Court File No: 39116

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, C. 12
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S. 26

BETWEEN

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN

Interveners

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. Of the three courts of appeal asked to opine on the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (the "*Act*"), the Alberta Court of Appeal was the only one to answer that it is unconstitutional.[1] British Columbia says the opinion of Chief Justice Fraser and Justices Watson and Hughes (the "majority") contains four fundamental errors:

(a) The majority characterized the matter of the *Act* broadly as "regulating GHGs [greenhouse gases]" (¶253), instead of a more precise statement of its dominant purpose and effect.

(b) The majority developed a novel theory that the "national concern doctrine" can only apply to matters that would – but for their national dimensions – fall within the provincial residual power of subsection 92(16) of the *Constitution Act, 1867* (¶172).

(c) The majority held that the effect on extra-provincial interests of provincial inaction in pricing GHGs are "policy" concerns, irrelevant to the division of powers (¶¶314-316).

(d) Finally, the majority held that because climate change is a global collective action problem – in which effective action by one country depends on cooperation from others – it cannot give rise to matters subject to provincial inability (¶324, ¶331).

2. British Columbia submits that if the majority had followed the appropriately neutral and precise characterization analysis, it would not have formulated such a broad matter as "regulating GHGs." There is a legal and practical distinction between *regulating* an activity and *pricing* it, and between determining *minimum standards* as opposed to *directly* pricing. Moreover, a statement of the matter should include the proximate purpose ("mischief") as revealed by intrinsic and extrinsic evidence. British Columbia characterizes the matter of the *Act* as ***establishing minimum national pricing standards to allocate part of Canada's targets for GHG emissions reduction***.

3. If matters of national concern must, in their provincial aspects, relate to subsection 92(16) of the *Constitution Act, 1867* and no other provincial head of power, the cases in which the Judicial

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[1] *Reasons for Judgment of Fraser CJA, Watson, Hughes, Wakeling and Feehan JJA Court of Appeal of Alberta, February 24, 2020,* **Supplementary Record of the Intervener Attorney General of Alberta in SCC Files 38663 and 38781 ["Supp. Record"], Vol. 1, pp. 1-273,** cited throughout to *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

Committee or this Court upheld federal "matters of national concern" were all wrongly decided. Given the breadth of subsection 92(13), adopting this theory would render the national concern doctrine a dead letter. The majority's principle can only be justified if it is right that the national concern power is "of doubtful legitimacy" and was "judicially created." British Columbia responds that the national concern doctrine, properly constrained, is rooted in the constitutional text, history and the principles of parliamentary federalism.

4. Extra-provincial impacts of provincial action or inaction are significant constitutionally. If Parliament merely disagrees with how a province addresses matters with primary effects within the province – including how it addresses ambient air quality – that gives it no jurisdiction. It is where the impacts on extra-provincial interests are direct and significant that Parliament can act under the national concern doctrine, so long as the scope of the matter minimally and proportionately balances the need to protect extra-provincial interests with provincial autonomy.

5. Finally, the majority argues that Canada's contribution of 1.8% of the world's GHGs in 2014 means that anything one province does or does not do will have no effect on other provinces. It is true that the capacity of the atmosphere and oceans to assimilate GHGs without unacceptable heating and acidification poses a *global* collective action problem: one country can no more resolve this problem than one province. But an unresolvable collective action problem *within* the country would mean Canada could not participate in the management of any global commons. A floor on the stringency with which provinces price GHGs is the least intrusive step Parliament can take to enable Canada to set national targets on the same basis as other federations.

PART II: QUESTION IN ISSUE IN THIS APPEAL

6. British Columbia says the *Act* is wholly constitutional.

PART III: STATEMENT OF ARGUMENT

The Matter of the *Act* Is Establishing Minimum National Pricing Standards to Allocate Part of Canada's GHG Emission Targets, Not "Regulation" Broadly

7. Sections 91 and 92 of the *Constitution Act, 1867* give Parliament and the provincial legislatures authority to make laws in relation to "matters" coming within "classes of subjects" enumerated therein, or, in the case of the "peace, order and good government" power *not* "coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." The first stage in the analysis of the validity of a federal or provincial statute is

therefore to *characterize* its "matter", while the second stage is to see how best this matter can be *classified*, i.e., what class of subject it can best be said to "come within."[2]

8. The "matter" of a statute is a summary of its dominant purpose and its legal and practical effect.[3] These are to be determined by looking at the words of the statute (the "intrinsic evidence") as well as the legislative history and policy context (the "extrinsic evidence").[4] Since characterization could, in principle, be made at any level of generality, there are two principles that constrain the choice of "matter":

(a) **The precision principle.** The characterization should be the most precise formulation of the purpose and effect – in other words, the *proximate* purpose (what the traditional law of statutory construction called the "mischief") and *direct* effects.[5]

(b) **The neutrality principle.** As Professor Abel argued, and as this Court confirmed in *Chatterjee*,[6] the "matter" of a statute should be determined through a legal analysis in a way that is neutral to the classification analysis ("independent of the categories of Canadian constitutional law.") British Columbia agrees with the majority that this means the "matter" of the statute determined through the characterization process is one and the same as the "matter" that is – or is not – of national concern depending on the result of the classification analysis (¶156). The characterization exercise should be performed the same way whether the law is federal or provincial and regardless of what head of power is ultimately argued to be the basis for its validity.

9. The Alberta majority treats the methodology of characterization inconsistently. In some passages, it embraces the importance of a precise and neutral approach to characterizing the matter (¶¶143-147, ¶152). It correctly criticizes Canada's characterization as too broad to the extent it goes beyond the dominant purpose and effect of the impugned statute (¶156). Yet elsewhere the majority says that the characterization process should be done differently in a national concern case (¶148) and rejects a "restrained" approach to characterization as favouring federal authority

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[2] A. S. Abel, "The Neglected Logic of 91 and 92", 19 *UTLJ* 487 (1969), pp. 488-490.
[3] *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, ¶¶25-26.
[4] *Canadian Western Bank*, ¶27.
[5] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, ¶35.
[6] *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 SCR 624, ¶16.

(¶¶206-7). At one point, the majority correctly says that the matter involves *both* purposes and effects (¶147). But elsewhere, it affirms Justice Huscroft's analysis in his dissent in the Ontario Court of Appeal that characterization should be limited to "ends" (i.e. purposes) to the exclusion of "means" (i.e. effects) (¶252).[7] In application, the majority resolves this contradiction by preferring a very broad "matter" that ignores the purpose of the *Act*, thus failing to follow the neutrality and precision principles.

10. Ironically, in its Introduction, when explaining what the case is about, the majority sets out a neutral and reasonably precise summary of the dominant effect and purpose of the *Act*:

> The *Act*, as currently worded, mandates *minimum national standards for pricing* (often referred to as carbon pricing) of commodities and activities that produce GHG emissions. The theory, according to the Act's Preamble, is that layering additional costs on those commodities and activities – costs to be borne largely by end users – should change behaviour, *leading to a reduction in GHG emissions* and, in turn, mitigation of climate change (¶13) [Emphasis added].

11. This is essentially the same as the "matter" stated by Associate Chief Justice Hoy, in her concurrence in the Ontario Court of Appeal, namely "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions."[8] It is only slightly more distant from that of the Saskatchewan majority[9] and Justice Feehan in dissent (¶943). British Columbia's only modification arises from using the more proximate purpose of helping to meet national targets for GHG emissions reductions. But in its analysis, the majority accuses these other formulations of being "an attempt to squeeze the *Act* into the national concern doctrine" that are "belied by the *Act* itself" (¶203). This is not because of a different reading of the extrinsic evidence. The majority says it cannot determine the practical effects of the *Act* because it is not a "trial court" and because doing so inevitably involves an investigation of efficacy (¶250).

12. The majority's only grounds for this charge is thus what the intrinsic evidence of the statute itself shows about its legal effects, which the majority glosses as "how the legislation as a whole affects the rights and liabilities of those subject to its terms" (¶148). But the only liability an individual or business subject to the *Act* can accrue for emitting GHGs is a liability to pay money.

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[7] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario* GGPPA *Reference*], ¶211, Huscroft JA (dissenting).
[8] *Ontario* GGPPA *Reference*, ¶188, Hoy ACJO (concurring).
[9] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, ¶¶118-125.

And this liability only arises to the extent that the federal cabinet determines that provincial law fails to meet a national minimum standard of stringency. Therefore, surely, the principal legal effect *must* be summed up as "establishing minimum national standards of GHG pricing."

13. The majority refers specifically to nine provisions of the *Act*: sections 165, 166, 168(2)(*l*), 171, 172, 188, 190, 197(1)(*a*) and 197(2). But with the exception of section 166 (mirrored, with respect to Part 2, by section 189), these provisions are ancillary or incidental to the main thrust of the *Act.* They provide for administration,[10] generation of information,[11] updating the list of gases based on new internationally-accepted climate science[12] or converting prices formulated in tonnes of gases to litres of fuel.[13] Section 188 provides that the revenues from any backstop applied in a listed province must be spent in that province, [14] while section 165 gives regulatory authority to designate persons to whom these grants can be made.[15] It is a *restriction* on what Canada can do with any money from the backstop. It clearly does not justify a *broader* statement of how the *Act* changes the rights and liabilities of those subject to it.

14. Subsections 166(2)-(4), which govern listing for Part 1 purposes – and the corresponding subsections 189(1) and (2) for Part 2 – are indeed at the core of the legal effects of the *Act*,[16] but they quite clearly permit cabinet to set minimum national pricing standards. They certainly do not create "unlimited" powers or allow interference in the "day-to-day" operation of industries (¶240). *All* the federal cabinet can do under these provisions is list a province or area of Canada to be subject to either the Part 1 (levy) or the Part 2 (output-based) backstop, which has the sole legal effect of requiring persons emitting GHGs in those provinces or areas pay a *price* to do so. And it can only do that to ensure the pricing of GHGs is applied broadly at levels the federal cabinet considers appropriate, taking into account, as the dominant factor, the stringency of provincial pricing. In short, sections 166 and 189 have no *legal* effect other than establishing minimum national standards of price stringency.

15. The majority rejects this straightforward conclusion based on concerns about the

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[10] *Act*, ss. 166(1), 171, 172.
[11] *Act*, s. 197.
[12] *Act*, s. 190.
[13] *Act*, s. 166(4), 168(2).
[14] *Act*, s. 188.
[15] *Act*, s. 165.
[16] *Act*, ss. 166(2)-(4), 189 (1)-(2).

supposedly "unfettered" discretion these provisions give to the federal cabinet. Colourfully borrowing from Greek mythology, the majority says the powers of the executive created by the *Act* are a "Trojan horse" (¶22) and that no one but a "Delphic oracle" could imagine how the exercise of those powers might be judicially reviewed (¶244).

16. But executive discretion is a constitutional red herring. *Some* discretion is made necessary precisely in order to avoid a one-size-fits-all approach (¶238). Provincial pricing schemes can obtain a given level of stringency in different ways – for example using different pricing mechanisms (quantity restrictions with trading, as with Quebec, levy as with British Columbia's carbon tax or output-based as with Alberta's Technology Innovation and Emissions Reduction regime) or different exemptions from coverage. The only way to avoid discretion in comparing these different approaches to a benchmark would be to mandate one pricing system across the country. Far from being full of hidden enemy soldiers, the discretion embodied in sections 166 and 189 *guards* the citadel of provincial diversity of approaches to the climate crisis – while ensuring that no region can sulk in its tents and leave to others the fight against the common foe.

17. Nor is inspiration from Apollo necessary to imagine how exercises of discretion by the federal cabinet might be judicially reviewed. The ordinary principles of Canadian administrative law will do. Cabinet's discretion is confined procedurally by the principle of fairness and substantively by the requirement to "consider the stringency of provincial pricing mechanisms" in a manner demonstrating the transparency of coherent reasoning and consistency with legal and evidentiary constraints that apply to all administrative decision makers.[17] A federal cabinet that failed to impartially evaluate information provided by provincial governments about their pricing mechanisms or that considered irrelevant factors such as partisanship, other federal-provincial disputes, or preferences about climate policy not reasonably encompassed by the concept of "stringency" could successfully be judicially reviewed.

18. In any event, legislative delegation to the executive is irrelevant to the division of powers. While Parliament cannot delegate authority it does not have, there is no federalism problem with delegation as such: "[h]ow far it shall seek the aid of subordinate agencies and how long it shall

[17] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, ¶99.

continue them are matters for each legislature, and not for the Courts of law, to decide".[18] The mere prospect that a statutory power *could* be applied in an *ultra vires* fashion does not make it unconstitutional – rather, it should be left to the "concrete case" to decide whether *that* application is *ultra vires*: in any event, it does not change the matter of the *Act.*[19] Since all Parliament has delegated is the power to set minimum standards of pricing GHGs, the dominant legal effect is confined to setting minimum standards of pricing GHGs.

19. The majority says that the distinction between pricing and regulation is "meaningless" because the price could be set at infinity and if it is set at infinity, this would "give the federal government control over the regulation of GHG emissions in their entirety" (¶253). With respect, this is a blatant "slippery slope" argument. A price and a regulation are qualitatively different. An unreasonably high price *could* have the same practical effect as a regulation or even prohibition[20] but this would require addressing the evidence of practical effects and making a finding of colourability - something for which the majority conceded there was no evidence (¶241).

20. While the federal cabinet could undoubtedly set the pricing standard higher than it has so far, it is limited by what could reasonably help accomplish Canada's national targets. Even if Canada's targets someday became "net zero", and even if Canada tried to meet this target entirely by pricing, the reasonable price of GHGs would still be limited by the marginal cost of capturing and storing GHGs in the ground, a process the Alberta government is investing in and which it hopes will become much cheaper in the next few decades.[21]

21. Every legal system makes the distinction between pricing, on the one hand, and regulation on the other, and it long predates environmental law in the modern sense. Regulation allows qualified persons to engage in activity under conditions delineated by a regulator. Prohibition prohibits anyone from engaging in an activity. Pricing allows anyone to engage in an activity if they pay to do so. These are different practically, legally and constitutionally. In the enforcement of contracts, for example, the English law distinguished between an order for damages, which was

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[18] *Hodge v. The Queen* (1883), 9 AC 117 (JCPC), p. 132; *Re George Edwin Gray* (1918), 57 SCR 150*; Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶123.
[19] *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198, pp. 1286-7.
[20] *Alberta (AG) v Canada (AG)*, [1938] 4 DLR 433 (JCPC) [*Alberta Banks*].
[21] Robert Savage Affidavit, ¶¶51-60, Ex. G-K **Supp. Record II, pp. A9-A10, A303-A358;** Robert Savage Cross-Examination, **Supp. Record X, pp. 60:ln18-63:ln8**.

the remedy at common law, and an order for specific performance, which required the more subtle (and therefore time-consuming and expensive) intervention of the courts of equity.[22] At Confederation, polygamy was prohibited, charitable trusts were regulated and imports were priced. The distinction between setting a price to engage in an action and regulating that action is also an important distinction in the policy of pollution control. Both Alberta's main affiant and British Columbia's expert distinguished between "pricing" and "regulating" emissions, and drew attention to the important policy differences between them – differences that are also relevant to the need for federal action and on the degree of intrusion into provincial affairs.[23] The *Act* does not allow the federal government to determine *who* may emit GHGs or set *conditions* on how they do it: even the Part 2 backstop can always be complied with by paying money and is therefore just a (complex) system of pricing.

22. As British Columbia has argued in its intervener factum in the Saskatchewan and Ontario appeals, modern practice has been to include references to *both* the dominant purpose *and* effect in the statement of a law's matter. In this respect, it is the proximate purpose that is important. This approach is consistent with the precision and neutrality principles. Unfortunately, the majority's statement of the *Act*'s purpose as "mitigating the effects of climate change" (¶214) is imprecise, and, in any event, the majority neglects to refer to it in its statement of the matter of the *Act*.

23. The extrinsic evidence demonstrates that to meet any target for warming of the world's climate system, there must be a cap on the accumulation of GHGs in the global atmosphere before the world reaches the stage of "net zero" – at which the point the permissible emissions must equal what is captured by biological and technological processes. The Paris Accord sets aspirational targets for overall warming and requires each party to set its own "nationally determined contribution": it is clear that the national contributions as currently set, even if reached, will not result in meeting the targets for warming. The hope is that countries will increase their ambition over time. It is in this context that Canada's target of 70% of 2005 GHG levels by 2030 was set as an international law commitment.[24]

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[22] *Semelhago v. Paramadevan*, [1996] 2 SCR 415.
[23] Expert Report of Jotham Peters, ¶9 **Supp. Record XVIII, pp. BC2-BC3**; Robert Savage Affidavit, ¶14, **Supp. Record II, p. A4;** Robert Savage Cross-Examination, **Supp. Record X, pp. 96:ln19-101:ln20**.
[24] Robert Savage Cross-Examination, **Supp. Record X, pp. 63:ln22-66:7**.

24. All countries must undergo some economic change and therefore cost to meet targets of any real ambition. Canada faces a specific problem. The general regulation of most of the activities that generate GHGs are within provincial jurisdiction. Reductions in GHG emissions in some provinces are offset by increases in others. [25] Canada has failed to meet any of its past international targets (¶¶883-884). Intergovernmental agreements have broken down (¶891). The economic burden of meeting national targets must be allocated among the provinces, preferably in a way that minimizes inter-provincial transfers of income, respects the existing diversity of provincial approaches and minimizes the economic impact. The proximate purpose of the *Act* is therefore to help resolve the "mischief" that the federal government has no way of getting Canada to meet this international commitment within its current authority and without allocation across the country.

25. To be sure, the evidence is also clear that the *Act* is not necessarily designed to meet *all* of the burden of Canada's national targets: the purpose is therefore most precisely stated as "to allocate part of Canada's national targets for GHG emission reductions." It attempts to allocate the burden fairly, in a way that minimizes the impact on the relative income of different parts of the country – something a quantity target that required every province to reduce by 30% compared with 2005, for example, could not do.[26]

26. The majority says the dominant purpose of the *Act* is to "mitigate the effects of climate change" (¶214). But "mitigating" the *effects* of climate change (usually called "adaptation") is not the focus of the *Act*. Responsibility for the effects of climate change – increased flooding, health problems, loss of forestry resources, increased forest fires, etc. – are left unchanged by the *Act* and therefore primarily for the provinces to address. If "mitigate the effects of climate change" is read to mean "mitigate the *amount* of climate change", then it would be accurate, but imprecise: the majority would be confusing the ultimate object of the *Act* with its proximate purpose, which is to allocate part of the national GHG target.

27. In any event, the majority compounds this mistake by not referring to *any* purpose in its formulation of the "matter" of the *Act*: it simply says it is to "regulate GHGs." As with Justice Huscroft's dissent in the Court of Appeal for Ontario, there is a contradiction between the majority's (incorrect) statement of method (that what matters for constitutional purposes is the

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[25] Expert Report of Dr. Nicholas Rivers, **Supp. Record XIV, p. R1212**.
[26] Robert Savage Cross-Examination, **Supp. Record X, p. 108:ln9-13**.

law's "end" and not its "means") with its as-applied formulation of the *Act*'s matter. The latter makes the opposite mistake of containing no statement of "end", but only an imprecise statement of "means." The better approach is to combine a precise and neutral statement of the means/effect with the end/purpose. British Columbia relies on its argument as an intervener in the companion appeals to support its own formulation.

Court of Appeal's Theory That "Matters of National Concern" Must Otherwise Be in Relation to Section 92(16) Should Be Rejected

28. At the classification stage, British Columbia submits that the matter of the *Act* "singly, distinctly and indivisibly" responds to the inability of any province to set minimum standards of pricing to allocate part of Canada's overall targets for GHG emission reductions. Clearly, no province can legally do this and equally clearly, creating overall national targets is a necessary part of governing a global commons, such as the capacity of the atmosphere and oceans to assimilate GHGs without unacceptable warming or acidification. Because the minimum standards are limited to stringency of pricing, recognizing federal authority maximizes provincial autonomy consistent with addressing this provincial inability and therefore "is reconcilable with the fundamental distribution of legislative power under the Constitution."[27]

29. The majority below rested its decision that the matter of the *Act*, however defined, could not be of "national concern" on the novel proposition that "only when the 'matter' would originally have fallen within the provinces' residuary power under s 92(16) [of the *Constitution Act, 1867*] does the national concern doctrine have any potential application" (¶172). Since a comprehensive GHG emission price could be enacted within a province under subsections 92(2) or 92(13) of the *Constitution Act, 1867*, if the majority's novel principle were correct, a minimum national standard of stringency for such prices could not be a matter of national concern.

30. The majority relies heavily (¶175) on Justice Beetz's remark in the *Anti-Inflation Reference* that "the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of distinct subject matters which do not fall within any of the enumerated heads of section 92 and which, by nature, are of national concern."[28] But the only

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[27] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, ¶33.3.
[28] *Re: Anti-Inflation Act*, [1976] 2 SCR 373, p. 457.

reason the examples Justice Beetz mentions do not fall within the enumerated heads of section 92 is that they are not best classified as "in the province". Aeronautics and radio communication would, but for their national dimension, relate to subsection 92(10); land use in the capital region to subsections 92(8) and 92(13); inter-provincial river pollution[29] and dumping in waters owned by the provincial Crown[30] to subsections 92(5) and 92(13); the inter-provincial production of records in civil litigation[31] to subsection 92(14) and nuclear energy to generate electricity to subsection 92A(1).[32] In every case, the reason for federal authority is that all of the section 92 powers are confined to being "in the province" and the matter held to be within federal authority was found not to be so confined because it was of "national concern." As Lord Simon pointed out in the definitive statement of the doctrine, a matter of national concern may in another aspect touch on *any* of the enumerated provincial powers.[33]

31. Justice Beetz's reasons for rejecting the "control of inflation" as a matter of national concern had nothing to do with whether it would otherwise be under subsection 92(16). It clearly would not, since setting the price term of contracts is a matter within "property and civil rights," but Justice Beetz made no reference to this point. Instead, Justice Beetz held that the national average of inflation is an aggregate of provincial price and wage phenomena with no evidence of connection to each other, other than with respect to matters already under federal jurisdiction, such as the money supply and interest rates. Second, he held that giving the federal government the permanent power to set every wage, profit margin and price in every industry was not a proportionate response to whatever cross-boundary issues arose in light of its impact on provincial autonomy.[34] In short, permanent wage-and-price controls, unlike the regulation of marine pollution, would not meet the test later articulated in *Crown Zellerbach.*

32. Given how broadly "property and civil rights in the province" has been interpreted, the majority's novel principle would in effect render the national concern doctrine a dead letter. A fair reading of the majority's opinion is that this was precisely the point: the majority considers the

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[29] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477.
[30] *Crown Zellerbach*, *supra.*
[31] *Hunt v. T & N plc* , [1993] 4 SCR 289, ¶60.
[32] *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] OR 862 (HC); *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327.
[33] *Ontario (AG) v. Canada Temperance Federation*, [1946] 2 DLR 1 (JCPC), p. 5.
[34] *Anti-Inflation Reference*, *supra.* pp. 452-4.

"national concern" doctrine to be "of debatable legitimacy" (¶189) and "judge-created"(¶16). If this Court is inclined to reconsider over a century of precedent, the question therefore is whether the majority was right that the national concern doctrine is a "judge-made" intrusion on the text of the Constitution, the Confederation bargain or the principles of federalism.

33. British Columbia says it was not. Properly understood, the "national concern" or "national dimensions" interpretation of the federal residual power fits with the principles of constitutional interpretation, including the text, the linguistic, historic and philosophic context, and the underlying purposes and principles of the Constitution, applied in a manner sensitive to new realities.[35] It arises from the text of section 91. It was considered an important part of the Confederation bargain. It fits with the basic principle of exhaustiveness that itself derives from the concept of a federation with a British, parliamentary form of government. Finally, so long as it is given a constrained and functional interpretation, the "national concern" doctrine is not just compatible with the principle of subsidiarity, but dictated by it.[36]

34. In its textual analysis, the majority correctly states that the plain reading of the words "not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" leads to the principle that where "a 'matter' does not fall into an enumerated power under either ss 91 or 92, it necessarily falls into the POGG power" (¶158). Where the majority goes wrong is in not recognizing that because all enumerated powers under section 92 are subject to geographic restrictions, this implies that if a matter is not best classified as being limited geographically to a province, it "falls into the POGG power": the judicial task *set by the text* is to make sense of what matters have provincial dimensions and which do not.[37]

35. Section 92 is quite explicit that provincial powers are "in each province", "within the province" "in the province" or "in and for the province". A variation on this phrase is found not only in the introductory paragraph of section 92, but also in subsections 92(2), 92(6), 92(7), 92(8), 92(12), 92(13), 92(14), 92(16), 92A(1) and 93, while other powers refer to the assets, liabilities, income and expenditure of the provincial government – subsections 92(2), 92(3), 92(4), 92(5),

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[35] *R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR 342, ¶52.
[36] David Beatty, *Constitutional Law in Theory and Practice* Toronto: UTP, 1995, pp. 34-39.
[37] *Interprovincial Co-operatives Ltd.*, *supra* p. 512-513, Pigeon J. (Beetz & Martland JJ, concurring); *Ontario (AG) v. Canada (AG)*, [1896] AC 348, [1896] UKPC 20 [*Local Prohibition*], pp. 8-10.

92(9) – or provincial purposes – subsections 92(2), 92(9) and 92(11). So matters that do not, from their intrinsic nature, have these limitations are "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." This simple textual point *requires* some judicial doctrine of when this is the case. With one exception, (¶40), when the majority refers to provincial powers, it elides the phrase "in the province" (¶¶274, 275, 283, 333).

36. The majority sees the federal residuum (the so-called POGG power) as the source of the so-called "gap" power, as opposed to the "national concern" power (¶158). This is a mistake. Because of subsections 92(13) and 92(16), there are no *private and local* matters that are "gaps": in other words, there are no gaps for matters that are "in the province."[38] The "POGG" cases are all matters that are, in some way or other, external to the province. In some cases, this is because the law only applies outside the geographic territory of any province.[39] In others, it is because the matter only applies to companies incorporated for extra-provincial purposes, federal institutions or the federal government.[40] The true "national concern" cases are ones where the federal enactment applies within the territory of provinces to entities otherwise susceptible to provincial legislation, but the *matter* (understood as the dominant purpose and effect of the enactment) "of its nature" transcends every province. The struggle of "national concern" jurisprudence is how to give meaning to this category – clearly anticipated by the text – in a way that respects the federal nature of the union. (In British Columbia's view, even the "emergency" cases are best understood as those matters that are temporarily of national concern: the Constitution gives no special authority to the federal government just because there is an emergency.)

37. The historical context points to the same conclusion as the linguistic context. British Columbia agrees with the majority's historical account of why the confederating colonies in 1867 sought a *federal*, as opposed to legislative, union – and why this means that provincial sovereignty must be protected from any *de facto* "limitless" reading of any federal head of power, since this would amount to establishing the legislative union that the Confederation bargain rejected. Nor does British Columbia have any quarrel with the account of the struggle of the western provinces

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[38] *Local Prohibition*, *supra* p. 8.
[39] *Reference re Offshore Mineral Rights*, [1967] SCR 792, p. 817; *Reference re Seabed and Subsoil of Continental Shelf Offshore Newfoundland*, [1984] 1 SCR 86.
[40] *John Deere Plow Co. Ltd. v. Wharton* (1914), 18 DLR 353 (JCPC); *Jones* v. *New Brunswick*, [1975] 2 SCR 182.

to be fully included within this federal arrangement in relation to their resources. However, to understand the opening words of section 91, it is also important to understand why the framers of the Confederation bargain sought a federal union, rather than to remain as separate colonies and why they rejected the only model of a federal written constitution available to them, that of the United States of America, whose Tenth Amendment leaves all unenumerated powers to the states.

38. The movement towards Confederation coincided with the descent of the United States into civil war. Even British North Americans who favoured federalism rejected the *ante bellum* model of U.S. federalism, especially as understood by those like John C. Calhoun who saw the states as the only real sovereigns.[41] This was not just a peculiarity of the most centralist politicians like John A. Macdonald. In an 1858 letter to the Colonial Secretary in London, George-Étienne Cartier, the most prominent politician in Canada East during the Confederation process, wrote along with Alexander Galt and John Ross that it would "form a subject for mature deliberation whether the powers of the Federal Government should be confined to the points named, or should be extended to all matters not specially entrusted to the Local Legislatures," and that in any event, "it is conceived that the proposed Confederation would possess greater inherent strength than that of the United States, and would combine the advantages of the unity for general purposes of a Legislative union, with so much of the Federative principle as would give all the benefits of local government and legislation upon questions of provincial interest."[42]

39. When that mature deliberation occurred, the framers of the Confederation bargain chose to divide the unenumerated powers on the same principle as that governing most of the enumerated powers, namely based on whether they were matters of a local or private nature in the province or matters that transcended any particular province by reason of what we would now call "collective action problems." So at the Quebec Conference, a proposal to add that "the Local Legislatures shall have the power to make all laws not given by this Conference to the General Legislature

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[41] P.B. Waite, *The Life and Times of Confederation* Toronto: UTP, 1962, pp. 33-4, 108-113; P. H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* Toronto: UTP, 2017, p. 139; *Australia (Attorney General) v. Colonial Sugar Refining Co.*, [1913] UKPC 76, [1914] AC 237, pp. 252-4, Viscount Haldane; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641, p. 658.

[42] Cartier et al. to Sir Edward Bulwer Lytton, 25 October 1858 in G. P. Browne, *Documents on the Confederation of British North America* Montreal Kingston: McGill-Queen's UP, p.18.

expressly" was voted down,[43] including by Cartier and Oliver Mowat (a Reformer, provincial rights advocate and author of the section 92 list).[44] Less noted is that there was also a decision not to give the federal Parliament residual authority over private and local matters. The versions of what later became section 92(16) in the Quebec and London resolutions restricted provincial authority to unenumerated matters of private or local concern "not given to the General government." But this phrase did not make the final text, which gave the provinces authority over all unenumerated matters of private or local concern.[45] This indicated a decision that unenumerated powers would be allocated based on *where* their effects are primarily felt. As Justice Rothstein discusses in *Consolidated Fastfrate* in the context of subsection 92(10), this was also generally the basis on which they divided the enumerated powers.[46]

40. Cartier's speech to the Legislative Assembly of the Province of Canada explaining the Confederation scheme emphasized the diversity of the new Confederation and the importance of the provincial governments. But Cartier also emphasized the authority of the general government to address those "large questions of general interest in which the differences of race or religion had no place."[47] The Confederation bargain involved *not* emphasizing the "ultimate locus of sovereignty", the issue which had led to the U.S. Civil War, but a more practical division of labour based on the geographic scope of the issues at stake: where each province could go its own way, it was permitted to do so; where others would be affected, federal authority was assumed.[48]

41. As British Columbia argued in its intervener factum in the companion appeals, a federal constitution similar in principle to that of the United Kingdom must reflect both the principle that there is some way for an elected legislature to do everything not prohibited by the written text (exhaustiveness) and respect for leaving matters to the representative bodies most directly

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[43] Browne, *Documents*, pp. 82, 122-4.
[44] Paul Romney, *Getting It Wrong: How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: UTP, 1999), pp. 29-30, 55-6.
[45] Quebec Resolution 43.18; London Resolution 41.18 in Browne, *Documents* pp. 161, 224; Romney, *Getting It Wrong*, pp.98-99, 101.
[46] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407, ¶¶33-39.
[47] Speech of the Hon. George-Étienne Cartier to the Legislative Assembly of the Province of Canada, February 7, 1865, online: Macdonald-Laurier Institute
[48] Waite, *Life and Times*, p.115-116; Romney, *Getting It Wrong*, pp.101-2.

accountable to those primarily affected by the decisions made (subsidiarity). This is the "philosophic" context of Canadian federalism.

42. The majority rightly emphasized the importance of the principle of subsidiarity to contemporary understandings of Canadian federalism (¶¶137-141). British Columbia agrees that subsidiarity – although not under that name– was part of what the framers of Confederation understood as characteristic of a "federal" union, modelled on the conventions of the relationship of the self-governing colonies to the late nineteenth century British Empire.[49] Subsidiarity weighs in favour of provincial jurisdiction where the impacts are primarily within the province and indeed puts a burden on those advocating for federal power to show the extent of extra-provincial impacts (¶142). But the majority goes wrong when it asserts that this principle always and everywhere points to decentralization. Subsidiarity is the principle that governance should be left at the level closest to the people *affected.* Subsidiarity therefore creates a *presumption* of provincial competence, but one that can be rebutted by showing the class of persons substantially affected by one province's inaction transcends that province and the federal matter minimally and proportionately affects the ability of each province to go its own way.

43. The majority was right to see the "national concern" doctrine as dangerously centralist, if taken too far or too formalistically: this is why the courts developed a functional and proportional test to deciding when a matter is not "in the province." But the majority was wrong to see it as illegitimate or of "judicial creation." The courts should consider carefully whether any matter that would otherwise be "private or local" or "in the province" is, or has become, one where the extra-provincial interests have become dominant and which is defined in a way that minimally and proportionally affects provincial autonomy. It cannot make any difference whether that matter would otherwise be provincial under the residual subsection 92(16) or some other head of power.

Extra-Provincial Interests Relevant to National Concern Test, Not A Mere "Policy" Issue

44. The majority below dismissed the effects of a failure of one province to price GHGs stringently on other provinces and other countries as a "policy" issue of no relevance to the division of powers. The majority stated, "Under our federal system, what one province […] does – or does

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[49] Romney, *Getting It Wrong,* pp.96-98. Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 *SCLR (2d)* 601, pp. 613-614.

not do – may well adversely affect another province socially, economically or environmentally" (¶314). If this were merely a reference to incidental effects, British Columbia would agree. But in context, it is clearly a broad claim that, regardless of magnitude, the impacts of provincial action or inaction on extra-provincial interests make no difference constitutionally. The majority gives as examples trade barriers, oil imports, coal exports, and lack of vaccinations leading to spread of infectious disease across provincial borders, concluding that an inter-provincial externality is not a basis for federal jurisdiction under the national concern doctrine (¶315). How the provinces might affect extra-provincial interests is "a policy question, not a legal one" (¶316).

45. Some of the majority's examples are difficult to understand, since Parliament clearly does have authority over inter-provincial and international trade, including energy imports and exports. Both the Judicial Committee and this Court have said that there is federal jurisdiction to address the spread of communicable diseases, at least to the extent that provinces are unable or unwilling to do so.[50] The concept of "provincial inability" was Dale Gibson's term for extra-provincial externalities: he specifically gave the example of contagious diseases spreading beyond a province.[51] Gibson's critique of *Russell* was that it failed to distinguish between the spread of a *contagious* disease across borders and the control of a *non-communicable* condition like alcohol abuse. While substance abuse exists across the nation, the extra-provincial effects of a failure to effectively deal with it do not dominate the effects within the province. Gibson's concept of "provincial inability" was adopted in *Schneider,* which held that *treatment* of a substance use – as opposed to trafficking in narcotics – was a provincial matter. *Schneider* summarized provincial inability as a situation in which "the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province."[52] While Justice Dickson referred to "regulation", the same formula could be applied to prohibition or pricing.

46. In *Crown Zellerbach,* Justice Le Dain made explicit that whether a matter is indivisible turns in large measure on "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

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[50] *Toronto Electric Commissioners v. Snider* [1925] 2 DLR 5 (JCPC), p. 16; *Labatt Breweries of Canada Ltd. v. Canada*, [1980] 1 SCR 914, p. 934; *Canadian Blood Services v. The Manitoba Human Rights Commission and Zoldy*, 2011 MBQB 312, ¶44.
[51] Dale Gibson, "Measuring National Dimensions", 7 *Man. L.J.* 15 (1976), pp. 33-4.
[52] *Schneider v. The Queen.*, [1982] 2 SCR 112, Dickson J. at p. 131.

(the so-called 'provincial inability' test)."[53] In their dissent in *Hydro Quebec* – not disputed on this point – Chief Justice Lamer and Justice Iacobucci held that the critical criterion for whether a pollutant is within federal jurisdiction under the national concern branch is "whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province."[54] The "provincial inability" test has been further refined in the context of the general commerce power, where it plays an essentially identical role.[55]

47. The majority is right that individual provinces may find themselves "on the outside looking in" at federal policy if popular opinion in that province is at odds with the national majority. They are also right that the guarantees of provincial autonomy in the division of powers are there to protect such regional majorities/national minorities from unnecessary interference with their collective self-government (¶140). This was why the colonies opted for a *federal* union in 1867. But the majority does not consider – and indeed discounts – the possibility that provinces may find themselves on the "outside looking in" at the unilateral action or inaction of other provinces that affects their vital interests. But this was above all why those colonies opted for a federal *union*.

48. The majority's vision is not of a federation in which there is give-and-take and shared, coordinate sovereignty, but of atomised independent nation states. Indeed, it is worse than that, since under this vision, the provinces do not even have the remedies available to independent nation states: they cannot sue each other at international law and they cannot impose carbon duties to address carbon leakage.[56]

49. It is not true, as the majority argues, that "if minimum national standards for pricing of GHG emissions […] were permitted, then, on this theory, the federal government could impose minimum national standards on innumerable areas under provincial jurisdiction" (¶335). Members of Parliament may have views about elementary school curricula, traffic control or ambient air quality in their ridings, but Parliament has no jurisdiction over these matters under the national concern doctrine because the relevant costs and benefits of these policies are felt primarily by the people of the province enacting them. Setting a "minimum national standard" for a matter that has

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[53] *Crown Zellerbach*, ¶33.4.
[54] *R. v. Hydro-Québec*, [1997] 3 SCR 213, ¶76.
[55] Beatty, *Constitutional Law in Theory and Practice*, pp. 34-39.
[56] M.Olszynski, N. Bankes & A. Leach, "Alberta Court of Appeal Opines That Federal Carbon Pricing Legislation Unconstitutional" (March 17, 2020), online: ABlawg.

primarily intra-provincial impact would not indivisibly address a provincial inability. Nor would Parliament have jurisdiction over "roadways, building codes, public transit, home heating and cooling" just because these matters are connected to the global problem of climate change. If there are less intrusive measures like minimum standards of pricing based on GHG content, then such legislation would disproportionately affect the federal-provincial balance. What is different here is the extent of the extra-provincial interests and that the impacts on provincial autonomy of a carefully delineated "matter" are necessary and proportionate.

Federal Government Must Have Powers to Address Governance of Key Global Commons

50. Finally, the majority takes the counter-intuitive position that because the problems of GHGs and of "carbon leakage" are global in nature, measures to address them must be provincial, not federal. It claims that Canada's role in the problem is small compared with that of China, the United States and the European Union and therefore nothing one province does can harm another (¶324). It also says that provinces' possibly greater concern with international as compared with inter-provincial carbon leakage undermines federal jurisdiction (¶331).

51. The supposedly small carbon footprint of Canada is exaggerated. Canada is one of the top ten emitters in both absolute and per capita terms. If either Alberta or Saskatchewan were independent countries, they would rank *first* in the world in per capita emissions.[57] To be sure, even China, the United States and the European Union (all of which are also federations) cannot – on their own – address the global collective action problem of GHG accumulations in the atmosphere, so of course Canada cannot either. But this is just another way of saying the problem of GHG accumulations in the atmosphere and ocean is a global collective action problem.

52. *Crown Zellerbach* held that it was precisely *because* of its international character that "marine pollution" was "clearly a matter of concern to Canada as a whole."[58] The majority states that ocean pollution can be distinguished from atmospheric pollution on the grounds that in the case of the former it is impossible to distinguish the "sources" of pollution (¶263, ¶292). This is not a defensible distinction between *Crown Zellerbach* and the present case. First, the *sources* of ocean pollution *can* be distinguished – and would have to be for the permit provisions of the *Ocean*

[57] Expert Report of Dr. Nicholas Rivers, **Supp. Record XIV, p. R1212**.
[58] *Crown Zellerbach*, ¶37.

Dumping Control Act to apply. Second, while the parts of the system of marine waters within which pollution *mixes* are difficult to distinguish,[59] this is *equally* true of the atmosphere. In any event, GHGs are marine pollutants as well as atmospheric ones.

53. The global atmosphere, the high seas and outer space are the great global commons. The evidence shows that the capacity of *both* the atmosphere and the ocean to assimilate GHGs is finite. Only states with international personality can influence the governance of these global commons and they can only do so if they can commit to national targets limiting how much of this common resource their citizens are going to deplete. International carbon leakage is a matter of international trade. The only remedies to the competitive pressures from trade with jurisdictions that have no price or a lower price for GHGs – whether a carbon duty or international agreements on minimum pricing standards – must lie with the federal government.

54. To be able to participate in such governance – and thereby defend the interests of Canadians – Canada must be able to come to the table with some ability to deliver national targets. Recognizing the matter of the *Act* – establishing minimum national pricing standards for GHGs to allocate part of Canada's targets for GHG emissions reduction – as being within federal jurisdiction gives Canada a tool to deliver on some of those targets that still leaves as much room as possible for provincial diversity in how to respond, while allowing defence of the interests of all provinces against this contemporary scourge.

55. Climate science models may be to us what the warnings of Cassandra were to the Trojans. But the *Constitution Act, 1867* is no ancient curse that prevents us from heeding them.

PART IV: COSTS

56. British Columbia does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

57. British Columbia asks that the Court allow the appeal and advise the Lieutenant Governor in Council that the answer to the question asked in Order in Council 112/2019 – whether the *Act* is unconstitutional in whole or in part – is "No."

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[59] *Crown Zellerbach*, ¶38.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th OF MAY, 2020

J. Gareth Morley & Jacqueline D. Hughes
Counsel for Attorney General of British Columbia

PART VII:
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