

[242] It is evident from the Preamble that the *Act* is intended to recognise that anthropogenic GHG emissions contribute to climate change, which is "a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians". For this reason, Parliament resolved 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".

[243] Recognising that "behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change", the Preamble evinces Parliament's resolution that pricing GHG emissions "on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change". The Preamble then records Parliament's view that GHG emissions pricing "reflects the 'polluter pays' principle".

[244] The Preamble next begins to reflect on some of the concerns that arise in this reference. For example, the constitutional division of powers is tangentially engaged by the recitation that "some provinces are developing or have implemented [GHG] emissions pricing systems". Critically, the Preamble notes "the absence of [GHG] emissions pricing in some provinces and a lack of stringency in some provincial [GHG] emissions pricing systems could contribute to significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity". For this reason, Parliament resolved that "it is necessary to create a federal [GHG] emissions pricing scheme to ensure that, taking provincial [GHG] emissions pricing systems into account, [GHG] emissions pricing applies broadly in Canada".

[245] On the whole of it, the Preamble establishes Parliament's overarching goal through the use of terminology that expresses several value judgments about GHGs and carbon-pricing

regimes and about federal and provincial policies and actions taken regarding the reduction of GHG emissions. In this way, the Preamble discloses and confirms the *purpose* of the *Act* in broad policy terms, which is to establish a benchmark GHG emissions price with the aim of modifying behaviour and incentivising industry to mitigate anthropogenic GHG emissions.

c. The two schemes of the *Act*

[246] The *Act* has four Parts. Part 1 addresses a fuel levy. Part 2 addresses an OBPS levy and an intensity-based trading system. Parts 3 and 4 support the first two Parts, and nothing more need be said about them as their constitutionality rests on the constitutionality of Parts 1 and 2.

[247] Part 1 is divided into eight Divisions dealing with the imposition of a fuel levy, its application, rebates of the levy and collection powers, etc. Part 2 addresses the GHG emissions of large industrial GHG emitters through an OBPS levy that is structured differently than the fuel levy under Part 1. The provisions under Part 2 begin with interpretation of the Part (ss 169–170), the remainder of Part 2 is divided under five Divisions, addressing the imposition of the OBPS levy, information gathering, administration and enforcement, offences and penalties, etc.

[248] There are also four schedules to the *Act*:

(a) Schedule 1 has two Parts:

(i) Part 1—Identifies Provinces and Areas for the purposes of Part 1; and

(ii) Part 2—Identifies Provinces and Areas for the purposes of Part 2;

(b) Schedule 2 contains five Tables that set forth the rates of the fuel levy in 2018, 2019, 2020 and 2021, respectively, in terms of type of fuel, listed province and applicable rate of levy, which is expressed in dollars per-litre, per-cubic-metre or per-tonne;

(c) Schedule 3 contains a table setting out the GHGs covered pursuant under Part 2, as well as the CO_2 equivalent [CO_2e] for each listed GHG; and

(d) Schedule 4 contains a table setting out the OBPS rate of levy on excess emissions for 2018–2022, which is set at $10 per CO_2e tonne in 2018 and rises by $10 per CO_2e tonne per year until it is set at $50 per CO_2e tonne in 2022.

[249] In addition to the *Act* itself, the Governor in Council, i.e., the executive branch of the federal government or federal cabinet, has proposed, passed or issued a number of regulations, regulatory instruments and policy statements in respect of the implementation of Part 2 to the *Act*, including:

(a) *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, which sets out the criteria for determining those facilities that are required to register for the OBPS levy;

(b) *Greenhouse Gas Emissions Information Production Order*, SOR/2018-214, which sets out industry-by-industry quantification, reporting and verification requirements for covered facilities;

(c) *Order Amending the Greenhouse Gas Emissions Information Production Order*, SOR/2018-277, which adds industries and industry-specific quantification, reporting and verification requirements for covered facilities in the industry;

(d) *Regulatory Proposal for the Output-Based Pricing System Regulations under the Greenhouse Gas Pollution Pricing Act*,[1] which will apply retroactively to January 1, 2019 (*Notice of intent to make regulations under part 2 of the Greenhouse Gas Pollution Pricing Act*);[2]

(e) *Policy regarding voluntary participation in the Output-Based Pricing System*;[3] and

[1] Government of Canada <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/obps-regulatory-proposal-en.pdf> (24 April 2019)
[2] Government of Canada <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/OBPS-notice-intent-en.pdf> (24 April 2019)
[3] Government of Canada <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/Policy-Voluntary-Participation-OBPS.pdf> (24 April 2019)

(f) *Cost-Benefit Analysis Framework for an output-based pricing system for greenhouse gas emissions from certain facilities in Canada*.[4]

[250] The federal cabinet has listed only Ontario, New Brunswick, Manitoba and Saskatchewan under Schedule 1 to Part 1. That is, the fuel levy under Part 1 of the *Act* only applies in those Provinces and does so effective April 1, 2019. However, a modified fuel levy will also apply in Yukon and Nunavut effective July 1, 2019.

[251] In Yukon and Nunavut, the federal government has modified the fuel levy to accommodate for "the high cost of living, challenges with food security and emerging economies" and, to reflect "the high-reliance of the territories on air transportation". For those reasons, the rates of levy for aviation gasoline and aviation turbo fuel are set to $0 in Yukon and Nunavut (*Backgrounder: Fuel Charge Rates in Listed Provinces and Territories*, Department of Finance Canada).[5]

[252] The federal cabinet has listed only Ontario, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, Yukon and Nunavut in Schedule 1 for purposes of Part 2.[6]

d. The two schemes and matter characterisation

[253] Having set forth the overall structure of the *Act*, the proper characterisation of its pith and substance, with the two distinct schemes that are evident in its structure, remains to be determined.

[254] In this regard, the Attorney General of Saskatchewan has invited the Court to assess the schemes under Parts 1 and 2 separately. We agree this may be done (see *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511 [*Confédération des syndicats nationaux*]). While Parliament intends the two principal Parts of the *Act* to achieve the same broad purpose, it would be an error of reasoning to judge the two Parts in terms of Parliament's intention rather than by what each Part actually does from a legislative or constitutional law perspective to achieve Parliament's intention. The schemes set

[4] Government of Canada <https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/pricing-pollution/6222_OBPS_Cost%20and%20Benefits_EN_03.pdf> (24 April 2019)
[5] Government of Canada <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-fuel-charge-rates-in-listed-provinces-and-territories.html> (24 April 2019)
[6] Government of Canada <https://laws-lois.justice.gc.ca/eng/acts/G-11.55/page-40.html> (24 April 2019)

out under Parts 1 and 2 of the *Act* are sufficiently distinct on their face to allow for an independent analysis of each Part, provided the whole of the *Act* is also considered.

[255] Because the *Act* is suggestive of Parliament's power of taxation under s. 91(3), we observe that, when it comes to questions about Parliament's power to impose a tax or to regulate in an area, Professor Peter W. Hogg aptly noted in *Constitutional Law of Canada*, loose-leaf (2018-Rel 1) 5th ed Supp, vol 1 (Toronto: Thomson Reuters, 2016) at c 31.10(b) [Hogg]:

> The federal Parliament, not being confined to direct taxation, can impose both direct and indirect charges under its taxation power (s. 91(3)), but a federal regulatory charge, like a provincial regulatory charge, may well have to stand or fall under some head of regulatory power. Thus, the distinction between taxes and charges may be become relevant to the validity of a federal law. ...

2. Scheme of taxation or regulatory scheme?

[256] The term *regulatory scheme* is not found in the *Constitution Act, 1867* and the word *regulation* is found only in s. 91(2) of the *Constitution Act, 1867*. *Regulatory scheme* is therefore a term of art in constitutional law. What it means has been discussed in cases like *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [*620 Connaught*]; *Kirkbi AG v Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 SCR 302; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*]; *Eurig Estate, Re*, [1998] 2 SCR 565 [*Eurig Estate*]; *Re Exported Natural Gas Tax*, [1982] 1 SCR 1004; and *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* (1930), [1931] SCR 357 [*Lawson*].

[257] In *620 Connaught*, the issue was whether a levy for an annual business licence was a regulatory charge or a tax. Justice Rothstein, for a unanimous Supreme Court, described the Court's task in these terms:

> [16] The task for the Court is to identify whether the fees paid by the appellants are, in pith and substance, a tax or a regulatory charge. The pith and substance of a levy is its dominant or most important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features (P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 433-36). The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental.
>
> [17] In the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory fee. In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3

> S.C.R. 134, Gonthier J. described the pith and substance of a government levy in terms of its primary purpose. At para. 30, he stated:
>
> > In all cases, a court should identify the primary aspect of the impugned levy. ... Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted by Rothstein J.]
>
> There is no suggestion in this case that the levy is a user fee for the provision of government services or facilities. The sole question is whether in pith and substance the levy is a tax or a regulatory charge.
>
> (Emphasis in original)

[258] Importantly, Rothstein J. drew a distinction between a regulatory charge and a user fee, noting a user fee is charged by a government for the use of government services or facilities and so there must be a "clear nexus between the quantum charged and the cost to the government of providing such services or facilities" and the fee cannot exceed the government's cost (at para 19). On the other hand, he described regulatory charges in this way:

> [20] By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles" (see *Westbank*, at para. 29, referring to *Ottawa-Carleton (Regional Municipality) By-law 234-1992 (Re)*, [1996] O.M.B.D. No. 553 (QL), and *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)* (1997), 144 D.L.R. (4th) 536 (N.S.S.C.) (aff'd (1997), 151 D.L.R. (4th) 575 (N.S.C.A.), leave to appeal refused, [1997] 3 S.C.R. vii)).

[259] As was the case in *620 Connaught*, there is no suggestion the fuel levy under Part 1 is a user fee payable in respect of government services or facilities. However, unlike the levy in *620 Connaught*, the fuel levy and OBPS levy may be characterised as being intended to be set at a level so as to "proscribe, prohibit or lend preference to certain conduct" (at para 21).

[260] The question is whether, in pith and substance, the fuel levy or the OBPS levy may be characterised as a tax or as a regulatory charge that is used to finance or constitute a regulatory

scheme (*Westbank* at para 30). As this suggests, the inquiry takes two paths, one down the road of tax and the second down the road of regulatory charge.

a. The characteristics of a tax

[261] In *Eurig Estate* (at para 15), Major J. summarised the characteristics of a tax, which were first identified by Duff J. (as he then was) in *Lawson* (at 362–363), as being whether the levy in question is: (a) enforceable by law; (b) imposed under the authority of the legislature; (c) levied by a public body; and (d) intended for a public purpose. In *Lawson*, Duff J. had also observed that a tax levy was compulsory and affected a large number of people.

[262] These characteristics have been recognised, adopted or used in *620 Connaught*; *Confédération des syndicats nationaux*; *Westbank*; *Ontario Home Builders' Association v York Region Board of Education*, [1996] 2 SCR 929 [*Ontario Home Builders*]; *Steam Whistle Brewing Inc. v Alberta Gaming and Liquor Commission*, 2018 ABQB 476 at para 10, 428 DLR (4th) 697; *Canadian Private Copying Collective v Canadian Storage Medial Alliance*, 2004 FCA 424 at para 39, 247 DLR (4th) 193; *R c Breault*, 2001 NBCA 16 at para 49, 198 DLR (4th) 669; and *Massey-Ferguson Industries Ltd. v Saskatchewan* (1981), 115 DLR (3d) 47 (Sask CA) at 59. As Rothstein J. observed in *620 Connaught*, the *Lawson* characteristics "will likely apply to most government levies" (at para 23). For this reason, the important question for a court is whether the characteristics are the "dominant characteristics of the levy or whether they are only incidental" (at para 23).

b. Distinguishing a regulatory charge from a tax

[263] In *620 Connaught*, Rothstein J. drew on *Westbank* (at para 43) to add a fifth consideration to the *Lawson* characteristics, namely, that a levy would be, in pith and substance, a tax if it were "unconnected to any form of a regulatory scheme" (at para 24). He then adopted the two-step approach undertaken in *Westbank* to determine whether the levy in *620 Connaught* was actually connected to a regulatory scheme. Under the first step, the court should "look for the presence of some or all of the following indicia of a regulatory scheme" (*Westbank* at para 44):

(a) a complete, complex and detailed code of regulation;

(b) a regulatory purpose that seeks to affect some behaviour;

(c) the presence of actual or properly estimated costs of the regulation; and

(d) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

[264] Justice Rothstein characterised the first three considerations as working together to establish the existence of a regulatory scheme, with the fourth establishing that the regulatory scheme so identified is relevant to the person being regulated (at para 27). In *Westbank*, Gonthier J. had described the required relationship as existing "when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour" (at para 44). On this basis, Rothstein J. summarised the approach in these terms:

> [28] In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.

3. Tax or regulatory charge?

[265] Following this approach, we find the fuel levy imposed under Part 1 of the *Act* bears all of the hallmarks of *taxation* and exhibits insufficient indicia of a regulatory charge—its main thrust or dominant characteristic is that of taxation. The scheme of Part 2 is different. We find Part 2 lacks certain hallmarks of taxation and bears sufficient hallmarks of a regulatory scheme to conclude that Part 2 does not impose a tax—its taxation characteristics are merely incidental to its main, regulatory thrust. On this basis, we find the fuel levy is, in pith and substance, a tax and the OBPS levy is a regulatory charge, as we will now explain.

a. *Lawson* tax analysis

i. Fuel levy

[266] The fuel levy, like most government levies, has the attributes of a tax. The fuel levy is enforceable by law. Subsection 71(3) of the *Act* sets out the legal requirement to pay the fuel levy. Division 6 of Part 1 sets forth powers of enforcement with respect to the payment of the fuel levy. Failure to comply results in penalties. Division 6 sets forth penalty, offence and punishment provisions, which largely criminalise the failure to file or make a return as and when required under the statute (s 132) and the making of a false or deceptive statement in a return (s 133). Subdivision K affords the Minister of National Revenue the power to make inspections and to carry out audits to determine the obligations of a person to comply with Part 1.

[267] Furthermore, Subdivision L of Division 6 deals with collection of the fuel levy by deeming it a "debt due to Her Majesty in right of Canada and is recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided under this Part" (s 148(2)). The Minister of National Revenue can recover the levy by means of criminal prosecution (s 135 and s 136), through compliance orders (s 137), or seizure (s 157), etc. In this respect, the fuel levy is as compulsory as any federal excise tax and the administration and enforcement provisions look very much like they do in excise tax legislation (see, for example, the *Excise Tax Act*, RSC 1985, c E-15, Part VII and Part IX, Division VIII).

[268] Although we express some reservations below about the constitutionality of Part 1, at a macro-level and for the purposes of the *Westbank* analysis, we have assumed the fuel levy is imposed under the authority of Parliament and is levied by a public body, namely, the Minister of National Revenue and the Canada Revenue Agency (s 3 and s 93). The fuel levy is imposed pursuant to federal statute and its rates are set and modified by the executive branch of the federal government. The whole of Part 1 is administered by the Minister of National Revenue.

[269] There can be no doubt that the fuel levy is levied for a public purpose. The full title to the *Act* is "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of [GHG] emission sources and to make consequential amendments to other Acts", which discloses the broad public purpose of mitigating GHG emissions through a

GHG-pricing mechanism. This is confirmed by the Preamble, where Parliament has, in some detail, set out the environmental and economic rationale for the whole of the *Act*.

[270] By its operational terms, Part 1 may be fairly characterised as establishing a benchmark CO_2e-based price for GHGs in Provinces that do not impose their own local GHG-pricing mechanism of at least equal *stringency* to that set forth under Part 1. Where applicable, Part 1 seeks to achieve this by imposing a broad based, local fuel levy on:

(a) registered distributors that *deliver* or *use* fuel in a listed province (s 17 and s 18);

(b) persons who *bring* or *import* fuel into, or who *produce* fuel in, a listed province (ss 19, 20 and 21);

(c) persons who *divert* delivered fuel from an exempt use to a non-exempt use (s 23);

(d) farmers and fishers who *divert* delivered fuel from use in *eligible farming activities* or *eligible fishing activities* (s 24 and s 24.1);

(e) persons who burn combustible waste in a listed province for the purposes of producing heat or energy (s 25); and

(f) air, marine, rail and road carriers based on the net fuel quantity used or delivered in respect of a listed province (ss 28–35).

[271] Part 1 may be said to raise revenues for a public purpose. While the fuel levy has a "more ambitious" goal than simple taxation (*Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3 at para 43 [*Matsqui*]), namely, to promote behaviour that may indirectly result in the reduction of anthropogenic GHG emissions, that does not remove the fuel levy from the realm of a taxation under s. 91(3). As the statute and the Constitution expressly provide, the revenues collected through the imposition of the fuel levy must be added to the Consolidated Revenue Fund (*Act*, ss 112, 165(4) and 188(4); and the *Constitution Act, 1867*, s 102 and s 103). The only operative function of Part 1 is to raise revenue. Certainly, the bulk of the revenue so generated is *distributed* within the Province of its collection, but there are no conditions or restrictions on its use once distributed. In the hands of taxpayers, it is simply a tax credit. As discussed below, this is indicative of a revenue-neutral tax, but a tax nonetheless.

[272] Further, the curious way in which the fuel levy applies only to listed provinces reinforces the conclusion that it is a tax. The *Act* acknowledges in its Preamble that the Provincial legislatures enjoy law-making powers over the broad matter the *Act* addresses—i.e., the pricing of GHG emissions. Under Part 1, the Governor in Council must evaluate the *stringency* of a Province's exercise of its own exclusive law-making powers in this regard to determine whether, and if so to what degree, the federal fuel levy will apply in the Province. By structuring Part 1 in this way, Parliament has lent considerable comfort to the conclusion that the fuel levy is a tax because, as the Attorney General of Saskatchewan concedes, Parliament has the power to tax; whereas, the Provincial legislatures have the power to regulate in this area.

[273] In sum, we conclude Part 1 satisfies the *Lawson* criteria and may be characterised as imposing a tax.

ii. OBPS levy

[274] The levy imposed under the OBPS is enforceable by law, imposed under the authority of a legislature, imposed by a public body, and intended for a public purpose. However, the OBPS levy is only compulsory for some, not all, industrial GHG emitters.

[275] Lower emitting facilities may *voluntarily* apply to be covered by the OBPS levy (s 172). Covered facilities in jurisdictions where the fuel levy will apply can also seek registered status with the Canada Revenue Agency before the fuel levy comes into force. If so, fuel delivered to the registered emitter will not be subject to the fuel levy. This means the OBPS is not broad based in that it only compulsorily affects heavy industrial emitters of GHG. As we understand the OBPS levy and the regulatory instruments under it, any facility whose emissions are 10 kilotonnes of CO_2e or more in a sector having an OBPS CO_2e standard may apply to opt-in to the scheme. Moreover, the federal government has indicated it proposes to develop new OBPS CO_2e standards for trade-exposed sectors where there are facilities whose emissions fall between 10 and 50 kilotonnes (*Output-Based Pricing System*).[7]

[276] In this way, the OBPS levy has some of the characteristics of a tax, but not all. As we examine more fully below, several features distinguish the OBPS levy from the fuel levy and

[7] Government of Canada <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/output-based-pricing-system.html> (24 April 2019)

from other taxes, chief among which is the clear and direct nexus that exists between the quantum of the levy and the regulatory purpose of the levy. As we conclude below, the OBPS levy and the taxation and criminal law provisions it contains are necessary for the regulatory purpose sought to be achieved by Part 2. Indeed, the OBPS levy and the intensity-based trading system established under Part 2 are the means of achieving that purpose.

[277] In sum, we conclude Part 2 does not satisfy all of the *Lawson* criteria.

b. Regulatory scheme analysis

i. A complete, complex and detailed code of regulation

a) Fuel levy

[278] The *Act* is a self-contained statutory scheme in the sense that it does not expressly rely on other statutes or regulations under other statutes to carry out its mandate. Of course, in the broadest sense, the *Act* exists and operates in conjunction with all federal statutes and subordinate legislation as part of the framework of federal laws that govern Canada. However, if that were enough to establish a complete, complex and detailed code of regulation, then no government levy could ever be found to be a tax. The nexus must be more precisely tied to the regulation of specific persons, activities or matters.

[279] Part 1 of the *Act* establishes a *fuel charge system* (s 168(1)) that levies a *fuel charge* on the GHG-producing fuel named in Schedule 2 (which includes aviation gasoline, butane, ethane, gas liquids, gasoline, heavy and light fuel oils, kerosene, methanol, naphtha, petroleum coke, propane, marketable and non-marketable natural gas, coal) and on combustible waste. As can be seen from the definitions in s. 3, the lists of things that are *fuel* and the types of things that are *combustible waste* are not fixed. The executive branch of the federal government may add any "substance, material or thing" to the list or to the definition of *combustible waste* (s 166(4) and s 168)). Under Schedule 2, the rates of the fuel levy applicable in each year from 2018 to 2021 and thereafter are itemised as a per-litre, per-cubic-metre, or per-tonne levy.

[280] The fuel levy is only payable in listed provinces. A Province becomes a *listed province* if the federal cabinet adds the Province to the list set out in Schedule 1. This is done under the regulation-making powers set forth in ss. 166(2) and (3). The primary factor governing the

application of Part 1 to a particular Province is “the stringency of provincial pricing mechanisms for [GHG] emissions” (s 166(3)).

[281] The fuel levy operates such that a registered distributor in a listed province must pay the levy to the Canada Revenue Agency. A *registered distributor* in respect of a type of fuel means a person that is registered under Division 4 of Part 1 as a distributor in respect of that type of fuel (s 3), i.e., producers, importers, deliverers, and measurers of fuel and such other persons as the federal cabinet may designate as a distributor of fuel. As noted, Part 1 also imposes a fuel levy on every person that burns combustible waste in a listed province for the purposes of producing heat or energy (s 25). Lastly, Part 1 sets out rules for determining when the fuel levy applies to air, marine, rail and road carriers (Division 2, Subdivision B). On this basis, it is clear that the fuel levy applies pervasively to almost all aspects of the economy of a listed province at the local level.

[282] However, Part 1 also sets out exemptions to the economy-wide approach that is said to underpin the *Act*. For example, the fuel levy is not payable on fuel delivered to farmers or fishers in a listed province, if it is a *qualifying farm fuel* or a *qualifying fishing fuel* (ss 17(2)(a)(iii) and (iii.1)), which are each defined as “a type of fuel that is gasoline, light fuel oil or a prescribed type of fuel”. In addition, industrial facilities are exempted from paying the fuel levy on delivered fuel that is subject to the OBPS levy. In this way, the fuel levy should not overlap with the OBPS levy, and the two schemes may be said to operate independently of each other, but to operate to achieve a common purpose.

[283] Under Divisions 3 and 4 of Part 1, Parliament has enacted a number of administrative provisions addressing, in broad terms, statutory rights to recover fuel levies paid, levy rebates for fuel removed from a listed province or brought to a *covered facility* (see Part 2), as well as distributor and carrier registration and reporting.

[284] Division 5 sets forth administrative rules with respect to miscellaneous matters, chiefly addressing how Part 1 applies to such things as trustees, receivers and personal representatives, amalgamated corporations, partnerships and joint ventures. It is a parallel of Division VII of Part IX of the *Excise Tax Act*. When seeking to ascertain the character of the framework of Part 1, we observe that it is expressed in terms normally associated with taxation statutes. For

example, Subdivision D of Division 5 is entitled “Anti-avoidance” and sets forth a “General anti-avoidance provision” under s. 82(2). These provisions are not in their primary sense regulatory in nature. They are supportive of a scheme of taxation or revenue collection.

[285] Division 6 pertains to administration and enforcement under Part 1. Although largely mundane provisions addressing collection of the fuel levy, Division 6 is relevant in that the Minister of National Revenue is authorised to use the powers and personnel of the Canada Revenue Agency to do anything authorised to be done under Part 1. This is all then made subject to the supervision of the Tax Court of Canada or the Federal Court of Canada. Subdivision F of Division 6 deals with *assessments* and *reassessments*; whereas Subdivision G addresses objections to assessments, with Subdivision H extending a limited right to appeal the Minister of National Revenue’s decision on an assessment to the Tax Court of Canada. Again, none of these provisions speak to regulation of a matter or thing. On the contrary, they strongly support the conclusion that the scheme established under Part 1 is one of taxation and revenue collection.

[286] Subdivisions I and J of Division 6 set forth the penalty, offence and punishment provisions of Part 1, which largely criminalise the failure to file or make a return as and when required under the statute (s 132) and the making a false or deceptive statement in a return (s 133). That is, no conduct or activities are criminalised or penalised under Part 1 other than as may relate to the calculation and payment of the fuel levy. Again, this supports the conclusion that Part 1 imposes a tax.

[287] Subdivision K affords the Minister of National Revenue the power to make inspections and to carry out audits to determine the obligations of a person to comply with Part 1, including under authority of a search warrant. The Minister of National Revenue has these same powers under the *Excise Tax Act*, s. 288(1) and the *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 231.1(1).

[288] Subdivision L of Division 6 further deals with collection of the fuel levy by deeming the amounts payable a “debt due to Her Majesty in right of Canada and is recoverable as such in the Federal Court or any other court of competent jurisdiction or in any other manner provided under this Part” (s 148(2)). Subdivision M sets out evidentiary and procedural rules applicable in enforcement proceedings.

[289] Read in conjunction with the other Parts of the *Act*, Part 1 arguably forms part of a scheme that the federal government has characterised as one of "broadly pricing GHG emissions from a broad set of emission sources" (Moffet Affidavit at para 102), but that characterisation works in a circular way to turn back to a conclusion that Part 1 is not, in pith and substance, regulatory in nature. This is chiefly because the scheme under Part 1 does not establish how government services are obtained or how rights and privileges are obtained, or what is prohibited conduct or encouraged conduct. Much like how an *ad valorem* tax works, it simply imposes a levy on the CO_2e content of fuel and combustible waste at the distribution level and establishes a collection regime for the fuel levy (a *carbo vestigium* or carbon footprint tax).

[290] The same may be said, in large measure, of Part 2. It does not establish how government services are obtained or how rights and privileges are obtained or what is prohibited conduct. It does, however, directly encourage industrial GHG emitters to reduce their GHG emissions by imposing a OPBS levy that is ostensibly intended to make emissions cost-prohibitive if they are in excess of a base level. But, the two Parts are separately administered and operated. Legislative authority under Part 1 is delegated to the Minister of National Revenue (s 3 and s 93); whereas, under Part 2, legislative authority is delegated to the federal Minister of Environment (s 169).

[291] While the two Parts are complementary in their longbow aim, we are simply not persuaded that Part 1 forms a complete, complex and detailed scheme of *regulation* of GHG emissions. Therefore, the first of the criteria in *Westbank* is not satisfied by the fuel levy.

b) OBPS levy

[292] Part 2 of the *Act* contains a scheme of some detail. Part 2 provides the legal framework and authority to establish an intensity-based trading system for industries, i.e., the OBPS. Part 2 contains an industrial GHG emissions OBPS mechanism that imposes a levy on the GHG emissions of industrial enterprises called *covered facilities*. An industrial facility is designated as a *covered facility* in respect of a listed province. Facilities will be covered facilities in a Province if they meet the criteria for that Province set out in the regulations (s 169) or are designated as such under regulation made by the federal cabinet (s 172(1)). That is, the OBPS levy applies to facilities that: (a) are located in a listed province, as indicated in Part 2 of Schedule 1; (b) have reported 50 kilotonnes of CO_2e emissions or more; and (c) carry out a covered activity.

[293] The following is also critical to an understanding the mechanics of the OBPS levy:

> **170** For the purposes of this Part, a quantity of a greenhouse gas, expressed in tonnes, is converted into carbon dioxide equivalent tonnes (in this Part referred to as "CO_2e tonnes") by multiplying that quantity by the global warming potential set out for the greenhouse gas in column 2 of Schedule 3.

[294] In broad terms, Part 2 will apply an OBPS levy to the portion of a covered facility's CO_2e emissions that exceed the emissions standard for the type of industrial activity engaged in at the facility. Owners of facilities that emit less than their industry standard will receive surplus credits they can bank for future use or trade to other participants (s 175). Facilities whose emissions exceed the standard either must submit compliance units (banked or bought credits) or pay the OBPS levy to make up the difference (s 174(2)). Once used, a compliance unit is retired from further use or trading (s 179). That is, only a portion of a covered facility's GHG emissions will be subject to a direct OBPS levy.

[295] The Attorney General of Canada has adduced evidence indicating that the OBPS levy will initially apply primarily to those covered facilities having annual GHG emissions of 50 kilotonnes of CO_2e or more (Moffet Affidavit at para 111; see also *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213), but it will not apply to facilities in listed sectors, such as municipal, hospital, university, school or commercial buildings, or waste and wastewater. Part 2 operates by identifying intensity-based emission standards on the *quantity* of CO_2e that a covered facility may emit *levy-free* in a compliance period and by requiring the person responsible for the covered facility to "provide *compensation* for the excess emissions" (emphasis added, s 174(1)).

[296] The regular rate of the OBPS levy is "one compliance unit for each CO_2e tonne that was emitted in excess of the emissions limit" (s 174(3)(a)) or the "excess emissions charge set out in column 2 of Schedule 4 … for each CO_2e tonne that was emitted in excess of the emissions limit" (s 174(3)(b)), for example, in a single-product facility, the formula could be: annual OBPS levy-free allowance (tonnes CO_2e) = industry standard (tonnes CO_2e/unit) x units produced, where tonnage in excess of the allowance attracts the OBPS levy (Moffet Affidavit at para 113). An increased rate equal to four times (4x) the regular rate of the levy applies if the person responsible for a covered facility fails to compensate the federal government "in full by the regular-rate compensation deadline" (s 174(4)).

[297] The federal Minister of Environment must establish and maintain a system to track the compliance units that are issued, transferred, retired, suspended, revoked and cancelled, as well as to track the "excess emissions charge payments" and other payments made by emitters. Part 2 thereby establishes what is known as an *intensity-based trading system*, not a cap-and-trade regime (as it is sometimes erroneously called), for GHG emissions (Shi-Ling Hsu and Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54 McGill LJ 463 at 468 and 505–507 [Hsu and Elliot]).

[298] The OBPS only applies in a *listed province*. The primary factor relevant to the designation of a Province as a listed province is "the *stringency* of provincial pricing mechanisms for [GHG] emissions" (ss 189(1) and (2)). The federal cabinet has listed only Ontario, New Brunswick, Manitoba, Prince Edward Island, Yukon and Nunavut in Schedule 1 for purposes of Part 2. That is, the OBPS levy applies in full in these Provinces and Territories. The OBPS levy applies in Saskatchewan but only in part because the Saskatchewan government has implemented its own OBPS-pricing system for industrial facilities,[8] and the federal cabinet has deemed Saskatchewan's OBPS-pricing regime of lesser stringency than the OBPS levy. Aside from the essential elements of its intensity-based trading system, Division 1 of Part 2 also includes a variety of administrative enforcement provisions necessary to the functioning of that system.

[299] Particularly relevant to a regulatory scheme, under Division 2 of Part 2, the federal Minister of Environment is empowered to assess the emissions levels in Canada of GHGs or "other gases that contribute or could contribute to climate change" (s 197(1)(a)) and to "determine whether measures to control those emissions are required and, if so, what measures are to be taken" (s 197(1)(b)). Although broad, the federal Minister of Environment's powers in this regard are ostensibly exercisable to ensure the Minister has the information necessary to implement and maintain the emissions intensity-based aspects of the OBPS.

[300] Division 3 of Part 2 addresses administration and enforcement, setting forth provisions typically found in other environmental regulatory legislation relating to enforcement officers and

[8] *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01; *The Management and Reduction of Greenhouse Gases (General and Electricity Producer) Regulations*, RRS c M-2.01 Reg 1; *The Management and Reduction of Greenhouse Gases (Reporting and General) Regulations*, RRS c M-2.01 Reg 2; and *The Management and Reduction of Greenhouse Gases (Standards and Compliance) Regulations*, RRS c N-2.01 Reg 3.

analysts.[9] Division 3 also grants exclusive jurisdiction to a justice or judge of any court of a Province or Territory to exercise powers and perform duties or functions under Part 2 in the "exclusive economic zone of Canada or the waters above the continental shelf of Canada" (s 213).

[301] Division 4 sets forth offences and punishment in respect of contravention of Part 2, including a full sentencing regime that sets as its fundamental purpose "to contribute—in light of the risks posed by climate change to the environment, including its biological diversity, to human health and safety and to economic prosperity—to respect for laws related to the pricing of [GHG] emissions through the imposition of just sanctions" (s 247). The objectives of sentencing under Part 2 include "the reinforcement of the 'polluter pays' principle" (s 247(c)). Division 4 continues by setting forth other principles of sentencing and by identifying aggravating factors in sentencing. The Part also sets out a range of orders a court may make when sentencing on an offence. In this regard, there is a strong argument to be made that Parliament has exercised under Part 2 its law-making power under s. 91(27) of the *Constitution Act, 1867*. We address this below.

[302] Division 5 recognises that the Minister of the Environment may negotiate agreements respecting the administration and enforcement of Part 2 with "any government in Canada, the government of a foreign state or a political subdivision of a foreign state, any international organization or any institution of a government or an international organization" (s 253(1)); presumably, so as to integrate the intensity-based trading system with extra-jurisdictional systems.

[303] Accordingly, we conclude the OBPS levy forms part of a complete, complex and detailed scheme of regulation of GHG emissions under Part 2 of the *Act*.

ii. A regulatory purpose that seeks to affect some behaviour

[304] The second *Westbank* criterion asks whether, in its operation, a levy is part of a scheme that is aimed at affecting behaviour.

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[9] *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22, Parts IX and X; *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Part X; *Fisheries Act*, RSC 1985, c F-14, ss 49–56; *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12, ss 14–27.

a) Fuel levy

[305] As will be quickly seen, Part 1 does not directly *regulate* the behaviour of individual Canadians in any way that would directly achieve the stated object of the *Act*. It imposes no regulatory requirements on the production, import, delivery or use of fuel or combustible waste nor any regulation of the levels of GHG emitted by the persons who directly pay the levy or the consumers who pay it indirectly. The broad range of industries and services to which the fuel levy applies are already independently *regulated* in this sense under provincial or federal regulatory regimes or both. Part 1 simply imposes a rate of levy on fuel and combustible waste on the basis of its CO_2e—it also provides a means to collect and enforce the collection of the levy. While all Canadians benefit from the reduction of GHG emissions and the abatement of anthropogenic climate change, the persons who pay the fuel levy cannot be said to benefit from its imposition—Part 1 imposes a levy that is economically aimed at modifying the behaviour of persons other than the ratepayer by increasing the cost of fuel and combustible waste or the cost of its delivery to thereby reduce the marketability and competitiveness of the ratepayer's fuel and combustible waste in the marketplace.

[306] Of course, Part 1 imposes a levy on fuel and combustible waste with a hope that the rate will eventually be high enough to effect broad-ranging changes in the purchasing behaviour of Canadians that will, in the aggregate but even more remotely, cause GHG emitters to modify their means of production so as to ultimately reduce their GHG emissions because, by doing so, they would reduce the fuel levy imposed on their products. The scheme is aimed at changing behaviour, but in an ancillary way.

[307] Ideally, by its own terms, at its most effective, the behavioural modification wrought by the fuel levy would put those persons who directly pay it out of business by causing their customers to opt for alternative fuel or combustible waste having lower CO_2e. By which, Parliament could be said not so much to seek to *modify* the behaviour of those upon whom it has imposed the fuel levy, but to seek to inhibit them from carrying on business in the way they currently do. Of course, in operational terms, Parliament does not truly seek to put an end to anthropogenic GHG emissions through the fuel levy or the OBPS levy; it simply seeks to legislatively arrive at an *acceptable amount* of GHG pollution. If Parliament's action actually eliminated anthropogenic GHG emissions, Canada could not be sustained economically- or

practically-speaking, at least not without abandoning all the existential elements of a carbon-based economy that Canadians currently enjoy.

[308] But, the point here is that even if the *elimination* of anthropogenic GHG emissions were the goal, it would not be impermissible for Parliament to use its taxing power to achieve that end—or, alternatively or in combination, to exercise its law-making power under s. 91(27) in respect of criminal matters. Excise taxes and criminal legislation often have an objective of this nature. Furthermore, these are measures that come within Parliament's enumerated heads of power and therefore their use respects Canadian federalism. For this reason, we find the operational structure of Part 1 is not indicative of any *regulatory* purpose that is tied to the fuel levy. Nor, as already noted, does it indicate that the persons who are subject to the direct payment of the fuel levy will benefit from any of the *regulation* provided under Part 1. The direct and focused aim of Part 1 is to impose a levy on GHG emissions based on their CO_2e content.

[309] There is economic evidence to the effect that levies of this nature, whether a tax or regulatory charge, can successfully effect behavioural changes in a consumer, provided they have sufficient effect on the consumer's bottom line (*Final Report* at 2–26 and 43; October 5, 2018 Affidavit of Dr. Nicholas Rivers at para 6 and Exhibit B—*Empirical Evidence on the Impact of Carbon Pricing on the Environment*, September 13, 2018 [*Rivers Report*]). As noted, the fuel levy is designed to increase annually so as to slowly bring about the desired behavioural changes in consumers (Moffet Affidavit at paras 60 and 101; *Final Report*). However, the evidence does not, in terms of efficacy, distinguish between taxation and regulatory charge (*Final Report* at 8–9) and, therefore, it lends nothing to the tax-versus-regulatory-charge analysis. Governments can and do effectively use taxes as a tool in the very same way as a regulatory charge to achieve the very same goals, i.e., behavioural modification in the marketplace. The chief example of this is an excise or *sin* tax, such as *The Liquor Consumption Tax Act*, SS 1979, c L-19.1, or *The Tobacco Tax Act, 1998*, SS 1998, c T-15.001. Indeed, the fuel levy is very much like the *Pigouvian* tax described by Hsu and Elliot (at 468).

[310] In *Re Exported Natural Gas Tax*, the Court dealt with a levy imposed by the federal government on natural gas that was owned, exported and produced by the Alberta government. In finding the levy was a tax, the majority of the Court stated (at 1070 and 1077):

> The essential question here is no different than in any other constitutional case: What is the "pith and substance" of the relevant legislation. If the primary purpose is the raising of revenue for general federal purposes, then the legislation falls under s. 91(3) and the limitation in s. 125 is engaged. If, on the other hand, the federal government imposes a levy primarily for regulatory purposes, or as necessarily incidental to a broader regulatory scheme, such as the "adjustment levies" considered in *Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, s. A-7 et al.*, [1978] 2 S.C.R. 1198 or the unemployment insurance premiums in *Attorney-General for Canada v Attorney-General for Ontario*, [1937] A.C. 355, then the levy is not in pith and substance "taxation" and s. 125 does not apply.
>
> …
>
> Parallel regulation is provided in the *Petroleum Administration Act, supra*. Part III of that Act, entitled "Domestic Gas Price Restraint", provides for the setting of a uniform price for all gas entering interprovincial or international trade. This is achieved by the various regulations found at C.R.C. 1978, chapters 1259 and 1261, and SOR/80-823.
>
> When viewed in the context of this all-embracing scheme to control the natural gas industry, the present tax is clearly not a "regulatory tool" in itself. *Every major aspect of the industry is already subject to licencing, prohibitions, orders and so on. On a plain reading of Bill C-57 it is manifest that the proposed tax adds nothing to the existing structure of regulation, save revenue. An argument may be made that the tax is ancillary to the omnibus scheme for use of natural gas in the economy but, in pith and substance, it remains "taxation" and not "regulation of trade and commerce"*. The title to Bill C-57 — "An Act to amend the Excise Tax Act and the Excise Act to provide for a revenue tax in respect of petroleum and gas"—confirms this characterization.
>
> (Emphasis added)

The same may be said here: on a plain reading of Part 1, it is manifest that the fuel levy adds nothing to any existing structure of regulation save revenue generation.

[311] In its factum, the Attorney General of Canada submits that the pith and substance of the *Act* is to "incentivize the behavioural changes and innovative solutions necessary to reduce GHG emissions by ensuring that GHG emissions pricing applies broadly throughout Canada, with increasing stringency over time". The Attorney General of Canada also initially took the position that the *matter* of national concern under POGG is "GHG emissions". However, in oral argument, the Attorney General changed its position by asserting that the matter in question is not "GHG emissions" but rather the "*cumulative dimensions* of GHG emissions". Regardless, under each approach, the Attorney General of Canada has characterised the matter without reference to the methodologies actually employed under the *Act* to reduce emissions.

[312] For this reason, the Attorney General of Canada's proposition that the fuel levy itself regulates behaviour drives straight into an extensional-context conundrum. This is so because the

proposition inexorably leads to the conclusion that there is contextual, policy and practical equivalence to the two methodologies at issue, making it impossible to distinguish between taxation and regulation. That is, one may substitute a tax for a regulatory charge in this analysis without changing a true proposition (i.e., the levy will effect *these* behavioural changes) into a false one. In this case, the distinction the Attorney General of Canada tries to draw between a tax and a regulatory charge is one of nomenclature, not of substance.

[313] Furthermore, because Parliament undoubtedly has the power to impose a tax and lacks an enumerated law-making power to *regulate* in this area, then, in keeping with Canadian federalism, the conclusion must be that it has exercised its power to tax—all other things being equal (*2011 Securities Reference* at para 7). As such, we find the arguments of the Attorney General of Canada do not address the second *Westbank* criterion and that its requirements are not satisfied. The purported regulatory scheme is indistinguishable from a tax.

[314] Moreover, the Record of the Attorney General of Canada acknowledges that carbon-pricing polices "are not automatically environmentally effective" (*The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions*, (April 2015, Canada's Ecofiscal Commission at IV, Moffet Affidavit, Exhibit N). In *The Way Forward*, Canada's Ecofiscal Commission observes (at 44):

> The dynamics of stringency are also important. Ramping up the stringency of policies over time will avoid unnecessary shocks to the economy, but will nonetheless encourage households and firms to slowly change their behaviours. The accumulation of small changes over many years can generate dramatic changes over the long term. The sooner policies are put in place, the more time is available for the carbon price to increase gradually, rather than abruptly. An economic environment with a gradual and predictable escalation in price is conducive to long-range planning.

Other evidence in the Record of the Attorney General of Canada indicates, in general terms, that (*Report of the High-Level Commission on Carbon Prices* (Washington, DC: World Bank, 2017) Moffet Affidavit, Tab J at 35):

> The current levels of carbon prices are insufficient to induce the abatement levels consistent with the temperature objective of the Paris Agreement, and future prices will definitely have to be higher. …

[315] This is consistent with Part 1, which is designed to impose an annually-increasing rate of levy that is intended to ultimately bring about the behavioural change the federal government seeks to achieve. But, the evidence must also be seen as demonstrating that the fuel levy has only

a secondary or ancillary purpose of indirectly discouraging or encouraging certain behaviour in listed provinces—because the legislation does not achieve that purpose at the outset and no one seems able to say when it will. No other purposes that might be characterised as regulatory purposes have been advanced or demonstrated. Absent a directly achievable regulatory purpose, the principal or primary focus of the fuel levy must be seen as revenue generation.

[316] Moreover, while the intention of Parliament is to bring about a reduction in GHG emissions, that is *not* the use to which the fuel levy revenues themselves are put under the *Act*. Parliament has not appropriated those revenues for any use whatsoever, let alone one that has an immediate nexus to the stated goal of reducing anthropogenic GHG emissions. The Constitution simply demands more precision from a regulatory charge than it does a tax (*Westbank* at para 39; *Attorney-General for Quebec v Reed* (1884), 10 AC 141 at 144–145).

b) OBPS levy

[317] Part 2 has a definite regulatory purpose. It establishes CO_2e emissions standards for heavy industrial GHG emitters and incentivises heavy industrial emitters to reduce GHG emissions to achieve identifiable but soft CO_2e emissions standards through the imposition of industry-specific CO_2e levy rates. Part 2 further directly regulates and incentivises heavy industrial emitters to reduce their GHG emissions by establishing an intensity-based trading system for surplus credits that are earned by falling below the CO_2e standard for an industrial sector. In this way, Part 2 identifies as its purpose the modification of the conduct of heavy industrial emitters through the direct regulation of their GHG emissions. This distinguishes Part 2 from the tax levy examined in *Re Exported Natural Gas Tax* (at 1075), which "belie[d] any purpose of modifying or directing the allocation of gas to particular markets". Lastly, all of this requires a framework for reporting on emissions, calculating floor levels, ascertaining excess emissions, monitoring credits earned, traded and redeemed, and administering all of those processes.

[318] In sum, Part 2 of the *Act* may be characterised as a regulatory scheme that *regulates* a specific thing and specific persons in specific ways and for a specific purpose.

iii. Actual or properly estimated costs of regulation

a) Fuel levy

[319] The third criterion for identifying a regulatory scheme is the presence of a proper estimation of its costs. This criterion is not satisfied by Part 1. The evidence before the Court does not demonstrate that the fuel levy forms a nexus with any regulatory costs so as to bring it within the type of regulatory charge contemplated in *Allard Contractors Ltd. v Coquitlam (District),* [1993] 4 SCR 371 [*Allard*], or in *Ontario Home Builders*. Although Part 1 is legislation that has as its focus fuel and combustible waste or the reduction of GHG emissions, it imposes no regulatory requirements on the production, import, delivery or use of fuel or combustible waste nor any regulation of the levels of GHG emitted by the persons who directly pay the levy or the consumers who pay it indirectly. Part 1 simply imposes a levy on fuel and combustible waste, provides a means to calculate the rate of the levy based on the CO_2e of a fuel or combustible waste, and sets out powers of collection and enforcement of the levy.

[320] There is no restriction on the rate of the levy and, indeed, it will increase over time without any attendant connection to an increase in the cost of administration and operation of the scheme. The rate of the levy is tied only indirectly to the achievement of national CO_2e emissions targets established under international arrangements.

[321] In *620 Connaught* (at para 39), Rothstein J. said, “it is equally necessary that the fee revenue not exceed the regulatory costs in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless”. Nonetheless, Rothstein J.’s reasons (at para 40) afford governments “some reasonable leeway” with respect to the constitutional limits on regulatory revenue generation (see also *Allard* at 411–412), allowing for “small or sporadic” surpluses where “there was a reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme”. Relevant to the circumstances, where there has been no attempt to match revenues to costs, Rothstein J. held that “a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge and would be a strong indication that the levy was in pith and substance a tax” (at para 40). The principle to which Rothstein J. spoke is that where the revenue generated by a levy exceeds the cost of the regulation, then it looks and acts like a tax and it must be treated as such because to do otherwise

would be to circumvent the requirements of s. 53 of the *Constitution Act, 1867*. To paraphrase, with acknowledgments to Gertrude Stein, a tax is a tax is a tax is a tax. We address this more fully below.

[322] There is no evidence to suggest, and no way to logically infer, that the fuel levy bears a relationship to anything but a fraction of the costs of the administration and operation of either or both of the schemes established under the *Act*. There was simply no attempt by Parliament to match the revenues from the fuel levy with the cost of the scheme under which the fuel levy is imposed. This is because Parliament designed the fuel levy to systematically generate significant surpluses above the cost of the scheme itself—it could not otherwise achieve its stated purpose. Accordingly, the quantum of the fuel levy cannot be said to be *connected* to the cost of the scheme established under Part 1.

[323] We conclude there is no evidence upon which to find the fuel levy is attached to a "complete and detailed code" or forms part of a "complex regulatory framework". There are no administrative or operational costs to assess outside of those associated with the imposition, collection and remission of the levy itself. Even still, Part 1 fails to identify what those administrative costs would be or any other costs that might normally be associated with a regulatory scheme. None of this satisfies the requirements for a regulatory scheme in the constitutional sense.

[324] As to the goal of modifying behaviour, Division 7 of Part 1 deals with distribution of the fuel levy collected[10] by the Minister of National Revenue through the auspices of the Canada Revenue Agency. It contains one provision. In very general terms, s. 165 requires the Minister of National Revenue to *distribute* the *net amount* of revenues raised in the listed province from which the revenues were collected. The net amount of revenue is determined for each listed province and is the levy revenue generated in the listed province less any amounts rebated, refunded or remitted. The Minister of National Revenue may distribute the net revenues to the listed province, to prescribed persons in the listed province, or to a combination of both (s 165(2)). In this way, the fuel levy is sometimes said to be revenue-neutral.

[10] The Office of the Parliamentary Budget Officer estimates "the federal government will generate $2.63 billion in carbon pricing revenues in 2019-20"—*Fiscal and Distributional Analysis of the Federal Carbon Pricing System* <https://www.pbo-dpb.gc.ca/en/blog/news/Federal_carbon_pricing> (30 April 2019).

[325] The revenue-neutral description indicates the fuel levy is a tax. Revenue-neutrality typically refers to a tax scheme where revenue from the tax is used to lower other sources of revenue to the government that imposed the tax (e.g., the British Columbia carbon tax regime). In operational terms, the federal government has said that the vast majority of the fuel levy revenues will be used to provide a refundable credit on personal income tax returns. In this way, while the revenue does not go back to the ratepayer, it is allocated in a manner that lowers other sources of revenue to the federal government. What s. 165 establishes, then, is that Parliament has not *appropriated* the revenues collected under the fuel levy to any particular purpose or cost. All tax revenues are appropriated to fund government expenditures (*Constitution Act, 1867*, s 102 and s 103) and nothing is added to the characterisation of a levy by legislatively designating its revenues to be distributed as tax credits to persons who may spend it in ways unconnected to a regulatory purpose. In this case, the fuel levy revenues are simply contributed to the Consolidated Revenue Fund and then distributed within a listed province, thereby reducing other sources of revenue. As Professor Hogg suggested, in the context of a 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" (Hogg at c 31.9, footnote 90a (WL)).

[326] Also, because there is no refund, rebate or remittance of the goods and services tax [GST] charged on the increase in the price of goods and services brought about by the fuel levy (*Excise Tax Act*, Part IX), the increased GST revenue remains in the federal government's coffers. Although GST revenue is indirectly generated by the fuel levy, it has a closer and more concrete nexus to the fuel levy than do the behaviour changes Parliament seeks to achieve.

[327] As an aside, the fuel levy is not *fiscally*-neutral since its revenues are distributed; they are not reinvested in new spending associated with climate change, like the fiscally-neutral Alberta and Quebec carbon tax regimes.

[328] While the *Act* is said to be an attempt to influence broader public behaviour, it does so under Part 1 only through the imposition of a broad-based levy on fuel and combustible waste that may be distributed to taxpayers or a provincial government without a requirement that it be spent in any way consistent with the behaviour modification sought by Parliament. That is, there

are no restrictions or specific purposes imposed on the expenditure of the revenues generated by the levy. While the net revenues are distributable to the listed provinces or taxpayers in that Province, all aspects of distribution and the use of the revenues are entirely discretionary. Moreover, there is no direct relationship between the actual ratepayer and the regulatory purpose to which the fuel levy adheres.

[329] We find the evidence fails to demonstrate that Part 1 of the *Act* meets the first three criteria in *Westbank*. For purposes of further analysis, we find Part 1 is properly characterised as a scheme of taxation.

b) OBPS levy

[330] While regulatory schemes usually involve expenditures of funds on the known or reasonably estimated costs of regulation, that is not present under Part 2. However, Part 2 has as its focus the *compensation* (ss 174(1) and (2)) of the federal government for the actual cost of GHG emissions. In this way, the costs of the regulatory scheme are a secondary consideration to the purpose not of the regulatory scheme but of the revenues derived from it. The evidence establishes that the environmental *cost* of GHG emissions far outstrips the economic cost of their emission to the emitter. The price points of the scheme are directly tied to the compensation set out in Part 2 and appear to "clearly [operate] so as to limit recoupment to the actual costs" of GHG emissions (*Ontario Home Builders* at para 55), in the broader environmental and societal sense of their cost—of note, this is also consistent with a Pigouvian tax. Nonetheless, we find there is a clear and close nexus between the estimated costs Parliament seeks to recover and the revenues raised through the OBPS levy.

iv. A relationship between the person being regulated and the regulation

[331] With respect to Part 2, there can be no doubt that heavy industrial GHG emitters have contributed to the accumulation of atmospheric GHGs that Parliament seeks to reduce or for which it seeks compensation. In some measure, Part 2 also benefits heavy industrial emitters by allowing them to capitalise on efforts to meet the OBPS emissions standards it imposes. In this way, the levy imposed under the OBPS is the means of advancing a regulatory purpose (*Attorney-General of British Columbia v Attorney-General of Canada* (1922), 64 SCR 377, aff'd

[1924] AC 22 (PC) [*AG BC v AG Canada*]), because it encourages heavy emitters to reduce their GHG emissions at the same time as it discourages them from emitting GHGs in excess of the industry average (Dr. Rivers' Affidavit at para 6, and *Rivers Report* at 29, albeit on "relatively thin" empirical evidence); it "lend[s] preferences to certain conduct with the view of changing … behaviour" (*Westbank* at para 29; *Cape Breton Beverages Ltd. v Nova Scotia (Attorney General)* (1997), 144 DLR (4th) 536 (NSSC), aff'd (1997), 151 DLR (4th) 575 (CA), leave to appeal ref'd, [1997] 3 SCR vii). Like the customs duties in *AG BC v AG Canada*, Part 2 is "something more" than simple taxation (at 387).

[332] Moreover, Division 4 sets forth offences and punishment in respect of contravention of Part 2, including the full sentencing regime identified earlier in this opinion. While an exercise of Parliament's criminal law-making power under s. 91(27), the clear objective of the criminal law provisions of Part 2 is to enforce the behavioural modification sought under that Part. Of note, the criminalisation of certain conduct with an attendant sentencing regime tied directly to GHG emissions and the *polluter pays* principle is not found under Part 1.

[333] We find Part 2 may be characterised as a scheme to regulate GHG emissions.

4. Classification of the *Act*

[334] Parliament and the Provincial legislatures share the power to tax and to regulate under the *Constitution Act, 1867*, ss. 91(2), (3) and (27) and ss. 92(2), (9), (10), (13) and (16) and s. 92A and s. 93. Before we classify the *Act*, it is important to understand that the Attorney General of Saskatchewan has made three concessions relevant to the existence and the exercise of Parliament's law-making power over taxation under s. 91(3):

> 39. … [T]he Attorney General would have no constitutional objection if the federal government adopted a national carbon tax that applied uniformly all across the country. The Attorney General would also have no constitutional objection if the national carbon tax provided for variations based on objective criteria. …
>
> ...
>
> 44. … The Attorney General readily acknowledges that Parliament has the jurisdiction to enact legislation implementing a national carbon tax under section 91(3). …

Moreover, the *Act* itself reflects an acknowledgement that the Provinces enjoy constitutional law-making power over the broad issue the *Act* addresses—i.e., the pricing of GHG emissions. So too does the jurisprudence.

[335] We find the fuel levy under Part 1 of the *Act* is, in pith and substance, a tax enacted under s. 91(3) of the *Constitution Act, 1867*, the broad purpose of which is to bring about behavioural changes to reduce GHG emissions. The fuel levy "bear[s] all the traditional hallmarks of a 'tax'" (*Westbank* at para 4) and Part 1 does not create a regulatory scheme in the sense required by the Constitution because none of the indicia of a regulatory scheme under constitutional law are present. The Attorney General of Saskatchewan has conceded that, if the fuel levy were found to be a tax, then Parliament had the constitutional authority to enact it.

[336] Nonetheless, we note that the Supreme Court and the Privy Council have held that Parliament's power to tax does not permit it to enact legislation that regulates matters that would otherwise fall within provincial jurisdiction simply because the regulatory provisions have been framed as a tax (see *Quebec (Attorney General) v Canada (Attorney General)*, [1932] AC 41 (PC) at 53; *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 355 (PC) at 367; *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at 468–469). The stated purpose of the *Act* is to regulate GHG emissions, a matter that comes within Provincial jurisdiction; that is, the legal consequences and effects of the *Act* on matters coming within Provincial jurisdiction are not incidental to its purpose. In this regard, albeit prior to the adoption of the double aspect doctrine, in *Quebec (Attorney General) v Canada (Attorney General)*, Viscount Dunedin wrote:

> Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Section 16 clearly assumes that a Dominion licence to prosecute insurance business is a valid licence all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so; that a Dominion licence so far as authorizing transactions of insurance business in a province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with provincial legislation has not already got, if he has complied with provincial requirements. It is really the same old attempt in another way. Their Lordships cannot do better than quote and then paraphrase a portion of the words of Mr. Justice Duff, in the *Reciprocal Insurance* case. He says ([1924] 1 D.L.R., at p. 799):–
>
> > In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91(27), appropriate to itself, exclusively, a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

> If instead of the words “create penal sanctions under s. 91 (27)” you substitute the words “exercise taxation powers under s. 91(3)” and for the word “criminal” substitute “taxing,” the sentence expresses precisely their Lordships’ views.

[337] The scheme under Part 2 is quite different than that under Part 1. We find the OBPS levy has certain hallmarks of a tax and also bears hallmarks of a regulatory charge. Although Part 2 has elements of taxation and elements of criminal law regulation, the primary function of the OBPS levy is, in pith and substance, to regulate industrial GHG emissions. As such, we find Part 2 imposes a regulatory charge having the broad purpose of regulating GHG emissions.

[338] The Attorney General of Canada has not pointed to any enumerated head of federal power to justify its claim that the *Act* comes within a class of subjects “truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction” (*Oldman River* at 72). Rather, the Attorney General of Canada submits GHG emissions or pollution is a new matter. However, the record adduced by the Attorney General of Saskatchewan (AG-SK Record, Tabs 13, 13A and 13B) indicates that regulations with respect to the release of CO_2 into the atmosphere (i.e., smoke) have existed for centuries and have been considered a local matter. While modern international recognition of the pernicious and pervasive effects of GHG emissions has brought the matter of their regulation to the forefront of governmental consciousness at both the federal and the provincial level, anthropogenic GHG emissions have been around as long as we have been burning things to keep warm and to cook food. In short, GHG emissions are not a new matter but are a subset of an old matter, namely, air pollution. Air pollution has always been a local matter, the result of a local activity, and regulated locally.

[339] While GHG emissions are clearly a form of air pollution, and may be approached from that perspective, the fuel levy and OBPS levy pervasively affect the local economies of the listed provinces and the day-to-day lives of their residents. By dampening consumer and industrial demand for fuel and combustible waste that produce CO_2e emissions, the methodologies used under the *Act* to achieve that purpose implicate provincial subject matters and law-making powers under ss. 92(2), (5), (10), (13) and (16) and s. 92A and s. 93 of the *Constitution Act, 1867*. These constitutional provisions give Provincial legislatures broad and exclusive jurisdiction over a wide range of local matters including the vast majority of the activities that generate GHG emissions. For example, a Province’s ability to legislate with respect to intra-provincial trade and commerce is significant and includes the ability to regulate the price of

gasoline and fuel oil sold within the Province (*Reference Re Validity of Section 5(a) of the Dairy Industry Act, Canada Federation of Agriculture v Attorney-General of Quebec (Margarine Case)*, [1951] AC 179 (PC)).

[340] Moreover, the fact the Provinces have the power and jurisdiction to legislate on the matter is acknowledged in the *Act* itself, which accounts for validly-legislated provincial GHG-pricing mechanisms aimed at reducing local GHG emissions. The plain fact is that the *Act* is not qualitatively different from what the Provinces can, and what some Provinces have, constitutionally enacted, whether individually or in combination, using their law-making powers under s. 92.

[341] While the Attorney General of Canada has argued that the Provinces are incapable of setting a *national* benchmark price for CO_2e emissions, putting the question in such terms is not helpful from a classification viewpoint. There will always be a "national aspect" of a matter that the Provinces are unable to enact using their Provincial law-making powers. The issue is whether, taking into account federalism and the jurisdictional balance inherent in the Constitution, federal legislation is grounded in a federal head of power, since the matter can be readily classified as an exercise of Provincial power.

[342] If the purpose and effect of the *Act* is to price GHG emissions and to provide for an intensity-based trading regime for industrial emitters, it has been suggested that the statute falls within the general trade and commerce power as set in s. 91(2) of the *Constitution Act, 1867*. In this respect, we agree with Chief Justice Richards that the *Act* cannot be sustained under Parliament's trade and commerce power. We further observe that the Provinces may validly enact provincial GHG pricing and trading legislation having national and international effect. As the *Pan-Canadian Framework* acknowledges (at 26; see also Moffet Affidavit at para 73), "Quebec and California already participate in international emissions trading under their linked cap-and-trade system". See also the Western Climate Initiative, Inc.[11] This highlights why the scope of Parliament's jurisdiction over trade and commerce has been scrutinised with "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors of Canada Ltd. v City National Leasing*,

[11] Western Climate Initiative, Inc. <www.wci-inc.org> (30 April 2019).

[1989] 1 SCR 641 at 659 [*General Motors*]). In *2018 Securities Reference*, the Supreme Court expressed its concern that an aggressive interpretation of the trade and commerce power could overwhelm provincial authority in respect of matters of a local nature and property and civil rights:

> [100] The scope of Parliament's jurisdiction over trade and commerce has been greatly influenced by "the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights" (*General Motors*, at p. 659). The concern here is that an overly broad interpretation of the general branch under s. 91(2) could entirely supplant the provinces' jurisdiction over property and civil rights (s. 92(13)) and over matters of a purely local nature (s. 92(16)), while an unduly narrow interpretation could leave this branch "vapid and meaningless" (*General Motors*, at p. 660).

[343] Further, we agree with the analysis of Chief Justice Richards under s. 91(27) of the *Constitution Act, 1867*. Part 2 of the *Act* cannot be sustained as an exercise of Parliament's criminal law jurisdiction. In that Part 2 permits the owners of covered facilities to buy and sell the *right* to emit excess GHG it hardly seems *prohibitory*.

[344] We also agree with the analysis of Chief Justice Richards under s. 132 of the *Constitution Act, 1867*, with respect to Parliament's authority to implement treaties and with his conclusion that there is no federal treaty implementation power that can be relied upon in this reference. We concur with his opinion in respect of the intervenor arguments that challenge the constitutionality of the *Act* under s. 125 and s. 92A of *The Constitution Act, 1867*. Lastly, we find this reference does not engage, at least not directly, s. 35 of the *Constitution Act, 1982*.

[345] In summary, we conclude that the matter addressed by the *Act*, i.e., the regulation of GHG emissions, can be classified as coming within the classes of subjects exclusively assigned under s. 92 of the *Constitution Act, 1867* to the Provinces. The constitutionality of the *Act* cannot be sustained under any of Parliament's exclusive law-making power under the classes of subjects enumerated in s. 91 of *The Constitution Act, 1867* or under s. 132. As such, Parliament's law-making power to enact the *Act* must be found under POGG if the *Act* is to be constitutional.

D. Constitutional limits on the power to tax

[346] Before turning to the POGG analysis, because the fuel levy under Part 1 of the *Act* is, in pith and substance, a tax, it fell to Parliament to enact the fuel tax in a constitutional manner. We now examine whether it has done so.

[347] As the jurisprudence indicates, unlike its law-making powers with respect to the other enumerated classes of subjects or under POGG, Parliament's power to tax under s. 91(3) is curtailed and circumscribed by a number of constitutional provisions. The bulk of these are found in ss. 53–57 of Part IV of the *Constitution Act, 1867*. Of these provisions, s. 53 and s. 54 are relevant:

> **MONEY VOTES; ROYAL ASSENT**
>
> **Appropriation and Tax Bills**
>
> **53.** Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.
>
> **Recommendation of Money Votes**
>
> **54.** It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

[348] The *Constitution Act, 1867* also specifically addresses the revenues that are generated by taxation:

> **VIII. REVENUES; DEBTS; ASSETS; TAXATION**
>
> **Creation of Consolidated Revenue Fund**
>
> **102.** All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.
>
> **Expenses of Collection, etc.**
>
> **103.** The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.
>
> …

Appropriation from Time to Time

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

[349] It is also important to recognise that the *Constitution Act, 1867* exempts certain public lands and property from the exercise of both the federal and provincial taxing powers:

Exemption of Public Lands, etc.

125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[350] Of course, many of the constitutional requirements have little or no bearing on the *Act*. Other of the requirements have been satisfied (e.g., s. 55). However, three of the provisions require further scrutiny in the context of the fuel levy, namely, ss. 53, 54 and 125.

[351] Section 125 is relevant here for two reasons. First, the intervenors, Saskatchewan Power Corporation and SaskEnergy Incorporated, directly challenge the constitutionality of the *Act* under that section. However, in conclusory terms, the constitutionality of the *Act* is not impugned by s. 125. As Gonthier J. found in *Westbank*, s. 125 renders one level of government's tax laws constitutionally *inapplicable* to another level of government, including as to its agents; it does not render tax laws unconstitutional.

[352] Second, observing that s. 125 is "one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system" (at para 17), Gonthier J. in *Westbank* looked more closely at how the constitutional provision informed an understanding of Canadian federalism and secondarily advanced "the constitutional value of democracy" (at para 19). In relevant terms, he explained the concept that underpins s. 125 in this way:

> [17] The section is one of the tools found in the Constitution that ensures the proper functioning of Canada's federal system. It grants to each level of government sufficient operational space to govern without interference. It is founded upon the concept that imposing a tax on a level of government may significantly harm the ability of that government to exercise its constitutionally mandated governmental functions. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), at p. 431, Marshall C.J. explained this concept as follows:
>
> > That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

> In *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, the majority of this Court referred to these statements at p. 1056, explaining at p. 1065 that "s. 125 is plainly intended to prevent inroads, by way of taxation, upon the property of one level of government, by another level of government".

[353] Justice Gonthier gave a narrow interpretation of the import of Chief Justice Marshall's dicta in *M'Culloch v Maryland*, 17 US (4 Wheat) 316 (1819) [*M'Culloch*], which suited a case where only s. 125 was at issue. Here, where s. 53 and s. 54 are engaged, the dicta has broader implications to an understanding of how the legislative power to tax is restrained by federalism and the constitutional value of democracy.

[354] We begin with *620 Connaught*, where Rothstein J. provided the following thoughts on federalism and taxation early in his reasons:

> [4] Central to our concept of democracy is the principle that the Crown may not levy a tax except with the authority of Parliament or the legislature. This principle harkens back to the *Bill of Rights of 1689*, 1 Will. & Mar. sess. 2, c. 2, art. 4, and ensures not only "that the executive branch is subject to the rule of law, but also that the executive branch must call the legislative branch into session to raise taxes (and vote supply)" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246).
>
> [5] This principle is found in s. 53 of the *Constitution Act, 1867*, which mandates that bills imposing any tax shall originate in the House of Commons. In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, Major J. explained the rationale underlying s. 53, at paras. 30-32:
>
> > The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather, it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.
> >
> > In our system of responsible government, the Lieutenant Governor in Council cannot impose a new tax *ab initio* without the authorization of the legislature. As Audette J. succinctly stated in *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, "[t]he Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament."
> >
> > *The basic purpose of s. 53 is to constitutionalize the principle that taxation powers cannot arise incidentally in delegated legislation. In so doing, it ensures parliamentary control over, and accountability for, taxation.* As E. A. Driedger stated in "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25, at p. 41:

> Through the centuries, the principle was maintained that taxation required representation and consent. The only body in Canada that meets this test is the Commons. The elected representatives of the people sit in the Commons, and not in the Senate, and, consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.
>
> [6] The issue in this case is whether the Minister imposed a tax, which, in accordance with s. 53 of the *Constitution Act, 1867*, is beyond his statutory power since only Parliament may levy a tax.
>
> (Emphasis added)

[355] In *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*OECTA*], the appellant had argued the power granted to the provincial Minister of Finance pursuant to amendments to the *Education Act*, RSO 1990, c E.2, under the *Education Quality Improvement Act, 1997*, SO 1997, c 31, violated s. 53 since it allowed the Minister to determine property tax rates. Although he found the legislation at issue in *OECTA* did not run afoul of s. 53, Iacobucci J. set out the requirements for a constitutional delegation of the power to tax:

> [74] *The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation.* The animating principle is that only the legislature can impose a new tax *ab initio. But if the legislature expressly and clearly authorizes the imposition of a tax by a delegated body or individual, then the requirements of the principle of "no taxation without representation" will be met. In such a situation, the delegated authority is not being used to impose a completely new tax, but only to impose a tax that has been approved by the legislature.* The democratic principle is thereby preserved in two ways. First, the legislation expressly delegating the imposition of a tax must be approved by the legislature. Second, the government enacting the delegating legislation remains ultimately accountable to the electorate at the next general election.
>
> [75] This view accords with the majority position in *Eurig, supra*. Major J. stated, at paras. 31-32: [excerpt omitted]
>
> Major J. later referred to this, at para. 40, as the "constitutional requirement for a clear and unambiguous authorization of taxation within the enabling statute". The [statute in question in *OECTA*] meets this requirement, as s. 257.12(1)(b) of the new *Education Act* expressly authorizes the Minister of Finance to prescribe the tax rates for school purposes. When the Minister sets the applicable rates, a tax is not imposed *ab initio*, but is imposed pursuant to a specific legislative grant of authority. Furthermore, the delegation of the setting of the rate takes place within a detailed statutory framework, setting out the structure of the tax, the tax base, and the principles for its imposition.
>
> …
>
> [77] There is long-standing legal authority for the view that the test for constitutional delegation of the taxation power is the use of clear and unambiguous language. In

Attorney-General v. Wilts United Dairies, Ltd. (1921), 37 L.T.R. 884 (C.A.), at p. 885, aff'd (1922), 91 L.J.K.B. 897 (H.L.), Scrutton L.J. stated:

> It is conceivable that Parliament, which may pass legislation requiring the subject to pay money to the Crown, may also delegate its powers of imposing such payments to the Executive, but in my view *the clearest words should be required before the Courts hold that such an unusual delegation has taken place*. As Chief Justice Wilde said in *Gosling v. Veley*, 12 Q.B., at p. 407: "The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established by those who seek to impose the [burden], has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it." [Emphasis added by Iacobucci J.]

This case was relied on in *Gruen Watch Co. of Canada Ltd. v. Attorney-General of Canada*, [1950] O.R. 429 (H.C.), at p. 438, affirmed on this point in *Bulova Watch Co. v. Attorney-General of Canada*, [1951] O.R. 360 (C.A.), where McRuer C.J.H.C. stated:

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. *In no case is the exercise of the delegated authority more carefully scrutinized than in the case where it is claimed that it gives a right to impose any financial burden on the subject.*

The same principles apply to the delegation of powers to the executive. As previously referred to in paras. 75 and 76, see *The King v. National Fish Co.*, [1931] Ex. C.R. 75, at p. 83, and *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.), at pp. 131-33.

[78] These principles explain how Parliament and the provincial legislatures are able to delegate taxing authority to municipalities, school boards and Aboriginal band councils. *Westbank First Nation*, *supra*, provides but one example of the constitutional delegation of such a taxing power, …

[79] …*[A] tax imposed through the delegation of the taxing authority must also be intra vires, for a legislature cannot delegate a power it does not have.* In the case of provincial legislatures, this primarily means that the delegated tax must be a direct tax, given that s. 92(2) of the *Constitution Act, 1867* assigns to the provinces only the power of "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes". Property taxes for education purposes are a direct tax, and so are *intra vires* the province. The delegation of the taxing authority in the *EQIA* is therefore constitutional. The delegation has been effected using express and unambiguous words, and the tax that the Minister has been delegated the authority to impose is *intra vires* the province.

(Italics emphasis added)

[356] We observe, however, that Professor Hogg has strongly criticised *Eurig Estate* and *OECTA* as allowing Parliament to "in practice escape the democratic accountability that occurs when a bill is introduced in the legislative assembly" (Peter W. Hogg, "Can the Taxing Power Be Delegated?" (2002), 16 SCLR (2d) 305 at 309). Professor Hogg wrote (at 309–310):

> With respect, the facts of the *Eurig* case demonstrated quite dramatically that it should not be possible for the taxing power (apart from details and mechanism) to be delegated. Once a taxing power has been delegated, the resulting taxes do in practice escape the democratic accountability that occurs when a bill is introduced in the legislative assembly. This was demonstrated quite clearly by the history of Ontario's probate fee. It had been increased tenfold since 1950 when the power was vested in the Lieutenant Governor in Council, and the last increase, which was a tripling of the rate in 1992, was quietly imposed by order in council after the government of the province publicly announced that there would be no further increases in taxation!
>
> ...
>
> The *Ontario English Catholic Teachers* case cannot easily be interpreted as a case in which only the "details and mechanism" of taxation were delegated. The phrase "details and mechanism" was never referred to, and the literal reading of the Court's opinion is that even an essential element of the power to tax can be delegated without offending section 53 of the *Constitution Act, 1867*. It seems therefore that, after the twists and turns of *Agricultural Products Marketing* and *Eurig*, the Court has finally provided an answer to the question whether the taxation power can be delegated. The answer, however, is the wrong one. While it is clearly established (and obviously necessary) that other legislative powers be subject to delegation, the taxing power is distinctive. It is distinctive for the legal reason that section 53 singles it out for the requirement that any bill must originate in the House of Commons. Admittedly, that is not the clearest possible declaration that delegation is prohibited, but a prohibition on delegation is, it is submitted, implicit in section 53. It must be remembered that the taxing power is the one upon which the rest of governance depends. As the King and Parliament both recognized in the 17th century, nothing important can be done without resources, and it is control of the taxing power that provides the resources. Moreover, no other power has as direct and immediate an effect on citizens as the taxing power, and (for that reason) nothing government does is as unpopular as the imposition and collection of taxes. There is a huge incentive for governments to offload this power to a delegate, who can raise taxes quietly without any irritating fuss in the Parliament or Legislature, and who can shoulder the blame when the media do get wind of the action. The action of the government of Ontario in 1992 in tripling probate fees by order in council *after having publicly promised to stop raising taxes* perfectly illustrates the mischief of delegation in the case of the taxing power. The Court should have interpreted section 53 as prohibiting the delegation of this primary instrument of democratic governance.
>
> (Emphasis in original, footnotes omitted)

[357] While we agree with Professor Hogg, on the basis of the case law we identify three issues with the validity of the *Act*: (a) the lack of a clear and unambiguous delegation of the power to tax; (b) the overbreadth of the delegation of legislative power; and (c) the so-called backstop.

1. No clear and unambiguous delegation of the power to tax

[358] As was the case in *Confédération des syndicats nationaux*, where the Supreme Court also dealt with s. 53 of the *Constitution Act, 1867*, the *Act* fails to set forth an express and unambiguous delegation of Parliament's taxing authority. In *Confédération des syndicats*

nationaux, LeBel J., for a unanimous Court, said the position taken in *Eurig Estate* remained valid and, according to it, "the taxing authority of Parliament or of a legislature may not be delegated unless that body clearly and unambiguously expresses its intent to delegate the authority" (at para 88). Justice LeBel later said, "[o]nce this requirement is met, the delegate may exercise the power to establish the details and mechanisms of taxation" (at para 92).

[359] Like the statute under consideration in *Confédération des syndicats nationaux*, Part 1 does not state that Parliament is delegating its taxing authority. The nature of the fuel levy as a tax is obscured by references to *charges* and *pricing*. It is further obscured because the executive branch of the federal government may *prescribe* all aspects of the tax. Parliament may have thought it was exercising its authority to impose a regulatory levy at the time it delegated the power to impose and collect the fuel levy, but it has no such clear authority (*Hydro-Québec*). Regardless, the fact is the *Act* contains no statement either that its purpose is to impose and collect a tax or that Parliament's taxing authority was being delegated. Particularly relevant to those circumstances, LeBel J. said in *Confédération des syndicats nationaux*:

> [93] The relevant provisions of the *Employment Insurance Act* must therefore be examined to determine whether, as in *Ontario English Catholic Teachers' Assn.*, they are consistent with the principles laid down in this Court's decisions. The provisions in question, ss. 66.1 and 66.3, do not state that Parliament is delegating taxing authority to the Governor General in Council. The nature of the levy remains ambiguous. It is unclear whether Parliament still considered that it was exercising the authority to impose a regulatory charge in enacting those provisions. At the time Parliament delegated the power to collect employment insurance premiums to the Commission and the Governor General in Council, the legislation contained no statement either that its purpose was to collect a tax or that Parliament's taxing authority was being delegated to the Governor General in Council. The delegation concerned a charge that was no longer a levy for specific purposes but had become a levy for general purposes with the meaning of *Westbank*, but it was not specified in the Act that Parliament intended to delegate its taxing authority as such. Parliament would have had to state that it was delegating that authority to the Governor General in Council. Owing to the ambiguous nature of the levy, whether Parliament intended to delegate its taxing authority remained uncertain.
>
> [94] I accordingly conclude that the version of s. 66.1 of the *Employment Insurance Act* that applied in 2002 and 2003 is invalid. This means that employment insurance premiums were collected unlawfully, without the necessary legislative authorization. The same conclusion must be reached as regards the version of s. 66.3 that applied in 2005 and the premiums collected that year. In the circumstances of this case, which involves the improper exercise of a power conferred on Parliament, I would suspend the declaration of invalidity to allow the consequences of that invalidity to be rectified. I would dismiss the appellants' other claims and affirm the judgments of the Court of Appeal and the Quebec Superior Court with respect to them.

[360] Accordingly, as Part 1 of the *Act* is entirely an exercise of Parliament's law-making power under s. 91(3), we conclude that Part 1 of the *Act* is invalid because it lacks a clear and unambiguous statement of Parliament's intention to delegate its taxing authority as required by s. 53 of the *Constitution Act, 1867*.

2. Overbreadth in the delegation of law-making power

[361] The second issue is whether the discretionary authority of the executive branch of the federal government under the *Act* arises from an unconstitutional delegation of *legislative* power to tax. For purposes of comparison, this was the delegation of law-making authority considered by the Court in *OECTA*:

> 257.12 (1) The Minister of Finance may make regulations,
>
> …
>
> (b) prescribing the tax rates for school purposes for the purposes of section 257.7;

[362] Taken in isolation, s. 166(2) and the definition of *rate* under Part 1 of the *Act* empower the federal cabinet to adjust the rate of fuel levy payable by ratepayers. Under *OECTA*, this is arguably within the scope of what may be considered a constitutionally-palatable delegation of legislative power to tax. And, it is reluctantly supported by Elmer A. Driedger, *The Composition of Legislation*, 2d ed revised (Ottawa: The Department of Justice, 1976), where the learned professor wrote (at 121–122):

> Occasionally power is conferred to amend statutes. There are but few instances of this power in the statutes of Canada. The *Food and Drugs Act* permits the amendment by regulation of a Schedule to the Act listing prohibited drugs. The justification is that it may be necessary to take action with respect to a newly discovered drug, for example, before Parliament would have an opportunity to amend. The *Currency and Exchange Act* authorizes amendment of the Schedules specifying denominations of subsidiary coin and prescribing composition and fineness. The instrument effecting the amendment should be a formal public document—as, for example, a proclamation under the Great Seal, published in the official Gazette—so that the amendment can be readily found and proven.
>
> *It is perhaps needless to caution that, except in unusual cases, the alteration of Acts of Parliament should be left to Parliament.*
>
> (Emphasis added)

Professor Driedger later wrote (at 198) that the "delegation of power to amend a statute is generally regarded as objectionable for the reason that the text of the statute is then not to be

found in the statute book". See also *Oldman River* at 38–39 per La Forest J. regarding the paramountcy of statute law over subordinate legislation.

[363] In this case, however, Parliament has given the Governor in Council considerably more discretion under Part 1 of the *Act* than the Minister had in *OECTA*. The *Act* includes these delegated powers (Appendix A provides the whole of s. 166 and s. 168):

> **Regulations**
> **166**(1) The Governor in Council may make regulations
>
> > (a) *prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation;*
> >
> > …
>
> **Amendments to Part 1 of Schedule 1**
> (2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada *at levels that the Governor in Council considers appropriate*, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.
>
> …
>
> **Amendments to Schedule 2**
> (4) The Governor in Council may, by regulation, *amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table*.
>
> …
>
> **Fuel charge system regulations — general**
> **168**(3) For the purpose of facilitating the implementation, application, administration and enforcement of the fuel charge system, the Governor in Council may make regulations
>
> > (a) *adapting or modifying any provision of this Part*, Part 1 of Schedule 1 or Schedule 2;
> >
> > (b) *defining, for the purposes of this Part*, Part 1 of Schedule 1 or Schedule 2, or any provision of this Part, Part 1 of Schedule 1 or Schedule 2, *words or expressions used in this Part*, Part 1 of Schedule 1 or Schedule 2 *including words or expressions defined in a provision of this Part*, Part 1 of Schedule 1 or Schedule 2; and
> >
> > (c) providing that a provision of this Part, Part 1 of Schedule 1 or Schedule 2, or a part of such a provision, does not apply.
>
> **Conflict**
> (4) If a regulation made under this Part in respect of the fuel charge system states that it applies despite any provision of this Part, *in the event of a conflict between the regulation and this Part, the regulation prevails to the extent of the conflict.*
>
> (Emphasis added)

[364] Moreover, the *Act* contains no less than 430 references to the word *prescribed*, which arise chiefly under Part 1, and include this definition in s. 3:

> **prescribed** means
>
> (a) in the case of a form or the manner of filing a form, authorized by the Minister;
>
> (b) in the case of the information to be given on or with a form, specified by the Minister;
>
> (c) in the case of the manner of making or filing an election, authorized by the Minister; and
>
> (d) in any other case, prescribed by regulation or determined in accordance with rules prescribed by regulation. (*Version anglaise seulement*)

[365] Importantly, most of the critical features of the fuel levy under Part 1, including just about every definition under s. 3, are open-ended, subject to qualifying statements that permit the executive branch of government to change the very nature of the levy, for example:

> **fuel** means
>
> (a) a substance, material or thing set out in column 2 of any table in Schedule 2, other than
>
> (i) combustible waste,
>
> (ii) a substance, material or thing that is prepackaged in a factory sealed container of 10 L or less, or
>
> (iii) a prescribed substance, material or thing; and
>
> (b) a *prescribed* substance, material or thing. (*combustible*)
>
> …
>
> **Covered facility of a person**
>
> **5** For the purposes of this Part, a covered facility is a covered facility of a person if
>
> …
>
> (b) the person is a *prescribed* person, a person of a *prescribed* class or a person meeting *prescribed* conditions in respect of the covered facility.
>
> …
>
> **Delivery of marketable natural gas — distribution system**
>
> **14** For the purposes of this Part, if marketable natural gas is delivered to a particular person by means of a distribution system, the person that is considered to deliver the marketable natural gas is
>
> …
>
> (b) if *prescribed* circumstances exist or *prescribed* conditions are met, the person that is a *prescribed* person, a person of a *prescribed* class or a person meeting *prescribed* conditions.
>
> …
>
> **Charge – regulations**
>
> **26** Subject to this Part, a *prescribed* person, a person of a *prescribed* class or a person meeting *prescribed* conditions must pay to Her Majesty in right of Canada a charge in

respect of a type of *fuel* or combustible waste in the amount determined in *prescribed* manner if *prescribed* circumstances exist or *prescribed* conditions are met. The charge becomes payable at the *prescribed* time.

Charge not payable — regulations

27 A charge under this Part in respect of a type of fuel or combustible waste is not payable

(a) by a *prescribed* person, a person of a *prescribed* class or a person meeting *prescribed* conditions; or

(b) if *prescribed* circumstances exist or *prescribed* conditions are met.

…

Charge amount — mixture

40(2) Despite subsection (1), if a manner is *prescribed* in respect of a mixture that is deemed to be fuel of a *prescribed* type under subsection 16(2), the amount of a charge payable under this Division in respect of such a mixture is equal to the amount determined in *prescribed* manner.

Charge amount — regulations

40(3) Despite subsection (1), if *prescribed* circumstances exist or *prescribed* conditions are met, the amount of a charge payable under this Division in respect of fuel and a listed province is equal to the amount determined in *prescribed* manner.

...

Charge amount — regulations

41(2) Despite subsection (1), if *prescribed* circumstances exist or *prescribed* conditions are met, the amount of a charge payable in respect of combustible waste and a listed province is equal to the amount determined in *prescribed* manner.

...

Amount of rebate — regulations

47(3) Despite subsection (2), if *prescribed* circumstances exist or *prescribed* conditions are met, the amount of a rebate payable under this section is equal to the amount determined in *prescribed* manner.

[366] As can be seen from the few provisions above, Part 1 grants sweeping *legislative* law-making power to the executive branch of the federal government to adapt or modify the statute itself, including the power to adapt and modify any provision of Part 1 and to redefine words and expressions already defined in the statute. Most importantly, in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive branch "*the regulation prevails to the extent of the conflict*" (emphasis added, s 168(4)). The full breadth of the powers delegated by Parliament to the executive branch can only be understood by reviewing s. 3, the operative provisions of Part 1 and each provision of ss. 166–168, but the gist of its unconstitutional scope is evident from just reading s. 166(1) and s. 168(4) alongside s. 26. The regulation-making powers granted under Part 1 are so broad as to eclipse Parliament's own

power to tax because they circumvent the constitutional requirements for a tax law set forth under the *Constitution Act, 1867* (*nemo potest plus juris ad alium transferre quam ipse habet*).

[367] In *2018 Securities Reference*, the Court spoke *per curiam* to the related principle of Parliamentary sovereignty as a foundational principle of the Westminster model of government and in terms of the executive being "incapable of interfering with the legislature's power to enact, amend and repeal legislation" (at para 53). In its traditional form, the principle means that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament", citing A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 39–40. The Court in *2018 Securities Reference* said, "Parliamentary sovereignty therefore means that the legislative branch of government has supremacy over the executive and the judiciary: both must act in accordance with statutory enactments, and neither can usurp or interfere with the legislature's law-making function" (at para 55).

[368] Furthermore, the Court recognised that "various aspects of our written Constitution have qualified the basic Diceyan rule that Parliament has the power 'to make or unmake any law whatever'", observing that one such qualification "lies in the federal structure of the Canadian state, which restricts the subject matters over which each legislature has jurisdiction" (at para 56). In *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 72 [*Secession Reference*], the Court observed that:

> The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

[369] In *2018 Securities Reference*, the Court confirmed the principle of constitutional supremacy, "insofar as the Constitution places limits on the law-making powers of Parliament and the provincial legislatures" (at para 58). However, the Court then reinforced that the "principle of parliamentary sovereignty remains foundational to the structure of the Canadian state: aside from these constitutional limits, the legislative branch of government remains supreme over both the judiciary and the executive" (at para 58). Importantly, the Court in the *2018 Securities Reference* found an "important corollary to parliamentary sovereignty is the rule that the executive cannot unilaterally fetter the legislature's law-making power" (at para 59). See also Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2d ed (LexisNexis: Toronto, 2017), where the authors note:

> **§3.74** The rule of law also protects against arbitrary decisions or abuses by the government. If the only requirement of the rule of law was for governmental actions to be provided by statute, Parliament could delegate extreme executive and discretionary powers to public officials, so that any action may be within the boundaries of the legislation. The rule of law thus sets out limits to discretionary power. It establishes a system of rules for preventing abuse of discretion, and allows ordinary courts of law to overrule administrative actions which they deem arbitrary.
>
> (Footnotes omitted)

[370] Compare the "ambiguous" levy in *Confédération des syndicats nationaux* to the fuel levy under the *Act*, where the rate of levy, the subject matter of the levy and the persons subject to the levy are all set out in the Schedules to the statute:

Employment Insurance Act:

> **66.1** Notwithstanding section 66, the premium rate for each of the years 2002 and 2003 is the rate set for the year by the Governor in Council on the recommendation of the Minister and the Minister of Finance.

Greenhouse Gas Pollution Pricing Act, Part 1:

> **26** Subject to this Part, a *prescribed* person, a person of a *prescribed* class or a person meeting *prescribed* conditions must pay to Her Majesty in right of Canada a charge in respect of a type of fuel or combustible waste in the amount determined in *prescribed* manner if *prescribed* circumstances exist or *prescribed* conditions are met. The charge becomes payable at the *prescribed* time.

[371] The formula used to calculate the rate of levy was initially set by Parliament under Part 1, but the executive branch of the federal government is not bound by what Parliament has set. The delegated authority is unlimited and unfettered. The federal cabinet has the authority to amend and redefine any aspect of the tax to its whim. The open-ended structure of Part 1 and the

delegation of powers under the *Act* is, frankly, a recipe for the type of abuse Professor Hogg identified in "Can the Taxing Power Be Delegated?" (at 309–310).

[372] In fact, even if Part 1 were seen to be a regulatory levy, we would question the constitutionality of the delegation of law-making power under it because s. 166(3) sets forth a wholly-unfettered grant of broad discretion to *amend* Part 1 of the *Act* that, by virtue of s. 166(4), may trump any exercise of legislative power by Parliament. That is to say, ss. 166 to 168 expressly afford the executive branch of government the power to circumvent the exercise of law-making power by the legislative branch of government. This would seem unconstitutional, and contrary to the Westminster model, regardless of where the so-delegated law-making power lies under the *Constitution Act, 1867*. But, in that Part 1 imposes a tax, it bears repeating what Rothstein J. said in *620 Connaught*:

> [46] Raising revenues is one of the most powerful tools of government. It involves the taking of property by the government. That is why taxes may be levied only by elected legislators in Parliament or the legislature of a province under the *Constitution Act, 1867*. Where the connection between the use of the revenues generated from a government levy and the persons being regulated is doubtful, the courts will scrutinize the facts to ensure that the Constitution is not circumvented by executive or bureaucratic edict.

[373] In our opinion, that is exactly what occurs under Part 1—the Constitution has been circumvented to allow taxation by executive and bureaucratic edict. This is because the delegation of law-making power under the *Act* circumvents the constitutional restrictions on the exercise of Parliament's power to tax by permitting the executive or bureaucracy to exercise that power free from those restrictions and without oversight by Parliament. We find Part 1 of the *Act* violates s. 53 of the Constitution and is invalid for this reason alone.

3. The backstop aspect of the *Act*

[374] The principles that underpin s. 53 take on greater import in the context of the so-called backstop of the *Act*. In *Eurig Estate*, the Court said individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated and determine how it should be spent (s 53 and s 54). The Court also said that intergovernmental taxation is prohibited, in part, because one group of elected representatives should not be allowed to decide how taxes levied under and within the authority of another group of elected representatives should be spent. There are, of course, other principled aspects to the

constitutional provisions relating to taxation and, in our opinion, one of the principles that may be found is *uniformity of taxation*.

[375] Here, we begin by observing that, in foundational terms, the Preamble to the *Constitution Act, 1982* states: "Whereas Canada is founded upon principles that recognize the supremacy of God *and the rule of law*" (emphasis added). The basic premise of the rule of law is that everyone is equal before the law—or that everyone is equally subject to the law. In England, the rule of law finds its expression in this way (Halsbury's Laws of England, 4th ed (reissue) (London: Butterworths, 1996) vol 8(2) at 14, footnote 1):

> ... equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts. …

[376] The principle of uniformity of taxation itself is found in two places in the Constitution of the United States of America. It is expressed in Article 1, Section 2, with respect to the apportionment of tax measures among the States "according to their respective Numbers" and, later, in these terms (*United States Constitution*, US Const art I, §8): "all duties, imposts, and excises shall be uniform throughout the United States".

[377] Although there is no similar express statement in the Constitution of Canada, we recognise an implicit statement of the principle of uniformity of taxation in s. 94A(4) of the *Constitution Act, 1867*, which contains a Provincial power to tax non-renewable natural resources and forestry resources in the Province as well as the primary production thereof:

> **Taxation of resources**
>
> **92A**(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> > (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
> >
> > (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,
>
> whether or not such production is exported in whole or in part from the province, but *such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.*
>
> (Emphasis added)

[378] Indeed, although not expressly set out in the *Constitution Act, 1867*, the foundational principle of tax uniformity under the rule of law may be found in *Minister of Finance v Smith*,

[1926] 3 DLR 709 (PC) [*Smith*]. In *Smith*, the issue was whether income generated by a trade in alcohol made illicit under *The Ontario Temperance Act*, SO 1916, c 50, was taxable under the *Income War Tax Act, 1917*, SC 1917, c 28. In that regard, their Lordships wrote (at 711–712):

> Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, *it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular provinces*. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of provincial wrongdoing.
>
> (Emphasis added)

[379] Although somewhat tangentially, the Federal Court of Canada referred to the principle set out in *Smith* in *Gervais v Canada (M.N.R.)*, [1984] FCJ 1040 (QL) (Fed Ct) [*Gervais*], where Walsh J. declined to extend the concept of a *gift* under the *Income Tax Act*, to indirect gifts permitted by Quebec civil law. Justice Walsh said, "[i]n the present case we are dealing with a taxing statute which must be applied in the same manner throughout Canada". In *Marguerite F. Doriga Trust v The Minister of National Revenue* (1981), 81 DTC 85 at 89 (Tax Review Board), the Tax Review Board cited directly to the dicta in *Smith* for a similar purpose.

[380] Apart from these broad statements, there is jurisprudence on the narrower dimensions of the principle of tax uniformity where a taxpayer or the Minister of National Revenue has asserted a right of *fairness* or to *equal treatment* under the law; however, the jurisprudence does not address the territorial application of a tax. Several cases employ uniformity of taxation to smooth out the potentially differing effect of tax legislation in circumstances where Quebec civil law treats a thing differently than does the common law. See, for examples, *Rosenstone v Minister of National Revenue* (1971), 71 DTC 688 at 696 (Tax Appeal Board), referring to a "discriminatory tax advantage"; *Marcoux v Canada (Attorney General)*, [2000] 4 CTC 143 at para 16 (QL) (Fed Ct), where Denault J. spoke to "[a]u nom de l'uniformité d'application de cette loi fédérale [i.e., the *Income Tax Act*] et de l'égalité des contribuables devant le fisc", albeit in a way that

served to trump provincial private law in that case; *Canada v Construction Bérou Inc.* (1999), [2000] 2 CTC 174 at para 2 (FCA), where Létourneau J.A. described Parliament's efforts to harmonise tax laws as between Quebec and the rest of Canada as having a "view to providing fair and equal treatment to all Canadian taxpayers" and, in that regard, see also the *Interpretation Act*, RSC 1985, c I-21, s 8.1. As to tax fairness, see *Symes v Canada*, [1993] 4 SCR 695, where the Supreme Court examined the principles of vertical equity and horizontal equity in tax laws in the context of the equality rights guaranteed under s. 15 and s. 28 of the *Constitution Act, 1982*.

[381] We also note that s. 94 of the *Constitution Act, 1867*, provides for uniformity of laws in general:

> **94.** Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

[382] We conclude that the principle of uniformity of taxation—or the equal treatment of taxpayers under tax laws—may be derived from the rule of law and the *Constitution Act, 1982*, from the principles of fairness that govern tax policy, and from the *Constitution Act, 1867*. Of course, it will be pointed out, the rule of law—in the sense of the equality of everyone before the law—does not mean that all law is necessarily applicable to everyone in the same way. And, outside of tax laws, we are not aware of any constitutional principle that requires federal legislation to apply in the same way to all individuals throughout Canada. See, for example, *Haig v Canada; Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995, in reference to discrimination under s. 15(1) of the *Constitution Act, 1982*; *R v S.(S.)*, [1990] 2 SCR 254; *R v Turpin*, [1989] 1 SCR 1296.

[383] However, for the purposes of this reference, the principle of uniformity of taxation—the equality of taxpayers under tax laws—may be found in the Constitution and, therefore, may be said to be a principle of federalism. The principle supports the proposition that the so-called backstop is unconstitutional because the tax imposed under Part 1 of the *Act* is not of uniform application throughout Canada—it does not operate with the same force and effect in every

Province where the subject of the tax is found. To be clear, the executive branch of the federal government has the discretion to add a Province to Part 1 Schedule 1 and to thereby impose a *national* tax in one Province only.

[384] In our opinion, uniformity in taxation requires equality in the burden of taxation, which cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. That is, a national tax must be co-extensive within the nation and it must be extended to all things subject to that tax within the nation so that all such things may be taxed alike and equally. Here, under Part 1 of the *Act*, the burden of the fuel levy is not borne uniformly throughout Canada—it is only borne by ratepayers in listed provinces and, even then, to varying degrees of *stringency* determined by the executive branch of the federal government.

[385] We observe, however, that Parliament could have structured the fuel levy in a way that met the principle of uniformity of taxation, such that the fuel levy had uniformity in the mode of assessment as well as in the rate of taxation. It could easily have imposed a co-extensive national tax on CO_2e emissions at the rates set forth in the Schedules to the *Act* with tax credits to off-set all Provincial and Territorial locally-imposed CO_2e levies of sufficient *stringency* to thereby achieve Parliament's broad goal of imposing a *national* benchmark price for CO_2e emissions. Moreover, such a scheme could be harmonised with provincial schemes, much in the way many Provinces have harmonised their sales taxes with the GST.

[386] In conclusion, we agree that the power to tax involves the power to destroy and that the power to destroy may defeat and render useless the power to create (*M'Culloch*). Those words have great import in this reference because, as we have explained, the Provincial legislatures have the power to create their own GHG emissions strategies under ss. 92(2), (5), (10), (13) and (16) and s. 92A and s. 93 and Parliament has the power to tax under s. 91(3). In this way, Part 1 of the *Act* is not so much regulating GHG emissions as it is regulating the *stringency* of a Provincial legislature's own regulation of GHG emissions. This is clear from correspondence from the federal Minister of Environment and Climate Change to Saskatchewan's Minister of Environment, wherein the federal Minister wrote (AG-SK Record, Tab 9):

> To be clear, whether or not you sign on to the Pan-Canadian Framework, our government will assess plans to price carbon pollution each year in all provinces and territories, including Saskatchewan.

[387] This brings us back to *Westbank* and s. 125, where Gonthier J. observed that s. 125 was "plainly intended to prevent inroads, by way of taxation, upon the property of one level of government , by another level of government" (at para 17). Consistent with this, we conclude the Constitution is plainly intended to prevent inroads, by way of taxation, upon the exclusive spheres of jurisdiction of one level of government by another level of government.

[388] We are of the opinion that it is constitutionally repugnant for Parliament to exercise its power to tax in a way that controls constitutional measures taken by a Province to address GHG emissions, over which the *Constitution Act, 1867* has declared the Provinces to be supreme. We therefore find the so-called backstop under Part 1 of the *Act* is unconstitutional.

E. Peace, Order and good Government

[389] We turn to assess whether Parliament, using its powers under the national concern branch of POGG, can validly enact the *Act* to regulate a matter that would otherwise come within Provincial classes of subjects.

1. Federalism

[390] The Attorney General of Saskatchewan makes a preliminary submission that the *Act* is unconstitutional because it offends the principle of federalism. It argues that, if this is so, it obviates the need for any further analysis under POGG. To assess the merits of this submission, it is necessary to briefly return to the role of the principle of federalism and the related principle of cooperative federalism.

[391] The Supreme Court underlined the importance of federalism as a judicial interpretive tool in *2011 Securities Reference*:

> [55] … Courts are guided in this task by foundational constitutional principles, which assist in the delineation of spheres of jurisdiction. Among these, the principle of federalism "has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution" (*Secession Reference*, at para. 57).

[392] More recently, in *R v Comeau*, the Supreme Court addressed the principle of federalism and its companion, the related concept of constitutional balance, and confirmed their utility in a division of power analysis. There, the Court considered the clash between s. 121 of the *Constitution Act, 1867*, which provides for a free flow of articles of manufacture from one

Province to another, and a restriction imposed by the Province of New Brunswick on the importation of out-of-province liquor. In that context, the Court said:

> [78] Federalism refers to how states come together to achieve shared outcomes, while simultaneously pursuing their unique interests. The principle of federalism recognizes the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": *Reference re Secession of Quebec*, at para. 58; see also *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 5. The tension between the centre and the regions is regulated by the concept of jurisdictional balance: *Reference re Secession of Quebec*, at paras. 56-59. *The federalism principle requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests.* The same concern has led to, for example, the development of doctrines like the necessarily incidental doctrine and the ancillary powers doctrine.
>
> (Emphasis added)

[393] In short, federalism and constitutional balance are normative and organising principles of constitutional interpretation. The principle of *cooperative* federalism allows room for flexibility, overlapping jurisdictions and intergovernmental cooperation in a division of power analysis (*2011 Securities Reference* at paras 56–57). The Supreme Court made it clear that cooperative federalism is an interpretive principle and not a substantive one in *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693. In that case, the Province of Quebec had relied on cooperative federalism in an attempt to obtain data under the abolished federal long-gun registry. The Supreme Court ruled against the Province, finding the principle of cooperative federalism could not prevail over otherwise valid federal legislation:

> [20] In our respectful view, the principle of cooperative federalism does not assist Quebec in this case. Neither this Court's jurisprudence nor the text of the *Constitution Act, 1867* supports using that principle to limit the scope of legislative authority or to impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action. To hold otherwise would undermine parliamentary sovereignty and create legal uncertainty whenever one order of government adopted legislation having some impact on the policy objectives of another. Paradoxically, such an approach could discourage the practice of cooperative federalism for fear that cooperative measures could risk diminishing a government's legislative authority to act alone.
>
> [21] We conclude that the principle of cooperative federalism does not prevent Parliament from exercising legislative authority that it otherwise possesses to dispose of the data.

[394] In *2018 Securities Reference* (at para 18), the Supreme Court reiterated that cooperative federalism is merely an interpretive tool that may not be used to override or to modify the division of powers (citing *Rogers* at para 39) or to impose "limits on the otherwise valid exercise

of legislative competence" (citing *Quebec (Attorney General) v Canada (Attorney General)* at para 19 and *2011 Securities Reference* at paras 61–62).

[395] On the basis of this jurisprudence, we conclude the principle of federalism, like that of cooperative federalism, is not a free-standing principle that, as argued by the Attorney General of Saskatchewan, may be used to render unconstitutional legislation passed by a level of government acting within its respective sphere of jurisdiction. That said, the jurisprudence clearly establishes that federalism and constitutional balance are overarching interpretive tools that a court may use in the determination of disputes about the division of powers. Federalism, therefore, informs the analysis under POGG.

[396] We also conclude that, although cooperative federalism is always at play in any resolution of jurisdictional disputes, the jurisprudence evinces a strong and explicit admonition that the constitutional division of powers and the maintenance of a constitutional balance between the two orders of government must be respected despite the pull of this principle (*2011 Securities Reference* at para 62). This counters the temptation to approach the POGG analysis from a starting point that, because climate change is a matter of great concern, there must be some way to reconcile the *Act* with existing Provincial legislation aimed at reducing GHG emissions, in the spirit of cooperative federalism. As Chief Justice Richards has observed, there is the possibility of some scope for the operation of the double aspect doctrine in the area of GHG emissions in connection with enumerated federal powers. However, this doctrine cannot ignore or "sweep designated powers out to sea" (*2011 Securities Reference*) in a POGG analysis.

2. The POGG power

[397] Keeping federalism in mind, we turn to the governing provisions of the *Constitution Act, 1867*, constitutional principles, the jurisprudence and the framework germane to a determination of whether the use of the POGG power is justified in this case. The source of the POGG power is found in s. 91 of the *Constitution Act, 1867*, which states that Parliament has 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 …

[398] Professor Hogg (Hogg at c 17.2 to c 17.5) describes the POGG power as having three branches: the “gap” branch, the “national concern” branch and the “emergency” branch. This reference is only engaged with the national concern branch of POGG.

[399] Lord Watson first articulated the national concern doctrine as part of the POGG power in *Attorney-General for Ontario v Attorney-General for the Dominion*, [1896] AC 348 (PC) at 361 [*Local Prohibition Case*]:

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

[400] For many years after the *Local Prohibition Case*, the Privy Council took the view that the use of POGG could only be justified by a national emergency. However, the national concern component of POGG received a boost from Viscount Simon in *Attorney-General of Ontario v Canada Temperance Federation*, [1946] AC 193 (PC) at 205–206, where the Law Lord said:

> … In their Lordships’ opinion, the true test must be found in the real subject-matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole ... then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. …

[401] Thereafter, courts used the national concern branch to validate federal legislation in a number of cases. In *Johannesson v Rural Municipality of West St. Paul*, [1952] 1 SCR 292 [*Johannesson*], the Supreme Court used the national concern branch to uphold *aeronautics* as a matter that fell within the exclusive authority of Parliament on the basis that air travel had ceased being merely a local or provincial concern. The Court said (at 326–327):

> … the field of aeronautics is one which concerns the country as a whole. It is an activity, which to adopt the language of Lord Simon in the *Attorney General for Ontario v. Canada Temperance Federation*, must from its inherent nature be a concern of the Dominion as a whole. *The field of legislation is not, in my opinion, capable of division in any practical way*. …
>
> (Emphasis added)

[402] In *Munro v National Capital Commission*, [1966] SCR 663 [*Munro*], the Court held that the municipal area around Ottawa was a matter of national concern. Justice Cartwright, speaking for a unanimous court, reasoned that "the development, conservation and improvement of the National Capital Region in accordance with a coherent plan" (at 671) is a matter which "goes beyond local or provincial interests".

[403] More recently, the Court breathed further life into the national concern branch of POGG in *Re: Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation*]. There, a majority of the Court upheld federal legislation on the basis of the emergency branch of POGG, but Beetz J., disagreeing on that point, went on to consider the national concern branch. Justice Beetz concluded "containment and reduction of inflation" did not qualify as a basis for federal jurisdiction because the matter lacked specificity and was no more than an aggregate of several subjects, some of which formed a substantial part of provincial jurisdiction (at 458). He suggested a matter needed to have a "degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form" (at 458). Justice Beetz stressed that, in considering the national concern doctrine, it was necessary to have regard for the extent to which a new power would allow Parliament to touch upon what had been recognised as provincial jurisdiction and thus upset the equilibrium of the Constitution (at 458). His analysis was endorsed by a majority of the Court.

[404] The analysis of Beetz J. in *Anti-Inflation* became the foundation for the principles set forth in the modern leading case on the national concern branch: *Crown Zellerbach*. In that case, the Court held that marine pollution, because of its predominantly extra-provincial as well as international character and implications, was clearly a matter of concern to Canada as a whole. Justice Le Dain reviewed the relevant jurisprudence and summarised a revamped national concern doctrine as follows (at 431–434):

> 1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
>
> 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

> 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.
>
> …
>
> As expressed by Professor Hogg in the first and second editions of his *Constitutional Law of Canada*, the "provincial inability" test would appear to be adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power: that provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the "provincial inability" test is 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 is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The "provincial inability" test must not, however, 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. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

[405] The majority in *Crown Zellerbach* also considered the principle that had been emphasised in *Anti-Inflation*: "that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned" (at 437–438). The majority held that the distinction between dumping a toxic substance in fresh water and salt water created the ascertainable and reasonable limits that permitted the intrusion on provincial jurisdiction. Justice La Forest dissented in *Crown Zellerbach*, finding the matter of marine pollution lacked distinctiveness. He found the power to regulate marine pollution intruded too deeply into industrial and municipal activity, resource development, construction, recreation and other matters within provincial jurisdiction to be validated under the national concern branch of POGG.

[406] *Crown Zellerbach* is also important in terms of the approach it sets out. The Supreme Court formulated a two-step test for the national concern branch of POGG. In summary, for a matter to be one of national concern, it must have:

(a) "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"; and

(b) "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".

3. The two-step test in *Crown Zellerbach*

[407] Subsequent jurisprudence has provided little guidance on the two steps identified in *Crown Zellerbach*. For example, the question as to whether a matter is single, distinctive and indivisible is sometimes difficult to answer because much depends on the characterisation of the matter. However, in *2011 Securities Reference*, the Supreme Court, when dealing with the balance to be struck between provincial powers over property and civil rights and local matters and the federal power over trade and commerce, said this about distinctiveness:

> **[70]** On its face, the general trade and commerce power (as distinguished from the more specific federal power to regulate interprovincial and international trade and commerce) is broad — so broad that it 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. This would upset the constitutional balance envisaged by ss. 91 and 92 and undermine the federalism principle. *To avoid this result, the trade and commerce power has been confined to matters that are genuinely national in scope and qualitatively distinct from those falling under provincial heads of power* relating to local matters and property and civil rights. The essence of the general trade and commerce power is its national focus.
>
> (Emphasis added)

[408] In our opinion, this explanation sheds light on the role of the first arm of the *Crown Zellerbach* approach to POGG because the Court was considering in the *2011 Securities Reference* Parliament's almost equally-broad trade and commerce power. The explanation brings two things into focus. First, the determination of distinctiveness is informed by the principles of federalism and constitutional balance. Second, the words "qualitatively distinct from those falling under provincial heads of power" have almost the same meaning and circumscriptive function as "distinguishes it from matters of provincial concern" as set forth in *Crown Zellerbach*. Notably, the Court in *2011 Securities Reference* found that legislation meant to

regulate securities nationally, while having some national aspects, did not address a matter of genuine national importance and scope going to trade as a whole in "*a way that [was] distinct and different from provincial concerns*" (emphasis added, at para 124).

[409] Further, the indicium of *provincial inability* also informs the *Crown Zellerbach* criteria of singleness, distinctiveness and indivisibility. In the Supreme Court's view, "[i]n 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" (*Crown Zellerbach* at 432).

[410] In *Crown Zellerbach*, Le Dain J. gave some guidance on the use of the provincial inability indicium that is worth repeating (at 434):

> … In this sense, the "provincial inability" test is 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 is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The "provincial inability" test must not, however, 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. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

[411] The Court's guidance emphasises that provincial inability is linked to the interrelatedness of the intra-provincial and extra-provincial aspects of a matter and the need for a uniform solution. The examination of provincial inability serves to delineate whether a matter is functionally as well as conceptually distinct. Put another way, an important element of the distinctiveness criteria is the need for one national law that cannot be realistically satisfied by cooperative provincial action (Hogg at c 17.3(c)).

[412] The cases that have invoked this aspect of the first step of the *Crown Zellerbach* test deal with matters such as the failure of the Provinces to accept uniform procedures for air travel (*Johannesson*); failure by Ontario and Quebec to cooperate on a national capital region thereby depriving all Canadians of a suitable capital region (*Munro*); and failure of a Province to impose

adequate regulatory measures regarding nuclear power exposing other Provinces to catastrophic environmental risks (*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327).

[413] It is notable that the courts have also invoked a type of provincial inability in the division of powers analysis with regard to the general branch of Canada's trade and commerce power. The Supreme Court in *2018 Securities Reference* circumscribed that power by reference to provincial inability:

> [101] Bearing these concerns in mind, this Court has developed an approach that seeks *to limit the general branch to matters of a genuinely national scope — matters that are "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination"* (*Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, at p. 267). *The regulation of such matters, which are irreducible to individual transactions, specific industries or local markets, will necessarily transcend local concerns and must therefore, by their very nature, "be regulated federally, or not at all"* (*Reference re Securities Act*, at para. 87; see also M. Lavoie, "Understanding Trade as a Whole in the *Securities Reference*", (2013) 46 *U.B.C. Law. Rev.* 157, at p. 160).
>
> (Emphasis added)

[414] Under this explanation of provincial inability, the Provinces must be unable to practically or constitutionally enact, either individually or together, legislation that is qualitatively the same as the federal legislation in question. The explanation helps in understanding what is meant by *provincial inability* in *Crown Zellerbach*. Provincial inability implicates the concepts of interrelatedness of the federal and provincial aspects of a matter, the functional as well as conceptual distinction of the matter, and the need for a uniform law, all relevant considerations as set out in *Crown Zellerbach.*

[415] In summary, the *singleness, distinctiveness and indivisibility* criteria and the attendant indicium of provincial inability must be construed as limiting Parliament's very broad power under POGG on matters of national concern. The limitation may be described as relating to matters that are not mere aggregates of local matters, but those that are clearly identified, particularised and defined in situations where the Provinces are unable to deal with them; matters that have a functional as well as a conceptual singleness and indivisibility. In other words, the application of these criteria must, in the words of *Crown Zellerbach*, "clearly distinguish" the matter from those of provincial concerns.

[416] As a last point, the criteria of singleness, distinctiveness and indivisibility are demanding so as to ensure the identified "national concern" does not "rapidly expand to absorb all areas of provincial authority" (*Hydro-Québec* at para 67, Lamer C.J. and Iacobucci J. (dissenting)). This means the federal law in question must be such that the court is able to "specify precisely what it is over which the law purports to claim jurisdiction" (*Hydro-Québec* at para 67), because once a matter has been qualified as something of national concern, then "Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (*Crown Zellerbach* at 433). We interpret this admonition as reflecting the principles of federalism and balance under the division of powers.

[417] The second step of the *Crown Zellerbach* test requires the Court to determine whether the federal legislation has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" (at 432). In *Crown Zellerbach*, the Supreme Court split four to three on whether federal legislation purporting to regulate ocean pollution as a matter of national concern had an unacceptably great "scale of impact" within the provincial sphere. The majority held that it did not, but Beetz J. (who had originally formulated the test under the national concern doctrine), as well as La Forest and Lamer JJ., were of the opinion that it did.

[418] Virtually nothing has been written as to how, exactly, a court should determine the *scale of impact* of federal legislation. However, since the national concern doctrine usually involves determining whether a federal enactment can validly *intrude* into provincial spheres of jurisdiction over a matter, any assessment of the scale of its impact must necessarily look at how and to what extent provincial law-making power will be affected by the federal enactment. As this suggests, such an exercise is entirely case specific.

[419] It is also notable that this step of the *Crown Zellerbach* test specifically and directly incorporates the principles of federalism and constitutional balance in a more substantive way by mandating that the scale of impact on provincial jurisdiction *must be* reconcilable with the fundamental distribution of legislative power.

[420] In summary, we conclude the two-step test in *Crown Zellerbach* is a rigorous one, meant to circumscribe Parliament's use of the broad power under POGG. At the heart of both arms of

this test is the concept that federal initiatives must not be allowed to intrude so heavily into the provincial domain as to distort the basic shape of Canadian federalism.

4. Analysis

[421] In applying the *Crown Zellerbach* test, we begin with the requirement of distinctiveness. In that regard, the Attorney General of Canada has conceded that neither the *environment*, nor *air pollution* at large, are matters of national concern (AG-Can Factum at para 88). Implicit in this is a concession that those issues are not distinct matters in constitutional terms. The Attorney General of Canada argued, nevertheless, that *GHG emissions* are matters of national concern and, therefore, are sufficiently distinct for the purposes of the national concern doctrine. We disagree.

[422] At the outset, the argument founders on the very words of the *Act*. The broad view of distinctiveness is that the "field of legislation is not…capable of division in any practical way" (*Johannesson* at 327). The *Act* acknowledges the field can be, and is, occupied by provincial legislation, some of which mirrors or exceeds the benchmarks established under the *Act*. Indeed, the *Act* itself acknowledges that, at least in Saskatchewan's case, provincial legislation directed at reduction of GHG emissions has been enacted and that, although it does not match the *stringency* of Part 2 of the *Act*, it nevertheless goes a long way to meet its objectives in terms of stringency. Likewise, the Provinces to which the *Act* does not apply are, by that fact alone, acknowledged to have put in place provincial legislation that is at least of equal *stringency* as the *Act* in the way the legislation deals with the reduction of GHG emissions.

[423] If we look at the interrelatedness of the provincial and federal aspects of the matter, as mandated by the provincial inability indicium, it becomes starkly obvious that all aspects of the *Act* mirror what the Provinces can enact and have enacted regarding local GHG emissions. On this basis, the matters Parliament seeks to regulate are, at the functional level, not so significantly distinct as to "clearly distinguish" them from matters of provincial concern. The fact is the *Act* is not, except insofar as it purports to set a *national* benchmark price, qualitatively or functionally different from anything that the Provinces could practically or constitutionally enact to regulate GHG emissions by exercising their law-making powers under s. 92(13), whether "separately or in combination".

[424] Nonetheless, in an effort to persuade that the "matter" is distinct, the Attorney General of Canada changed its initial position (i.e., that the matter of national concern was GHG emissions) and in oral argument suggested that the matter of national concern is the *cumulative dimensions* of GHG emissions. In our opinion, this is a distinction without a difference.

[425] First, the characterisation of GHG emissions as having "cumulative dimensions" provides no reference points for determining "precisely what it is over which the law purports to claim jurisdiction" (*Hydro-Québec* at para 67). As mentioned, law-making powers are exercisable *in relation to* matters. This is important under the POGG analysis because where a court determines that a matter falls under POGG, it means the matter is thereafter constitutionally and exclusively within the jurisdiction of Parliament. The characterisation of the matter in this case as the *cumulative dimensions* of GHG emissions provides a more amorphous or "abstruse" description of the matter, rather than a more discrete one.

[426] Second, given the fundamental nature of GHGs, there is no discernable difference between GHG emissions and the cumulative effect or dimensions thereof. Once emitted, a GHG molecule, while having a local origin, instantly becomes an indiscernible, fungible part of the international whole of GHG emissions, which travels inter-provincially, extra-provincially and internationally. The effect of a single GHG emission, or the contribution an emission makes to climate change, is the same regardless of its source or the state of the environment. One cannot parse the atmosphere into provincial or national segments—it knows no natural or manmade borders. In this context, the accumulation of GHG emissions is not a national concern, it is a global concern. But, in the constitutional context, because GHG emissions are fungible on a global level, the national aggregation of locally-emitted GHG molecules does not lend distinctiveness to the matter. Similarly, the deleterious effects of GHG emissions are not somehow heightened by their accumulation—each molecule is equally pernicious on its own and nothing suggests the aggregation of GHG emissions has synergistic effect. As such, describing the matter as the "cumulative dimensions" of GHG emissions is just another way of saying the whole of local GHG emissions. That is, characterising the matter as the regulation of "the cumulative dimensions of GHG emissions" is really the same as saying the matter relates to GHG emissions.

[427] The Attorney General of Canada argued that GHGs are distinct because they are a specific form of pollution and are defined in the *Act* and internationally. Although the chemical and scientific distinctiveness of GHGs allows them to be readily identified for regulation purposes, it does not make them constitutionally distinct for the purposes of a POGG analysis. The fact there is no meaningful disagreement about what is, or is not, a GHG is not determinative of the distinctiveness of the matter.

[428] There is also nothing qualitatively different about GHGs as a subset of air pollution. We agree with the Attorney General of Saskatchewan that the requirement of distinctiveness is not met, either legally or constitutionally, by specifying by regulation a subset of an area that is already recognised as being insufficiently distinct (*Hydro-Québec* at paras 112–117).

[429] Nor are we satisfied that, because GHGs travel out of a Province and circulate globally, the interprovincial quality of GHGs necessarily lends distinctiveness to them. The same can be said of other local air pollution, for instance smoke. There is nothing qualitatively different about the movement of GHGs and the movement of other airborne substances. Indeed, the pernicious effects of GHG emissions are not augmented by their travel extra-provincially. In short, the extra-provincial, international nature of GHGs does not give the distinctiveness the matter requires for constitutional purposes.

[430] Likewise, the fact that reduction of GHG emissions has garnered international concern and attention and the fact there is an undoubted urgency to control GHG emissions does not make the matter distinct in constitutional terms. Although Canada is a signatory to international treaties to reduce GHG emissions and seeks to fulfill them, the jurisprudence has long established that this fact cannot form the basis for claiming it is within federal jurisdiction to enact legislation that regulates GHGs, if there is otherwise no federal jurisdiction to do so.

[431] The intervenor Attorney General of British Columbia characterised the matter of national concern in various ways in its factum that may be summarized as setting “minimum national standards of stringency for pricing GHG emissions”. Such a characterisation arose because of a conflation of the matter under the pith and substance analysis with the determination of the matter under the national concern doctrine. In commenting on the Attorney General of Canada’s characterisation of the matter in its factum as “greenhouse gases” in pith and substance, the

Attorney General of British Columbia noted, incorrectly, that the matter must be narrowed down to "its most single, distinct and indivisible core", using the words of *Crown Zellerbach*. In doing so, it defined the matter too narrowly for both the pith and substance and national concern analysis.

[432] The characterisation of the matter under the descriptive phrase "minimum national standards of stringency" may give the matter an *appearance* of distinctiveness, but such a narrow description of the matter, while clever, is suspect. It is tied intimately with the Attorney General of British Columbia's submissions (AG-BC Factum at paras 34, 36, 45 and 46) that, with the matter so narrowed, the Provinces may still legislate in the area of GHG emissions due to the double aspect doctrine. The Attorney General of British Columbia argued that "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". The Attorney General of British Columbia submitted this is possible because the proposed exclusive Parliamentary authority would be over an abstract matter, i.e., minimum national standards of stringency for GHG pricing, not over "concrete persons, things, acts or omissions". Thus, it argued, federal and provincial jurisdiction over GHG emissions can happily coexist. The Attorney General of Canada was content to take this approach as well. There are several problems with this narrow characterisation.

[433] The first is that the characterisation is really a form of double aspect reasoning which, as mentioned earlier, does not apply in the case of POGG. The Supreme Court observed in *2011 Securities Reference*, at para 66, "the double aspect doctrine, allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter" (emphasis in original).

[434] Implicit in the narrow characterisation proposed is that "national standards" and "stringency" are imposed concurrently over provincial legislation that also deals with "standards" and "provincial benchmarks." The *national concern* characterised this way would impermissibly create concurrent jurisdiction.

[435] The second problem with the characterisation is that it is constitutionally suspect to approach matter characterisation from the viewpoint that, if an abstraction can be teased out of

recognizable matters within the jurisdiction of the Provinces, then it immediately becomes more amenable to being labelled a matter of national concern. This, again, is the error of hypostatisation. This would not make the matter more palatable for the purposes of a POGG analysis because abstract concepts like, for example, the *environment* are too abstruse to belong to either order of government (*Oldman River*). In blunt terms, such an approach to characterisation would, in the long run, destabilise the federation and the division of powers through death by a thousand cuts.

[436] The third problem is that a narrow description of the matter as proposed by the Attorney General of British Columbia, given the breadth of the *Act*, does not fairly represent its true nature and the real effect of the legislation as a whole. The narrow description is a minimization: an attempt to fit a large foot into a small shoe. The narrowness of the characterisation attempts to provide an abstract conceptual distinction to the matter but it ignores the direction in the first step of *Crown Zellerbach* that the functional as well as the conceptual distinction of a matter is important. The effects of the *Act* are neither abstract nor minimal. It cannot be said, as was argued by the Attorney General of British Columbia, that the *Act* in its operative effect does not concern "concrete persons, things, acts or omissions".

[437] Fourth, the narrow moniker of setting "minimum national standards of stringency" belies the pervasive impact of the *Act* and its reach into the lives of the people and the economy of a Province in the name of reduction of GHG emissions. It is merely a sanitized and unduly-narrow version of "the regulation of GHG emissions", a matter that falls to the Provinces. Moreover, at its core, setting "minimum national standards of stringency for pricing GHG emissions" is just a nice way of saying the matter is actually "the regulation of Provincial GHG emissions pricing", which is something that would rip the heart out of the division of powers, if it were permitted. As noted, in *Re The Initiative and Referendum Act*, the Privy Council held the object of the *Constitution Act, 1867* was not to "weld the provinces into one, nor to subordinate Provincial Governments to a central authority" (at 942).

[438] As an aspect of distinctiveness, the provincial inability criterion assumes that one national law is needed because the purpose it will serve and the desired effects of the law cannot be realistically achieved by cooperative Provincial action and, moreover, the failure of a

Province to cooperate would carry with it adverse consequences for residents of other Provinces. Here, the centerpiece of the alleged need for national uniformity is the so-called benchmark or stringency aspects of the *Act*.

[439] The Attorney General of Canada argued that only Parliament can set *national* standards for the mitigation of carbon emissions. Put this way, provincial inability becomes a self-fulfilling prospect in all cases. Indeed, a Province may only act intra-provincially. Putting the issue in such terms is not helpful because there will always be a "national aspect" to a matter that the Provinces are unable to address under s. 92, allowing Parliament to claim it has become a matter of national concern. The real question is whether the Provinces are *capable* of dealing with the matter and whether a uniform law is clearly and unequivocally needed in the circumstances.

[440] In this case, the identified need to set a national benchmark or stringency standard for the pricing of GHG emissions does not make the pricing or the reduction of GHG emissions distinctive. Each Province has the ability to set a benchmark or stringency standard. In this respect, the Provinces, if they so desired, could collectively arrive at a benchmark and uniform law as they have in other situations. Indeed, for a time, many Provinces had largely done this under the Western Climate Initiative.

[441] The real issue underpinning the expressed need for uniformity is a policy dispute between the two orders of government. The imposition of federal policy through the benchmark lies at the heart of the federal government's claim that the Provinces are unable or unwilling to *adequately* legislate regarding the matter of GHG emissions. To bring this aspect into sharper focus, it is necessary to briefly review the genesis of how and why the federal government and some Provinces fail to see eye-to-eye on the matter of the regulation of GHG emissions.

[442] The federal government had, in the period leading up to the enactment of the *Act*, encouraged provincial diversity in approaches to the reduction of GHG emissions before it shifted to imposing its own approach on the Provinces. In March 2016, all Provinces had supported the *Vancouver Declaration*. While this committed the federal, provincial and territorial governments to work toward achieving reductions in national GHG emissions, the *Vancouver Declaration* expressly recognised the diversity of provincial and territorial economies and that Provinces and Territories should have flexibility in designing their own policies to meet

emissions reduction targets. The *Vancouver Declaration* acknowledged that a carbon-pricing mechanism was one option to do this, but it did not prescribe that Provincial policies had to include that mechanism. That there was initial flexibility in the targets and mechanism to achieve them is significant.

[443] In October 2016, the federal government released its policy document, the *Pan-Canadian Approach*, setting out its plan to reduce GHG emissions. Although building on the *Vancouver Declaration*, in its detailed aspects it reflected the *unilateral policy* of the federal government. Significantly, the *Pan-Canadian Approach* interpreted the commitments in the *Vancouver Declaration* as commitments by all Provinces and Territories to implement carbon-pricing regimes. The *Pan-Canadian Approach* determined that the most *efficacious* way to reduce GHG emissions was to establish an economy-wide national benchmark price for carbon, where the federal government alone determined the parameters of efficaciousness. The *Pan-Canadian Approach* proposed that all jurisdictions were to have carbon-pricing regimes in place by January 1, 2018, and set a benchmark price for carbon. Importantly, the *Pan-Canadian Approach* stated that the federal government would impose a carbon-pricing regime that would apply in all Provinces and Territories that did not match its policy benchmark for carbon pricing, i.e., the so-called backstop.

[444] Effectively, the *Pan-Canadian Approach* reflected an intention by Canada to impose its GHG reduction policies on Provinces that had no such policies or that implemented policies that failed to meet the stringency standards of the federal policy as reflected by the benchmark.

[445] In December 2016, the federal government released the *Pan-Canadian Framework*. This document repeated the federal government's intention to impose the backstop in Provinces that refused to sign the *Pan-Canadian Framework* and that refused to implement carbon taxes that met its benchmark. Although many Provinces adopted the *Pan-Canadian Framework*, Saskatchewan did not. Since then, other Provinces have resiled from it.

[446] In December 2017, Saskatchewan released its own climate strategy document: *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy* (AG-SK Record, Tab 10) [*Saskatchewan Strategy*]. It outlined steps that the Saskatchewan government would take to address climate change and GHG emissions. The steps included a wide range of mitigation

policies. The *Saskatchewan Strategy* does not include a carbon tax or levy. This was explained in the *Saskatchewan Strategy* as follows (at 1):

> We wholeheartedly support efforts to reduce greenhouse gases. But those efforts must be effective and they must not disadvantage one region of Canada more than another. A federal carbon tax is ineffective and will impair Saskatchewan's ability to respond to climate change.
>
> Our opposition to the federal government's carbon tax should not be seen as reluctance to act. Rather, it is a recognition that we must act, and act decisively, with all our economic strength. For Saskatchewan, mitigation is not enough. Our agriculture and resource-rich province must also focus on climate adaptation and resilience in order to be effective.

[447] The *Saskatchewan Strategy* included a plan to impose sector-specific OPBS (similar to those set out in Part 2 of the *Act*) on facilities emitting more than 25,000 tonnes of CO_2e per year and to obligate facilities that emit more than the regulated standard to take compliance actions. As outlined earlier, the Saskatchewan government has implemented its own GHG emissions control laws that address the matter.

[448] The foregoing history of federal-provincial dealings demonstrates this is not a circumstance where the Saskatchewan government is jurisdictionally unable to address GHG emissions. Rather, the Saskatchewan government disagrees with the federal government policy on addressing GHG emissions and with the federal mechanism in the *Act* designed to enforce federal policy in recalcitrant Provinces. The Saskatchewan legislation seeks to address GHG emissions in a more nuanced fashion by industrial sector accounting for regional diversity, with its own benchmarks and without a tax.

[449] Stringency alone cannot be a determinative factor of distinctiveness because it is solely a reflection of differing policies. The concept of *stringency* embedded in the *Act* shouts "policy dispute" as detailed above. A disagreement about the right numbers does not imbue the *matter* with any constitutional distinctiveness. A disagreement about the mechanisms used to achieve those numbers likewise provides no distinctiveness. Stringency is a very thin basis upon which to invoke POGG.

[450] The Attorney General of Canada's assertion that provincial measures in Saskatchewan lack *efficacy* and, that it is therefore necessary to enforce national standards of *efficacy*, form the core of the argument on provincial inability and the claim that it is necessary to trench upon Provincial powers. However, while the benchmark has a scientific basis, the efficaciousness of

the benchmark is not a relevant consideration in a division of powers analysis. *A fortiori* neither is any other aspect of stringency relevant in that analysis. In *2011 Securities Reference*, the Court said:

> [90] … The courts do not have the power to declare legislation constitutional simply because they conclude that it may be the best option from the point of view of policy. The test is not which jurisdiction—federal or provincial—is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.

As this suggests, the courts must not confuse what is *optimal policy* with what is *constitutionally permissible legislative action*. Yet, given the genesis of the policy dispute, and the applicability of the *Act*, that is exactly what the Attorney General of Canada submits this Court should do in determining the constitutionality of the *Act*. We cannot agree. National benchmarks unilaterally set and imposed by Parliament play no role in the provincial inability analysis.

[451] In our opinion, the notion that national benchmarks are required merely speaks of a federal dissatisfaction with Provincial policy and a desire to impose federal policies on those Provinces now not meeting the benchmark and on those whose future policies may, at some point, fail to meet the federal benchmark. It is a dispute about what the right numbers are and who gets to decide what they are. A finding of provincial inability in these circumstances would improperly require the Court to choose between the policies, benchmarks and approaches of the Provinces and those of the federal government as they apply to the people and economy of the Provinces that do not meet the federal idea of *stringency*. In this way, the unilateral imposition of national uniformity based on Parliament's notion of proper stringency in an area of Provincial jurisdiction would deny the very notion of federalism, which entails the possibility of different legislative solutions to the same problem across Canada, taking into account cultural or regional particularities.

[452] The Attorney General of Canada also made a number of submissions to the effect that a failure to implement a national price for carbon in one Province would adversely affect other Provinces, listing a number of effects: more GHGs will be emitted; the failure of some Provinces to set sufficiently stringent standards would undermine the efforts of those that do; businesses will transfer production from Provinces that have more stringent standards to those that do not because it is cheaper to operate there. These arguments cannot carry the day. First, the *Act* does

not cap GHG emissions—the fuel levy is a tax and the OBPS levy is an intensity-based trading regime that permits the heavy industrial users to buy the right to emit GHGs; whereas, Provincial carbon-capture policies directly effect a reduction of GHG emissions. Second, with respect to whether the efforts of one Province may be undermined by another, while it is laudable that the federal government has taken an interest in leveling the playing field, that field, because of the geographic, climatologic and economic diversity of our country, is not and has never been level. The same can be said of the last putative extra-provincial effect of the failure of a Province to meet federal stringency standards, namely, the movement of business from one Province to another. Jurisdiction shopping occurred for all kinds of reasons long before GHGs were a concern. Furthermore, as the *Act* recognises, some Provincial actions already exceed the federal benchmarked stringency under the *Act*, thereby giving rise to the very concern the Attorney General of Canada poses. That is, if this were truly a concern, then the *Act* would benchmark a ceiling as well as a floor price for carbon.

[453] On the whole of it, we conclude that provincial inability as an indicium of distinctiveness has not been established.

[454] In summary, we are unable to conclude, based on all the foregoing, that there is anything about the reduction of GHG emissions and the need for a national approach that is distinctive in the constitutional sense so as to *clearly* distinguish it from matters of Provincial concern as required under the first arm of the *Crown Zellerbach* test.

[455] We will nevertheless proceed to address the second arm of the *Crown Zellerbach* test, i.e., whether the "scale of impact on provincial jurisdiction…is reconcilable with the fundamental distribution of legislative power under the Constitution".

[456] This arm of the *Crown Zellerbach* test directly invokes the principles of federalism and the legislative balance addressed earlier. The Attorney General of Saskatchewan, supported by several intervenors, submits that recognising Parliamentary authority over GHG emissions opens the door to federal regulation of an extraordinarily-broad array of provincial life and thereby upsets the constitutional balance. This is said to be so because almost every kind of activity, whether industrial or private, in some fashion generates GHGs.

[457] We agree with the Attorney General of Saskatchewan. The sheer breadth of activities that give rise to GHG emissions and their close linkage to almost everything in a Provincial economy means that Provincial authority will be adversely impacted in a way unlike any other matter in the history of Canada, except, perhaps, the wage and price control measures considered in *Anti-Inflation*. In our assessment, the *Act* touches upon every industrial, commercial, institutional and private activity that occurs in a Province and that come within the Provincial heads of power.

[458] On a practical level, the imposition of the *Act* deprives a Province of the ability to regulate GHGs within the Province, to fashion solutions that are sensitive to local needs, and to respond to regional diversities. The intervenor Agricultural Producers Association of Saskatchewan Inc. submits the direct and indirect effects of the *Act* are significant to the people of Saskatchewan, especially given our agricultural and resource-based industries. Producers and distributors of farm inputs, including seed, fertilizer, herbicides, fungicides, insecticides, natural gas, propane and other fuel, are subject to the fuel levy or the OBPS levy.

[459] The Attorney General of Canada concedes the *Act* will cause prices of agricultural inputs to rise. Even though farmers are exempt from the fuel charge, the producers, manufacturers and retailers of farm inputs are not. Further, transportation companies that haul grain, livestock and inputs for farmers are not exempt from the fuel levy. In this way, the effect of the *Act* is to regulate local industries, businesses and consumer activity in a specific way chosen by the federal government, but the practical effect on a Province of the imposition of federal GHG emissions policy under the *Act* is a profound intrusion into the exclusive spheres of Provincial jurisdiction. As set forth earlier, the Government of Saskatchewan has indicated in the *Saskatchewan Strategy* that it believes the fuel levy imposed under the *Act* will actually impair its ability to react to and to address climate change.

[460] The *Act* is highly intrusive into provincial jurisdiction. Although less direct, it is only slightly less intrusive than the legislation considered in *Anti-Inflation*, where the federal government had sought to pervasively control wages and prices in the Provinces. Although the Supreme Court sustained that legislation under the emergency branch of POGG, it could not have sustained the legislation under the national concern branch.

[461] The *Act* is highly intrusive in another way. The benchmark, which determines its application in the Provinces, effectively establishes federal oversight of GHG emissions regulation by the Provinces within their spheres of exclusive jurisdiction. It is regulation of the regulator. To permit Parliament to exercise a law-making power of this nature in respect of GHGs would be to open up the use of POGG to allow regulatory oversight by the federal government over all manner of Provincial matters as it might unilaterally deem to have become matters of national concern.

[462] Of particular concern to us on the question of its impact are the provisions of the *Act* that make it possible for the executive branch of federal government to substantially alter the original form and effect of the *Act*. The provisions that permit statutory transmogrification are ss. 26, 166 to 168 and 197(1)(a). Furthermore, the pervasive use of the word *prescribed* in the *Act* confers further metamorphic power on the executive branch to alter the appearance, character and functionality of the *Act*. These provisions have been referred to earlier but are worth reviewing in this context. In that regard, s. 26, dealing with the fuel levy, allows the federal cabinet by prescribing certain things, to change to whom the fuel levy applies, under what conditions it applies, the manner of payment and the time of payment.

[463] We have already discussed how s. 166 to s. 168 confer a wide and unfettered discretionary authority on the executive branch to amend the *Act* itself without reference to Parliamentary oversight. These provisions allow the federal cabinet, by regulation, to adapt and modify not only the schedules to the *Act* but the *Act* itself, thereby providing the executive branch of the federal government with a general power and free run to do almost anything to implement its policy. Moreover, the provisions specifically allow the federal cabinet, when modifying the *Act* by regulation, to prevail over the express terms of the *Act* simply by stating its intention to do so.

[464] As noted, the *Act* contains well over 400 references to the word *prescribed*. Importantly, many of the critical features of the fuel levy, including just about every definition under s. 3, are open-ended, subject to qualifying statements that permit the federal cabinet to change the very nature of the fuel levy. The profuse use of the word *prescribed* in the *Act* is reminiscent of the statement of that egg-shaped philosopher in Lewis Carroll's *Through the Looking Glass* (1872)

who said, in a rather scornful tone, “When I use a word…it means just what I choose it to mean—neither more nor less”.

[465] Lastly, s. 197(1) of the *Act* empowers the federal Minister of Environment to assess the emissions levels in Canada of GHGs or “other gases that contribute or could contribute to climate change” (s 197(1)(a)) and to “determine whether measures to control those emissions are required and, if so, what measures are to be taken” (s 197(1)(b)). While this would appear innocuous in itself, taken in combination with the foregoing provisions, which give unfettered discretion to change the *Act*, it becomes an enabling device for that purpose.

[466] As explained above, taken in combination, these provisions not only usurp the legislative role of Parliament but create the disturbing potential for an off-the-books widening of the practical and legal scope of the *Act* and of its effects as and whenever the policies or objectives of the executive branch of the federal government change. The impact on the Provinces of any such future widening is potentially unlimited and is certainly unqualifiable and unquantifiable at this point. The potential for expansion of scope itself creates the potential of a “‘national concern’ [that] could rapidly expand to absorb all areas of provincial authority” (*Hydro-Québec* at para 67).

[467] This is precisely the scenario described by Jean LeClair in “The Elusive Quest for the Quintessential ‘National Interest’” (2005) 38 UBC L Rev 353 at 364, who, when addressing the concept of distinctiveness and the impact of federal encroachment on provincial powers, said:

> … Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its “... exclusive jurisdiction of a plenary nature to legislate in relation to that matter” [*Crown Zellerbach* at 433], Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt.

[468] In our view, the position taken by the Attorney General of Canada mirrors the scenario described above. The *Act* has broad effects and the potential to have even broader effect than its current terms, but these facts are ignored in the expediency of characterising the matter, whether in terms of cumulativeness or stringency, narrowly enough to qualify it as a matter of national concern. However, a court cannot ignore the fact that, by its very terms, the *Act* can be expanded in any way the federal cabinet determines is necessary or expedient.

[469] The impact analysis must also be informed by the principle of federalism. We return to the jurisprudence that spoke of the need for a just and fair balance in the distribution of power between the two levels of government. It is worth repeating that the Court in *2011 Securities Reference*, when speaking about the federal trade and commerce power, stated:

> [61] While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

[470] In our opinion, at this point in the impact analysis, the principle of subsidiarity also plays a role. Although most used in the context of determining the dividing line between complementary federal powers and provincial powers, it dovetails well with the principle of federalism and can be seen to be a subset of that principle. Indeed, Deschamps J., in dissent in *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453, described the principle of subsidiarity as a component of Canadian federalism (at para 109).

[471] The Court described the principle of subsidiarity in *Rogers* in these terms:

> [84] In *Spraytech*, the Court also recognized the importance to be given to the principle of subsidiarity. As the Court explained, this principle is the proposition that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (*Spraytech*, at para. 3; see also *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 ("*CWB*"), at para. 45). In the words of Professor Hogg once again, "[t]he choice [of characterization] must be guided by a concept of federalism. Is this the kind of law that should be enacted at the federal or the provincial level?" (p. 15-21). …

[472] The diversity of the regions and the autonomy of Provincial governments to develop their own societies within their spheres of exclusive jurisdiction are important facets of federalism and constitutional balance, given the geographic, climatologic and economic diversity of our land. As the Supreme Court stated in the *Secession Reference*, "[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity" (at para 58).

[473] The *Act* pervades the life and economy of each Province it affects. It unilaterally imposes federal policy in place of Provincial policy on the same matter, a matter over which the Provinces have exclusive jurisdiction. The *Act* sets forth an approach to GHG mitigation that

hinders a Province's ability to fashion its own, local response to GHG emissions at the level that is most suited to achieving the nuanced response that a diverse country requires.

[474] For all of these reasons, we conclude that, with respect to the second arm of the *Crown Zellerbach* test, the impact of the *Act* on Provincial jurisdiction is not reconcilable with the fundamental distribution of legislative powers under the Constitution.

5. Conclusion under POGG

[475] In summary, the *Act* fails the two-part test in *Crown Zellerbach*. We conclude the *Act* cannot be sustained as a valid exercise of federal law-making power under the national concern branch of POGG.

III. CLIMATE CHANGE AND CONFEDERATION

[476] Before summarising our opinion, we would reiterate two points. First, we agree that all levels of government in Canada must take action to address climate change. The anthropogenic emission of GHGs is an issue of pressing concern to all Canadians and to the world. Second, Parliament has a number of constitutional powers, legislative means and administrative mechanisms at its disposal to achieve its objectives in this regard. This reference arises because Parliament chose not to avail itself of its established constitutional powers or to do so validly. Notwithstanding the existential threat of climate change, federalism in Canada means that all governments of Canada must bring all law-making power to bear on the issue of climate change, but in a way that respects the division of powers under the *Constitution Act, 1867*. We return to the *2011 Securities Reference*, where the Court said *per curiam*:

> [7] It is a fundamental principle of federalism that both federal and provincial powers *must be respected*, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres. …
>
> ...
>
> [62] In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers *must be respected*. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.
>
> (Emphasis added)

IV. OPINION

[477] Section 52 of the *Constitution Act, 1982* states that the Constitution is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. We advise the Lieutenant Governor in Council that, for the foregoing reasons, in our opinion:

(a) Part 1 of the *Act* is invalid, being an unconstitutional delegation of Parliament's law-making power under s. 91(3) of the *Constitution Act, 1867* and being contrary to s. 53 of the *Constitution Act, 1867*.

(b) The *Act* cannot be sustained as a valid exercise of Parliament's other enumerated law-making powers under s. 91 of the *Constitution Act, 1867* nor can it be sustained under POGG.

"Ottenbreit J.A."

Ottenbreit J.A.

"Caldwell J.A."

Caldwell J.A.

APPENDIX A

26 Subject to this Part, a prescribed person, a person of a prescribed class or a person meeting prescribed conditions must pay to Her Majesty in right of Canada a charge in respect of a type of fuel or combustible waste in the amount determined in prescribed manner if prescribed circumstances exist or prescribed conditions are met. The charge becomes payable at the prescribed time.

…

166 (1) The Governor in Council may make regulations

(a) prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation;

(b) requiring any person to provide any information, including the person's name, address, registration number or any information relating to Part 2 that may be required to comply with this Part, to any class of persons required to make a return containing that information;

(c) requiring any person to provide the Minister with the person's Social Insurance Number;

(d) requiring any class of persons to make returns respecting any class of information required in connection with the administration or enforcement of this Part;

(e) distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things; and

(f) generally to carry out the purposes and provisions of this Part.

(2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.

(3) In making a regulation under subsection (2), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

(4) The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.

(5) A regulation made under this Part is to have effect from the date it is published in the *Canada Gazette* or at such time thereafter as may be specified in the regulation, unless the regulation provides otherwise and

(a) has a non-tightening effect only;

(b) corrects an ambiguous or deficient enactment that was not in accordance with the objects of this Part;

(c) is consequential on an amendment to this Part that is applicable before the date the regulation is published in the *Canada Gazette*;

(d) is in respect of rules described in paragraph 168(2)(f); or

(e) gives effect to a public announcement, in which case the regulation must not, except if any of paragraphs (a) to (d) apply, have effect before the date the announcement was made.

…

168 (1) In this section, ***fuel charge system*** means the system under this Part, Part 1 of Schedule 1 and Schedule 2 providing for the payment and collection of charges levied under this Part and of amounts paid as or on account of charges under this Part and the provisions of this Part relating to charges under this Part or to rebates in respect of any such charges, or any such amounts, paid or deemed to be paid.

(2) The Governor in Council may make regulations, in relation to the fuel charge system,

(a) prescribing rules in respect of whether, how and when the fuel charge system applies and rules in respect of other aspects relating to the application of that system, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(b) prescribing rules in respect of whether, how and when a change in a rate, set out in any table in Schedule 2 for a type of fuel and for a province or area, applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to such a fuel or province or area, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(c) prescribing rules in respect of whether, how and when a change to the provinces or areas listed in Part 1 of Schedule 1 or referenced in Schedule 2 applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to a province or area or to a type of fuel, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;

(d) if an amount is to be determined in prescribed manner in relation to the fuel charge system, specifying the circumstances or conditions under which the manner applies;

(e) providing for rebates, adjustments or credits in respect of the fuel charge system;

(f) providing for rules allowing persons, which elect to have those rules apply, to have the provisions of this Part apply in a manner different from the manner in which those provisions would otherwise apply, including when an amount under this Part became due

or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported or accounted for and when any period begins and ends;

(g) specifying circumstances and any terms or conditions that must be met for the payment of rebates in respect of the fuel charge system;

(h) prescribing amounts and rates to be used to determine any rebate, adjustment or credit that relates to, or is affected by, the fuel charge system, excluding amounts that would otherwise be included in determining any such rebate, adjustment or credit, and specifying circumstances under which any such rebate, adjustment or credit must not be paid or made;

(i) respecting information that must be included by a specified person in a written agreement or other document in respect of specified fuel or a specified substance, material or thing and prescribing charge-related consequences in respect of such fuel, substance, material or thing, and penalties, for failing to do so or for providing incorrect information;

(j) deeming, in specified circumstances, a specified amount of charge to be payable by a specified person, or a specified person to have paid a specified amount of charge, for specified purposes, as a consequence of holding fuel at a specified time;

(k) prescribing compliance measures, including anti-avoidance rules; and

(l) generally to effect the transition to, and implementation of, that system in respect of fuel or a substance, material, or thing and in respect of a province or area.

(3) For the purpose of facilitating the implementation, application, administration and enforcement of the fuel charge system, the Governor in Council may make regulations

(a) adapting or modifying any provision of this Part, Part 1 of Schedule 1 or Schedule 2;

(b) defining, for the purposes of this Part, Part 1 of Schedule 1 or Schedule 2, or any provision of this Part, Part 1 of Schedule 1 or Schedule 2, words or expressions used in this Part, Part 1 of Schedule 1 or Schedule 2 including words or expressions defined in a provision of this Part, Part 1 of Schedule 1 or Schedule 2; and

(c) providing that a provision of this Part, Part 1 of Schedule 1 or Schedule 2, or a part of such a provision, does not apply.

(4) If a regulation made under this Part in respect of the fuel charge system states that it applies despite any provision of this Part, in the event of a conflict between the regulation and this Part, the regulation prevails to the extent of the conflict.