

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Sched. B);

AND IN THE MATTER OF an Application by Enbridge Gas Inc., pursuant to section 36(1) of the *Ontario Energy Board Act, 1998* for an order or orders for gas distribution rate changes and clearing certain non-commodity deferral and variance accounts related to compliance obligations under the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186.

JOINT NOTICE OF CONSTITUTIONAL QUESTION

The Intervenors, Anwaatin Inc. (“**Anwaatin**”) and Chiefs of Ontario (“**COO**”), intend to question the constitutional applicability of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (the “**GGPPA**”) to Enbridge Gas Inc.’s (“**Enbridge’s**”) First Nation customers in the context of the Ontario Energy Board EB-2019-0247 proceeding (the “**Proceeding**”).

The Board has invited Anwaatin and COO to file submissions in respect of the question by June 7, 2021. Enbridge, Board staff, and other intervenors are invited to file submissions by July 5, 2021. All parties and Board staff are invited to file reply submissions by July 19, 2021.

The following are the material facts giving rise to the constitutional question:

1. The Board issued a Notice of Hearing for the Proceeding on an application by Enbridge pursuant to section 36(1) of the *Ontario Energy Board Act, 1998* for:
 - (a) a final order allowing it to charge customers a federal carbon charge on a volumetric basis, in the amount of the charge on fossil fuels required to be paid pursuant to the *GGPPA* (the “**Federal Carbon Charge**”), effective April 1, 2020;
 - (b) a final order approving or fixing just and reasonable rates for all Enbridge rate zones, effective April 1, 2020, to allow Enbridge to recover other costs (including facility-related costs), in compliance with the *GGPPA*; and
 - (c) approval of 2019 balances for all federal carbon pricing program-related deferral and variance accounts, for all Enbridge rate zones, and for an order to dispose of those balances effective October 1, 2020.

2. Anwaatin and COO are intervenors in the Proceeding. Anwaatin is a collective of Indigenous communities including Aroland First Nation, Animbiigoo Zaagi'igan Anishinaabek Nation, and Ginoogaming First Nation.
3. Anwaatin indicated that it may make submissions on the constitutional dimensions of the Application and related First Nations rights when it applied for intervenor status in the Proceeding on January 27, 2020.
4. Similarly, COO noted concerns with respect to the application of sections 87 and 89 of the *Indian Act*, R.S.C., 1985, c. I-5 (the “**Indian Act**”) to charges imposed by the *GGPPA* when it applied for intervenor status in the Proceeding on January 23, 2020.
5. The Board decided on March 19, 2020, to defer the constitutional and *Indian Act* issues raised by Anwaatin and COO in the Proceeding (the “**Deferred Issues**”) pending the decision of the Supreme Court of Canada (“**SCC**”) in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. The Board stated that “should the SCC uphold the constitutionality of the *GGPPA* and of the charges thereunder such that the concerns raised by the COO and Anwaatin remain, these matters can be considered at that time and be informed by the SCC’s views.”
6. The Board’s Decision and Order in the Proceeding, issued August 13, 2020, (attached at Appendix A), approved the Federal Carbon Charge effective April 1, 2020, on a final basis for all Enbridge customers, except on-reserve First Nations customers. The Board allowed the Federal Carbon Charge for on-reserve First Nations customers without hearing the matter but found that such charges would remain interim until the Board’s determination of the Deferred Issues. The Board also established a new tracking account to record the Federal Carbon Charges for on-reserve First Nations customers until the final determination of the Deferred Issues.
7. The SCC handed down its decision in the *References re Greenhouse Gas Pollution Pricing Act* on March 25, 2021, (attached at Appendix B), and upheld the constitutional validity of the *GGPPA*.
8. The Board issued Procedural Order No. 3 on April 20, 2021, outlining the next steps in the Proceeding on the Deferred Issues. In accordance with Procedural Order No. 3, Anwaatin filed a letter on May 3, 2021, requesting that the Board adjudicate the Deferred Issues and indicating that it intends to file submissions on same. COO filed a similar letter on May 5, 2021.

The following is the legal basis for the constitutional question:

9. Anwaatin and COO intend to question the constitutional applicability of the *GGPPA* charges to Enbridge’s First Nation customers.

10. Anwaatin's and COO's arguments may include that:
 - (a) the Federal Carbon Charge is constitutionally inapplicable to on-reserve First Nations natural gas customers in accordance with sections 87 and 89 of the *Indian Act*;
 - (b) the application of the Federal Carbon Charge to First Nations natural gas customers infringes upon existing aboriginal and treaty rights of First Nations and is thereby contrary to section 35 of the *Constitution Act, 1982* and unconstitutional; and
 - (c) the application of the Federal Carbon Charge to First Nations natural gas customers is inconsistent with the Honour of the Crown which is an obligation constitutionalized in section 35 of the *Constitution Act, 1982*.
11. Section 35 of the *Constitution Act, 1982* recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada. Legislation and regulations are constitutionally inapplicable when they interfere unjustifiably with the exercise of an existing Aboriginal or treaty right (*R v. Nikal*, [1996] 1 S.C.R. 1013; *R v. Adams*, [1996] 3 S.C.R. 101; *R v. Côté*, [1996] 3 S.C.R. 139; *R v. Badger*, [1996] 1 S.C.R. 771; *R v. Marshall*, [1999] 3 S.C.R. 533).
12. Aboriginal rights are generally those held by Aboriginal peoples that relate to activities that are an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal group claiming such rights (*R v. Van der Peet*, [1996] 2 S.C.R. 507). Treaty rights include rights to and protection of reserves and livelihoods on reserves, as well as harvesting and other rights. Aboriginal and treaty rights may include those rights that are unconstitutionally impaired by the application of the Federal Carbon Charge to First Nations natural gas customers.
13. Anwaatin and COO may argue that the application of the Federal Carbon Charge to First Nations natural gas customers infringes upon existing aboriginal and treaty rights and therefore contravenes section 35 of the *Constitution Act, 1982*.
14. Anwaatin and COO may argue that the application of the Federal Carbon Charge to First Nations natural gas customers is inconsistent with the Honour of the Crown which is a legal principle born out of the assertion of Crown sovereignty as against Indigenous peoples where there was no conquest or discovery of lands terra nullius but where nonetheless the Crown took de facto control over the Indigenous lands, and it has become an obligation of the highest order applicable to all dealings between the Crown and Indigenous peoples, now part of section 35 of the *Constitution Act, 1982* (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Manitoba Metis Federation v. Canada (Attorney General)*, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] 2 S.C.R. 765).

15. Section 87(1) of the *Indian Act* provides that, subject to certain limitations, the following property is exempt from taxation: (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve. Section 87(2) provides that no Indian or band is subject to taxation in respect of the ownership, occupation, possession, or use of any such property or is otherwise subject to taxation in respect of such property. Accordingly, section 87 ensures that the personal property of Indigenous persons located on reserve is tax-exempt.
16. Section 89(1) provides that “the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress, or execution in favour or at the instance of any person other than an Indian or a band.” Accordingly, section 89 places restrictions on encumbrances with respect to the real and personal property of Indigenous persons on reserve.
17. The purpose of sections 87 and 89 of the *Indian Act* is to preserve the entitlements of Indians to their reserve lands and to ensure that the use of their property on their reserve lands is not eroded by the ability of governments to charge, or otherwise tax it (*Bastien Estate v. Canada*, 2011 SCC 38 at para 23).
18. “Personal property”, for the purposes of section 87 and 89 of the *Indian Act*, is to be interpreted liberally and includes intangible personal property, including energy (*Brown v. The Queen in Right of British Columbia*, (1979) 3 CNLR 67 (BCCA)).
19. The Federal Carbon Charge violates the personal property charge and tax exemptions granted to Indigenous peoples under sections 87 and 89 of the *Indian Act*. Indigenous peoples or bands are typically not required to pay charges when fuel is purchased on-reserve for personal or band use. Neither the *GGPPA*, nor Enbridge, provide a means by which Indigenous peoples can realize their exemption rights under the *Indian Act*. We therefore respectfully submit that Federal Carbon Charge is constitutionally inapplicable to on-reserve First Nations natural gas customers.

May 21, 2021

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APPENDIX A



Ontario
Energy
Board

Commission
de l'énergie
de l'Ontario

DECISION AND ORDER

EB-2019-0247

ENBRIDGE GAS INC.

2020 Federal Carbon Pricing Program Application

BEFORE: Lynne Anderson
Presiding Member

Susan Frank
Member

Michael Janigan
Member

August 13, 2020

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1 INTRODUCTION AND SUMMARY

Enbridge Gas Inc. (Enbridge Gas) requested Ontario Energy Board (OEB) approval under section 36(1) of the *Ontario Energy Board Act, 1998* (OEB Act) to increase rates to recover costs associated with meeting its obligations under the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA) and the Federal Carbon Pricing Plan (FCPP), and to dispose of the 2019 balances recorded in its FCPP-related deferral and variance accounts.

Under the GGPPA, Enbridge Gas is required to pay to the federal government a federal carbon charge for greenhouse gas emissions from the natural gas that it delivers to its non-exempt customers, and further payments for its own facility emissions. On April 1, 2020, the federal carbon charge under the GGPPA increased to \$30/tonne of carbon dioxide equivalent (CO_{2e}), equivalent to a charge of 5.87 ¢/m³ of natural gas use.

Enbridge Gas requested approval to increase the Federal Carbon Charge from 3.9100 ¢/m³ to 5.8700 ¢/m³ to match the volumetric charge it must remit to the federal government for its customers' emissions, and to increase the Facility Carbon Charge to reflect its forecast facility costs.

On February 11, 2020, the OEB approved Enbridge Gas's proposed rates for the Federal Carbon Charge and Facility Carbon Charge on an interim basis, effective April 1, 2020. In this Decision and Order, the OEB approves these charges on a final basis effective April 1, 2020.

The incremental bill impact of the 2020 Federal Carbon Charge and 2020 Facility Carbon Charge for typical residential customers was \$47.07 per year in the Enbridge Gas Distribution (EGD) rate zone (based on annual consumption of 2,400 m³) and \$43.15 per year in the Union rate zones (based on annual consumption of 2,200 m³). This was the incremental bill impact on April 1, 2020, the effective date for the interim rates. No change was requested from the interim rates, therefore there are no further bill impacts for the Federal Carbon Charge and Facility Carbon Charge.

Enbridge Gas's application also requested approval to dispose of the 2019 balances in the FCPP deferral and variance accounts (DVAs):

- \$145.70 million in the Customer Variance Accounts, recording the variance between FCPP customer-related costs incurred by Enbridge Gas and costs recovered in rates

- \$0.98 million in the Facility Variance Accounts, recording the variance between FCPP facility-related costs incurred by Enbridge Gas and costs recovered in rates
- \$1.60 million in the Administration Deferral Accounts, recording Enbridge Gas's administration costs associated with the FCPP

The large balance in the Customer Variance Accounts was due to costs incurred in the four-month period between April 1, 2019 and July 31, 2019. For this period, Enbridge Gas was required to remit a federal carbon charge to the federal government for its customers' emissions, but a Federal Carbon Charge was not included on the bills of Enbridge Gas customers to recover this cost.

The OEB approves the 2019 balances in all FCPP DVAs, subject to an adjustment regarding the interest rate used for the balances in these accounts in the 3rd quarter of 2020. This will have a minor impact on the balances in these accounts.

The OEB approves the disposition of all FCPP deferral and variance account balances in three monthly installments beginning October 1, 2020 for all Enbridge Gas customers. Enbridge Gas estimated the total bill impact (over the three-month period) of the proposed 2019 FCPP DVA disposition to be an increase of \$21.85 for a typical residential customer in the EGD rate zone with annual consumption of 2,400 m³, and increases of \$16.01 and \$16.58 for typical residential customers with annual consumption of 2,200 m³ in the Union South and Union North rate zones, respectively. The OEB does not expect that the changes resulting from this Decision and Order will materially change the estimated total bill impacts.

The OEB previously determined that it would defer consideration as to whether the FCPP charges are constitutionally applicable in light of the *Indian Act*, relevant treaties, and section 35 of the *Constitution Act, 1982* until the Supreme Court of Canada (SCC) rendered its decision on appeals currently before the SCC concerning the constitutionality of the GGPPA.

Enbridge Gas shall file a draft rate order with updated rates reflecting this Decision and Order. Absent unforeseen circumstances, Enbridge Gas will be able to incorporate the outcomes of this Decision and Order as part of its October 1, 2020 quarterly rate adjustment mechanism (QRAM) application.

2 BACKGROUND

The federal *Greenhouse Gas Pollution Pricing Act* established a federal carbon pricing program. Under the GGPPA, Enbridge Gas is required to pay to the federal government a federal carbon charge for greenhouse gas emissions from the natural gas that it delivers to its non-exempt customers, and further payments for its own facility emissions.¹ The federal carbon charge under the GGPPA came into effect on April 1, 2019, at a rate of \$20 per tonne of CO₂e, which is equal to 3.91 ¢/m³ of natural gas used. On April 1, 2020, the federal carbon charge under the GGPPA increased to \$30/tonne of CO₂e (equal to 5.87 ¢/m³ of natural gas).

In a previous proceeding,² the OEB approved a Federal Carbon Charge of 3.91 ¢/m³ on Enbridge Gas customer bills to recover Enbridge Gas's FCPP costs related to customer emissions, and a Facility Carbon Charge to recover Enbridge Gas's FCPP costs related to facility emissions, both of which became effective on August 1, 2019. The OEB also established three sets of FCPP deferral and variance accounts:³

- Federal Carbon Charge – Customer Variance Accounts (Customer Variance Accounts), to record the variance between actual FCPP costs related to customer emissions and FCPP costs recovered in rates related to customer emissions
- Federal Carbon Charge – Facility Variance Accounts (Facility Variance Accounts), to record the variance between actual FCPP costs related to facility emissions and FCPP costs recovered in rates related to facility emissions
- Greenhouse Gas Emissions Administration Deferral Accounts (Administration Deferral Accounts), to record the administration costs associated with the FCPP

¹ Certain customers (e.g. industrial customers and greenhouses) are eligible for full or partial exemption from the federal carbon charge under the GGPPA for their emissions, and are thus also exempt from Enbridge Gas's Federal Carbon Charge.

² EB-2018-0205

³ For each of the three sets of DVA, two accounts exist, one for customers in the EGD rate zone and one for customers in the two Union rate zones (Union North and Union South).

3 THE PROCESS

Enbridge Gas applied to the OEB on November 18, 2019 for approval under section 36(1) of the *Ontario Energy Board Act, 1998* to increase rates effective April 1, 2020 to recover costs associated with meeting its obligations under the GGPPA. Enbridge Gas's application also requested approval to dispose of the 2019 balances in the FCPP DVAs.

Following issuance of notice and requests for intervention status, the OEB issued [Procedural Order No. 1](#) on February 6, 2020. In Procedural Order No. 1, the OEB denied the requests of several parties for intervention status, on the grounds that these parties had not adequately explained their interest in the proceeding, or that their stated interests (in particular, abatement efforts to reduce greenhouse gas emissions) were not expected to be within the scope of this proceeding.

On February 11, 2020, the OEB issued an [Interim Decision and Order](#), to address Enbridge Gas's request for interim rates effective April 1, 2020. The OEB approved Enbridge Gas's proposed rates for the Federal Carbon Charge and Facility Carbon Charge on an interim basis, effective April 1, 2020. The OEB did not approve interim disposition of the balances in Enbridge Gas' FCPP DVAs and directed Enbridge Gas to file updated evidence with the final December 31, 2019 balances in these accounts when audited numbers became available. The OEB also directed Enbridge Gas to propose options for the approach to disposition of the DVA balances that would smooth bill impacts. The OEB also clarified that the scope of this proceeding would be limited to considering recovery of Enbridge Gas's costs related to the FCPP.

After being initially denied intervention status through Procedural Order No. 1, several parties subsequently submitted updated requests for intervention status, which the OEB addressed in its [Decision on Updated Intervention Requests and Scope of Proceeding](#), issued on March 19, 2020. The final list of parties granted intervenor status and cost eligibility in this proceeding is as follows:

- Anwaatin Inc. (Anwaatin)
- Building Owners and Managers Association, Greater Toronto (BOMA)
- Chiefs of Ontario
- Energy Probe Research Foundation (Energy Probe)
- London Property Management Association (LPMA)
- School Energy Coalition (SEC)

In that decision, the OEB also indicated that it would defer consideration of issues raised by Anwaatin and the Chiefs of Ontario, as to whether the FCPP charges are constitutionally applicable in light of the *Indian Act*, relevant treaties, and section 35 of the *Constitution Act, 1982* (the Deferred Issues), until such time as the Supreme Court of Canada has rendered its decision on the appeals concerning the constitutionality of the GGPPA. The OEB also indicated that the issues of energy poverty and energy poverty in indigenous communities and the differential impact of natural gas rates on remote and near remote communities were not within the scope of this proceeding.

Anwaatin subsequently filed several letters with the OEB, objecting to the OEB's approach to the Deferred Issues, which the OEB responded to. The OEB's approach to the Deferred Issues is discussed in more detail in section 4.3 of this Decision.

On May 14, 2020, Enbridge Gas filed an [updated Application](#), which included final audited December 31, 2019 balances in the FCPP DVAs, and a proposed methodology for disposition.

On May 22, 2020, the OEB issued [Procedural Order No. 2](#), which indicated that the OEB would proceed by way of a written hearing, and established the procedural steps to address all issues in scope of this proceeding, other than the Deferred Issues.

On or before June 4, 2020, intervenors and OEB staff filed written interrogatories to be answered by Enbridge Gas. Enbridge Gas filed responses on June 18, 2020.

On June 25, 2020, Enbridge Gas filed its argument-in-chief. On or before July 9, 2020, intervenors and OEB staff filed final submissions.⁴ On July 16, 2020, Enbridge Gas filed its reply submission.

⁴ Anwaatin filed an updated submission on July 29, 2020, to reflect new information arising from the SCC proceeding that Anwaatin believed to be material to this proceeding.

4 DECISION

This decision provides the OEB's determinations regarding:

- Enbridge Gas's request for approval of final rates for the Federal Carbon Charge and Facility Carbon Charge, to reflect forecast 2020 costs.
- Enbridge Gas's request for approval to dispose of the 2019 balances in the FCPP-related deferral and variance accounts. The OEB addresses the balances proposed for disposition in each of the three types of accounts (Customer Variance Accounts, Facility Variance Accounts, Administration Deferral Accounts), as well as the methodology proposed to allocate these balances to rate classes, and the disposition period for these balances.
- Treatment of the Deferred Issues, and how this affects implementation of the OEB's determinations regarding the carbon charges and disposition of the 2019 balances in the FCPP-related deferral and variance accounts.

4.1 Federal Carbon Charge and Facility Carbon Charge

Enbridge Gas requested approval, on a final basis, of rates for the Federal Carbon Charge and Facility Carbon Charge, effective April 1, 2020.

Enbridge Gas requested final approval of the increase⁵ to the Federal Carbon Charge from 3.9100 ¢/m³ to 5.8700 ¢/m³, and the increase to the Facility Carbon Charge: from 0.0036 ¢/m³ to 0.0049 ¢/m³ for the EGD rate zone, and from 0.0084 ¢/m³ to 0.0088 ¢/m³ for the Union rate zones.

These rates requested by Enbridge Gas were identical to those previously approved by the OEB on an interim basis, in its Interim Decision and Order of February 11, 2020.

Enbridge Gas estimated that the incremental bill impact of the 2020 Federal Carbon Charge and 2020 Facility Carbon Charge for typical residential customers was \$47.07 per year in the EGD rate zone (based on annual consumption of 2,400 m³) and \$43.15 per year in the Union rate zones (based on annual consumption of 2,200 m³). This was the incremental bill impact on April 1, 2020, the effective date for the interim rates. No change was requested from the interim rates, therefore there would be no further bill impacts for the Federal Carbon Charge and Facility Carbon Charge.

⁵ Relative to the rates approved on a final basis in EB-2018-0205

Enbridge Gas calculated these rates by forecasting the costs it expected it would need to remit to the federal government for its customers' emissions and its own facility emissions for 2020, and the customer volumes over which these costs would be recovered. The requested rate of 5.8700 ¢/m³ (or \$30/tonne of CO₂e) for the Federal Carbon Charge matches the volumetric charge that Enbridge Gas must remit to the federal government for its customers' emissions.

No parties objected to the rates requested by Enbridge Gas, or the methodology used by Enbridge Gas to determine the requested rates.

Energy Probe commented that it was concerned with approving 2020 FCPP rates on a final basis, due to several uncertainties, including impacts related to the COVID-19 emergency that may affect Enbridge Gas's forecasts of customer volumes and FCPP costs. Energy Probe requested that, should the updated rates be approved on a final basis, Enbridge should provide the OEB with an update on its forecasts. Enbridge Gas submitted that this was unnecessary, as it does not have any more current 2020 forecast information available and does not anticipate any significant impact to its proposed FCPP-related rates at this time. Enbridge Gas also noted that deferral and variance accounts are already in place to track any variances from forecast that do occur.

Findings

The OEB approves, on a final basis effective April 1, 2020, the Federal Carbon Charges and Facility Carbon Charges proposed by Enbridge Gas that were previously approved by the OEB on an interim basis. No parties submitted any concerns with the approach to setting these charges, the calculation for which is largely mechanistic. Energy Probe's concern related to the uncertainty of forecasts. The OEB has determined that an update to Enbridge Gas's forecasts is not required, as proposed by Energy Probe. The approved Customer Variance Accounts and Facility Variance Accounts were established to track variances between forecast and actual costs.

4.2 2019 Deferral and Variance Accounts

4.2.1 Customer Variance Accounts

Enbridge Gas sought disposition of a 2019 balance of \$145.70 million⁶ in the Customer Variance Accounts. This balance was due entirely to costs incurred in the four-month period between April 1, 2019 and July 31, 2019, plus accumulated interest costs. For this period, Enbridge Gas was required to remit a federal carbon charge to the federal government for its customers' emissions, but a Federal Carbon Charge was not included on the bills of Enbridge Gas customers to recover this cost.

With the exception of the approach used to calculate interest (discussed further in section 4.2.4), no party objected to the balance proposed for disposition in these accounts.

Findings

The OEB approves the disposition of the balance in the Customer Variance Accounts with interest projected to September 30, 2020. No parties raised any concerns with the principal balance in the Customer Variance Accounts. These accounts track the difference between the amount remitted to the federal government related to the FCPP and the amount collected from customers, and therefore are largely mechanistic. Interest on the balance is discussed later in this Decision.

4.2.2 Facility Variance Accounts

Enbridge Gas sought disposition of a 2019 balance of \$0.98 million in the Facility Variance Accounts (updated in Enbridge Gas's interrogatory responses from an earlier value of \$1.22 million, due to a change to the calculation of Enbridge Gas's required payment to the federal government, related to Enbridge Gas's facility emissions from flared volumes of natural gas).⁷ The Facility Variance Accounts record the variance between actual facility-related FCPP costs, and the facility-related costs recovered through rates. Actual facility-related FCPP costs in 2019 were \$2.34 million.⁸

More than 90% of the 2019 balance in the Facility Variance Accounts is attributable to period prior to July 31, 2019, when no Facility Carbon Charge had been included on the

⁶ This was the account balance in Enbridge Gas's updated application. The exact amount to be disposed of will change slightly based on the method of calculating interest for Q3 2020, as discussed in this Decision. This adjustment will also affect the balances in the Facility Variance Accounts and Administration Deferral Accounts.

⁷ Exhibit I.Staff.9 (a)

⁸ Exhibit I.Staff.9 (a)

bills of Enbridge Gas customers to recover the costs of Enbridge Gas's facility-related emissions. The remainder of the balance is due to the variance between the actual facility-related costs and the revenue collected from customers, due to the differences in forecast versus actual customer volumes, and in forecast versus actual facility-related costs.⁹

OEB staff submitted that it had no concerns with Enbridge Gas's calculations regarding the 2019 balance in the Facility Variance Accounts, but that Enbridge Gas had provided little information on either the factors impacting Enbridge Gas's actual 2019 facility-related costs and emissions, or on Enbridge Gas's efforts to manage these costs. OEB staff noted that facility-related costs are forecast to increase in 2020 and future years as the federal carbon charge payable to the federal government under the FCPP increases, and submitted that Enbridge Gas should be directed to include supporting evidence of its actions to manage facility-related emissions and costs in future FCPP applications. Enbridge Gas replied that it intends to bring forward further details of its actions to manage facility-related emissions and costs in its 2021 FCPP application and that there is no need for the OEB to direct Enbridge Gas in this regard.

OEB staff also noted that Enbridge Gas has not yet remitted payment for the majority of its facility-related costs to the federal government. The bulk of Enbridge Gas's facility-related emissions are from its transmission and storage compressor stations. These emissions are covered under the Output-Based Pricing System (OBPS) of the FCPP. The FCPP provided several options for Enbridge Gas to meet its OBPS obligation, including paying the federal carbon charge on excess emissions, or making use of other options such as purchasing surplus or offset credits.

Enbridge Gas's OBPS payment is not due to the federal government until April 15, 2021, and there is the potential for the final amount to change (e.g., due to use of surplus credits or offset credits, or further adjustments due to the third-party verification of Enbridge Gas' 2019 OBPS report). Enbridge Gas noted that it did not expect to be able to use surplus credits or offset credits for its 2019 OBPS obligation, but that it would record any variance in its final 2019 OBPS obligation in the Facility Variance Accounts, and seek to dispose of this variance through a future FCPP application.

Findings

The OEB approves the disposition of the balance in the Facility Variance Accounts with interest projected to September 30, 2020, including the update by Enbridge Gas to the principal balance noted in its interrogatory responses and Argument-In-Chief. Enbridge

⁹ Exhibit I.Staff.9 (a)

Gas shall file revised rates to reflect the updated balance as part of the draft rate order (DRO). Interest on the balance is discussed later in this Decision.

If Enbridge Gas takes further actions to reduce the amounts to be remitted to the federal government related to its 2019 OBPS emissions, this amount shall be recorded in the Facility Variance Accounts at the time that the action is taken, for future disposition.

Enbridge Gas shall also record in the Facility Variance Accounts the interest on the amounts collected from customers prior to the time of payment made to the federal government, for future disposition.

OEB staff expressed concern about the level of detail provided by Enbridge Gas on factors affecting its facility-related costs. Enbridge Gas intends to bring forward more details in its application for 2021 FCPP charges. The OEB finds Enbridge Gas's proposal appropriate.

4.2.3 Administration Deferral Accounts

Enbridge Gas sought disposition of \$1.60 million in the Administration Deferral Accounts, from 2019 FCPP-related administration costs. Major cost elements were staffing costs (\$0.72 million) and information technology (IT) billing costs (\$0.52 million), including revenue requirement for previous IT capital expenditures on Cap-and-Trade related billing system functionality that Enbridge Gas re-purposed to collect FCPP-related charges.

No parties objected to the balances proposed for disposition in these accounts.

Enbridge Gas also included in its Application, for information purposes only, a forecast of 2020 administration costs. Enbridge Gas noted that ongoing COVID-19 related conditions may impact 2020 FCPP-related bad debt beyond Enbridge Gas's forecast, although it did not provide an estimate for what these incremental bad debt costs might be.¹⁰

On March 25, 2020, the OEB established a new sub-account for natural gas distributors to track incremental identifiable costs related to the COVID-19 emergency, which could include bad debt. The OEB is conducting a consultation to establish further detailed accounting guidance, including policy direction, regarding the use of these accounts.¹¹

¹⁰ Application and Evidence (updated), Exhibit C, Page 17 of 18

¹¹ EB-2020-0133 proceeding.

SEC submitted that incremental FCPP-related bad debt attributable to COVID-19 should be tracked in this new COVID-specific sub-account, not in the Administration Deferral Accounts. Enbridge Gas objected to SEC's proposal, noting that bad debt amounts resulting from the FCPP are incremental to bad debt amounts included in Enbridge Gas's base rates, and for this reason, FCPP-related bad debt amounts are recorded in FCPP-specific Administration Deferral Accounts.

Findings

The OEB approves the disposition of the balance in the Administration Deferral Accounts, with interest projected to September 30, 2020. Parties either made no submission or submitted that Enbridge Gas's administrative costs to date have been reasonable, and have built upon the work Enbridge Gas did to prepare for the previous Cap-and-Trade program.

The OEB finds it appropriate for Enbridge Gas to record bad debt expense for the FCPP related to the COVID-19 emergency in the COVID-specific sub-account so that all matters related to the COVID-19 emergency are recorded in the same account. Enbridge Gas can keep records to distinguish between the bad debts for FCPP and other bad debt amounts.

4.2.4 Interest Expense on Deferral and Variance Accounts

The 2019 FCPP DVA balances that Enbridge Gas requested for clearance included \$3.75 million of interest charges in the Customer Variance Accounts (due to the large balance in these accounts accumulated between April 1, 2019 and July 31, 2019).¹²

Enbridge Gas's methodology for calculating interest charges used the quarterly Prescribed Interest Rate for DVAs set by the OEB, including a prescribed interest rate of 1.38% for the third quarter of 2020. The Q3 2020 interest rate was set by the OEB in a [letter](#) of June 16, 2020. The OEB's approach to setting the 2020 Q3 DVA prescribed interest rate departed from the OEB's Approved Prescribed Interest Rates Methodology, due to the extreme volatility in reference interest rates in early 2020 caused by the COVID-19 emergency.

¹² This value was updated in Enbridge Gas's interrogatory responses (from a value of \$4.02 million in Enbridge Gas's FCPP application), to use the Q3 2020 interest rate (1.38%) set by the OEB after Enbridge Gas had filed its updated FCPP application. Enbridge Gas's application had used a forecast interest rate of 2.18% for Q3 2020 in its interest calculations, which was the Q2 2020 interest rate. Exhibit I.Staff.9.

LPMA and SEC submitted that the Q3 interest rate used to calculate interest on the balance in the Customer Variance Accounts (and the very minor interest balances in the other FCPP-related DVAs) should be set based on the OEB's longstanding methodology. Using this methodology would result in a rate of 0.57%, not 1.38%, and a reduction in total interest charges of approximately \$30,000.

In its [letter](#) of July 30, 2020 (filed after the submissions of the parties), the OEB indicated that, after considering comments filed by stakeholders, the 2020 Q3 DVA prescribed interest rate has been revised to 0.57%, based on the OEB's Approved Prescribed Interest Rates Methodology.

LPMA also submitted that ratepayers should not have to pay interest costs accumulated after April 1, 2020 (\$1.26 million), as the OEB could have approved disposition of DVA balances on an interim basis, effective April 1, 2020, to avoid continued accumulation of interest costs. Enbridge Gas noted that it did not accept LPMA's assertion that Enbridge Gas should be disallowed recovery of these reasonable and prudently incurred costs.

Findings

The OEB agrees that interest expense is a cost to Enbridge Gas and can be recorded on the balances in the FCPP deferral and variance accounts, at the interest rate prescribed by the OEB. The OEB is not persuaded that the approach to accruing interest on the FCPP deferral and variance accounts should be changed from the OEB's policy or standard practice.

Separate from this proceeding, the OEB considered comments on the approach to setting the prescribed interest rate for deferral and variance accounts for the 3rd quarter of 2020, and amended the interest rate to 0.57% based on the established mechanism. The OEB is adopting this prescribed interest rate for the FCPP deferral and variance accounts. Enbridge Gas shall revise the interest projected to September 30, 2020 on all deferral and variance accounts and file updated balances and rate riders as part of the DRO.

4.2.5 Allocation Methodology and Disposition Period for Deferral and Variance Accounts

Enbridge Gas proposed to allocate balances in the Customer Variance Accounts and Facility Variance Accounts to rate classes in proportion to the actual customer volumes in each rate class that were subject to the Federal Carbon Charge and Facility Carbon Charge, respectively, from April 1, 2019 to July 31, 2019.

Enbridge Gas proposed to allocate balances in the Administration Deferral Accounts to rate classes in proportion to the number of customers within each rate class for the EGD rate zone, and in proportion to each rate class's share of 2013 OEB-approved administrative and general expenses for the Union rate zones. Enbridge Gas noted that this allocation methodology was consistent with the OEB's previous decision on allocation of the administrative costs associated with the previous Cap-and-Trade program.¹³

Within each rate class, Enbridge Gas proposed to allocate costs for all FCPP DVA balances to individual customers based on each customer's actual consumption volume within the April 1 to July 31, 2019 period (except for general service customers in the Union rate zones, as discussed below). Enbridge Gas noted that customers' consumption over this period contributed to nearly 99% of 2019 FCPP-related deferral and variance account balances (considering the combined balances from all three sets of FCPP DVAs).¹⁴

No parties objected to Enbridge Gas's proposed allocation approach.

For general service customers in the Union rate zones, Enbridge Gas proposed that the FCPP DVA balances would be disposed of on a prospective basis (i.e., based on a customer's natural gas consumption during the disposition period). For all other customers (i.e., non-general service customers in the Union rate zones, and all customers in the EGD rate zone), Enbridge Gas proposed that the FCPP DVA balances would be disposed of based on their actual natural gas consumption between April 1, 2019 and July 31, 2019.

Enbridge Gas indicated that this difference in disposition approaches was necessary as it is limited to prospective recovery for the Union rate zones' general service customers (Rate M1, Rate M2, Rate 01 and Rate 10) due to billing system constraints.¹⁵ Enbridge Gas indicated that it will not be able to adopt a common disposition period and approach for all customers until mid-2021 at the earliest.¹⁶

OEB staff noted that the prospective disposition approach would lead to a degree of misalignment of costs for general service customers in Union rate zones within each rate class, due to different consumption patterns between the times of year when the FCPP costs were incurred and when they would be recovered. However, OEB staff

¹³ Application and Evidence, Exhibit D, p. 10 of 15. The OEB decision referenced is in proceeding EB-2018-0331

¹⁴ Arg. In Chief, par. 23.

¹⁵ Application and Evidence (updated), Exhibit D, Page 11 of 15

¹⁶ Exhibit I.Staff.13 (d)

acknowledged that it did not see a preferable alternative, due to the billing system constraints identified by Enbridge Gas.

Disposition Period and Bill Smoothing

In its Interim Decision and Order, the OEB required Enbridge Gas to propose options for the approach to disposition of the balances in FCPP DVAs that would smooth bill impacts. Enbridge Gas calculated the total bill impact of the proposed 2019 FCPP DVA disposition to be an annual increase of \$21.85 for a typical residential customer in the EGD rate zone with an annual consumption of 2,400 m³, and annual increases of \$16.01 and \$16.58 for typical residential customers with annual consumption of 2,200 m³ in the Union South and Union North rate zones, respectively.¹⁷ The monthly bill impact will depend on the disposition period.

In its updated Application and Evidence, Enbridge Gas considered one-month, three-month, and six-month disposition periods.

Enbridge Gas proposed disposition over a six-month basis (beginning October 1, 2020) for general service customers in the Union rate zones, noting that a six-month disposition period is consistent with past practice for disposition of DVA balances for these customers.

Enbridge Gas proposed a one-time adjustment based on actual consumption between April 1, 2019 to July 31, 2019, disposed of in three monthly installments (beginning October 1, 2020), for all other customers. Enbridge Gas noted that a one-time billing adjustment (in one monthly installment) is consistent with past practice for disposition of DVA balances for these customers. However, due to the large balance in the FCPP DVAs, Enbridge Gas proposed a three-month disposition period to smooth bill impacts.

Enbridge Gas noted that a six-month disposition period is not proposed for customers in the EGD rate zone in particular, because it would limit the ability to dispose of other deferral and variance account balances for the EGD rate zone during any part of the six-month period, due to billing system constraints.¹⁸ Enbridge Gas submitted that a three-month disposition period (from October 1, 2020 to December 31, 2020) would enable other account dispositions to begin the following quarter, such as other 2019 DVA balances and the 2019 earnings sharing and the 2017 and 2018 Demand Side Management DVA balances.

¹⁷ Application and Evidence (updated), Exhibit A, Page 15 of 15

¹⁸ Application and Evidence (updated), Exhibit D, Page 13 of 15

Energy Probe submitted that it would prefer similar disposition periods for EGD and Union rate zones, but accepted the proposed different disposition periods at this time.

Both LPMA and OEB staff submitted that there should be greater alignment of the disposition period across rate zones, and made different proposals to this effect.

LPMA submitted that a three-month disposition period beginning October 1, 2020 should be used for all Enbridge Gas customers, as the proposed six-month disposition period for general service customers in the Union rate zones could correspond with additional costs (such as disposition of other DVA balances, and an increase in gas commodity costs) that would impact customers at the time of year when natural gas consumption is at its highest (January to March 2021).

OEB staff submitted that, based only on the bill impact of the FCPP DVAs, a six-month disposition period would best achieve the OEB's goal of smoothing bill impacts. However, OEB staff accepted that a six-month disposition period in the EGD rate zone would impact Enbridge Gas's ability to dispose of balances in other DVAs in the following quarter. Therefore, OEB staff recommended a six-month disposition period for all customers in the Union rate zones and a three-month period for customers in the EGD rate zone.

OEB staff further submitted that the evidentiary record in this proceeding did not enable a full comparison of the combined bill impact of a three-month versus six-month disposition period, taking other factors impacting the bill into account (e.g. changes in commodity cost, seasonal differences in customer natural gas use). For this reason, OEB staff submitted that a final decision on the appropriate disposition period of the FCPP DVA balances should be made as part of the OEB's review of Enbridge Gas's next QRAM application, when the combined bill impact of all rate adjustments being implemented could be considered.

In its reply submission, Enbridge Gas indicated that it would be able to facilitate disposition over a three-month period for all customers (LPMA's proposal), and had no concerns with proceeding in this manner if that was the OEB's preference. Enbridge Gas noted that it could facilitate disposition over a six-month period for all customers in the Union rate zones (OEB staff's proposal), but that it believed this would provide limited incremental benefit and place additional administrative burden on Enbridge Gas. Enbridge Gas also expressed a preference for the OEB to make a final decision on the disposition period within this proceeding, not in a future QRAM proceeding.¹⁹

¹⁹ Enbridge Gas reply argument, par. 14-19

Findings

The OEB accepts Enbridge Gas's proposal for the allocation of balances from the FCPP deferral and variance accounts. No parties took exception to the approach and it is consistent with the past practice for the EGD and Union rate zones.

The OEB approves the disposition of account balances in three monthly installments beginning October 1, 2020, as proposed by Enbridge Gas, except that the OEB concludes this approach should be used for all Enbridge Gas customers, including the general service customer classes in the Union rate zones. The OEB is persuaded by the argument brought forward by LPMA that it is appropriate to conclude the clearing of balances before the high consumption quarter that starts in January 2021.

A consistent approach to disposition of balances for each rate zone is preferable, and Enbridge Gas should provide a proposal for aligning its approach for the EGD and Union rate zones as soon as practical, and no later than its next rebasing rate application.

4.3 Deferred Issues

Anwaatin and the Chiefs of Ontario raised for consideration in this proceeding as to whether the FCPP charges are constitutionally applicable in light of the *Indian Act*, relevant treaties, and section 35 of the *Constitution Act, 1982*. In its intervention request, the Chiefs of Ontario argued that provisions in the *Indian Act* provide legislative recognition of First Nation immunity from taxes or charges on any property situated on a reserve.

The OEB determined that it would defer consideration of the Deferred Issues until the SCC rendered its decision on appeals before the SCC concerning the constitutionality of the GGPPA.²⁰ The hearing of these appeals was originally scheduled for the spring of 2020, but, due to the COVID-19 emergency, was subsequently delayed to September 2020.²¹ It is not known at this time when a final SCC decision will be issued.

OEB staff submitted that, of the approvals requested by Enbridge Gas in this proceeding, only the finalization of the Federal Carbon Charge and the disposition of the 2019 balance in the Customer Variance Accounts required consideration of the Deferred Issues, as the FCPP facility-related and administrative costs are operational

²⁰ Decision on Updated Intervention Requests and Scope of Proceeding, March 19, 2020

²¹ Supreme Court of Canada, "[Docket 38781: Attorney General of Ontario v. Attorney General of Canada](#)"

costs recovered from all Enbridge Gas customers, including those customers who are exempt from paying the Federal Carbon Charge.

OEB staff proposed two options to allow for the Deferred Issues to be considered at a future date:

1. Set final rates for the 2020 Federal Carbon Charge and Facility Carbon Charge and provide for the disposition of balances in the 2019 FCPP-related DVAs on a final basis, but require Enbridge Gas to record the FCPP-related revenues that could potentially be impacted by consideration of the Deferred Issues in the variance account.
2. Postpone the approval of the 2020 Federal Carbon Charge and the disposition of the 2019 balance in the Customer Variance Accounts on a final basis until the deferred issues have been considered.

OEB staff indicated a preference for the first option. OEB staff submitted that the revenues that should be tracked in the variance account are the Federal Carbon Charge revenues, and any revenues from the disposition of the 2019 balance in the Customer Variance Accounts, that are collected from on-reserve customers (approximately 3,500 customers in 21 communities). Should the OEB eventually determine that these customers should not have been required to pay the Federal Carbon Charge, Enbridge Gas would then be in a position to refund these payments.

Anwaatin submitted that the OEB's actions to date have predetermined that FCPP charges will apply to the Anwaatin communities without hearing from Anwaatin, and denied its members their legislative, constitutional, and common law right to be heard contrary to each and all of: sections 2, 19, 20, and 36 of the OEB Act; sections 87 and 89 of the *Indian Act*, section 35 of the *Constitution Act, 1982* and various common law decisions. Anwaatin also argued that the OEB had refused to hear its issues on energy poverty in indigenous communities and the differential impact of natural gas rates on remote and near remote communities.

Anwaatin further stated that it expected that the SCC proceeding would deal only with the constitutional *validity* of the GGPPA, and would not address the issues raised by Anwaatin as to whether FCPP charges are constitutionally *applicable* in light of the *Indian Act*, relevant treaties, and section 35 of the *Constitution Act, 1982*. To support this position, Anwaatin attached to its submission several documents from the SCC proceeding: a letter from the Attorney General of Canada (filed in response to an intervention request from Thunderchild First Nation in that proceeding) stating that arguments regarding the tax exemption of the fuel charge under the GGPPA for Indians

and Indian bands should not be permitted; and the SCC's decision on the intervention request, which granted leave to intervene, but stated that "the intervener is not entitled to raise new issues".²²

In response to OEB staff's submission, Enbridge Gas stated that, should the OEB find it necessary to make a provision to enable the possible exemption of on-reserve customers from Federal Carbon Charges, then it agreed with OEB staff's first option with a modification. With this modified option, the OEB should finalize rates and direct Enbridge Gas to track 2019 and 2020 Federal Carbon Charge revenues, not to record these revenues in a variance account, as it would not be consistent with the purpose of the existing FCPP variance accounts to "record" revenues already collected from on-reserve customers and remitted to the Canadian Revenue Agency.²³

Enbridge Gas submitted that it did not support the second option, but that if the OEB determined that it would postpone its final determination on 2020 Federal Carbon Charges and clearance of 2019 balances in the Customer Variance Accounts, that the OEB should clarify that this postponement only applies to on-reserve customers.

Findings

The OEB approves the Federal Carbon Charge and the disposition of the 2019 balances in the Customer Variance Accounts on a final basis for all customers except First Nations on-reserve customers.

The Federal Carbon Charge for First Nations on-reserve customers will remain interim until the OEB's determination on the Deferred Issues. In addition, the rate riders for disposition of the 2019 balances in the Customer Variance Accounts are approved on an interim basis for First Nations on-reserve customers, until the OEB's determination of the Deferred Issues.

The OEB is also establishing a new tracking account for each rate zone, as proposed by Enbridge Gas, to record the Federal Carbon Charges (including disposition of the balances in the Customer Variance Accounts) for First Nations on-reserve customers until the final determination of the Deferred Issues.

The OEB notes the submissions of Anwaatin concerning its allegation that the OEB has denied Anwaatin its right to be heard on the issue of the application of sections 87 and 89 of the *Indian Act* and section 35 of the *Constitution Act, 1982* to the charges imposed

²² Anwaatin final submission, Exhibit A and B (updated July 29, 2020).

²³ EGI Reply Argument, par. 26-31

by the GGPPA. The OEB's consideration of this issue has been deferred pending a determination of the SCC as to the challenge to the constitutionality of the GGPPA.

The OEB notes that, consistent with previous intervention requests, the SCC has determined that Thunderchild First Nation "is not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties". However, the OEB remains of the view that there may be relevant factors for the OEB to consider in its determination of the challenge raised by Anwaatin and the Chiefs of Ontario that arise as an outcome of the SCC's consideration of the constitutional validity of the GGPPA. While the decision of the SCC may not be determinative of the issue raised by Anwaatin and the Chiefs of Ontario, it may provide guidance to the OEB in its own consideration of the positions advanced by these parties concerning the applicability of the GGPPA to First Nations on-reserve customers.

The OEB has not dispensed with its consideration of the Deferred Issues, nor has the OEB denied a right to be heard to the relevant parties. By setting the relevant FCPP charges on an interim basis effective April 1, 2020, the OEB has ensured that the matters raised by Anwaatin can be heard at a future time, and the FCPP charges being determined in this proceeding can be amended for First Nations on-reserve customers if warranted.

Anwaatin has also asserted that the OEB decision to exclude from consideration the issues of energy poverty affecting indigenous communities and the differential impact on remote and near remote communities is a denial of its right in law to be heard. The OEB does not agree.

The issues of energy poverty in indigenous and remote communities as well as accessibility to affordable energy by all Ontario consumers are issues of significant importance to the OEB. While there are programs to assist vulnerable customers, the OEB does not assert that the problems associated with energy poverty in indigenous communities and the access to affordable energy by rural and remote customers have been resolved by these existing measures. However, not every OEB proceeding for the determination of rates and charges for customers of natural gas distribution utilities presents an occasion for the comprehensive examination that these issues would require. In accordance with the *OEB Rules of Practice and Procedure*, the OEB has determined that this is not an appropriate proceeding for these issues to be considered, particularly given the largely mechanistic approach used to pass costs of the FCPP through to customers.

The Facility Carbon Charge, the disposition of the 2019 balances in the Facility Variance Accounts and the disposition of the 2019 balances in the Administration

Deferral Accounts are approved on a final basis for all Enbridge Gas customers. The OEB agrees with the submission by OEB staff that the Facility Carbon Charge, the disposition of the 2019 balances in the Facility Variance Accounts, and recovery of the 2019 FCPP administration costs should not be impacted by consideration of the Deferred Issues. The OEB concludes that the costs Enbridge Gas incurs for its own emissions, and for managing the FCPP program, are costs of doing business as a natural gas distributor to be borne by all customers, even those that are potentially exempt from the Federal Carbon Charge.

4.4 Future Federal Carbon Pricing Program Applications

Under the GGPPA, changes to the carbon charge that Enbridge Gas must remit to the federal government for customer and facility emissions come into effect on April 1 of each year, with future increases scheduled in 2021 and 2022.²⁴ Enbridge Gas's preference is for updates to the Federal Carbon Charge and Facility Carbon Charge for its customers to also be made effective on April 1 of each year to match the timing of changes to the federal carbon charge under the GGPPA, and to avoid the accumulation of unbilled and uncollected amounts from customers.

In this proceeding, Enbridge Gas filed its original application on November 18, 2019, requesting updates to the Federal Carbon Charge and Facility Carbon Charge, effective April 1, 2020, and clearance of the 2019 balances in its FCPP DVAs based on nine months of actual 2019 costs and three months of forecast 2019 costs. In its Interim Decision and Order of February 11, 2020, the OEB approved interim rates for the Federal Carbon Charge and Facility Carbon Charge effective April 1, 2020, but directed Enbridge Gas to file updated evidence on the FCPP DVA balances, based on actual costs incurred and recorded up to December 31, 2019. Enbridge Gas filed an updated Application on May 14, 2020 that included actual year-end balances in the FCPP DVAs.

Enbridge Gas submitted that in future years, it would be in a position to file an FCPP application by the end of September each year.²⁵ Enbridge Gas proposed to introduce a one-year lag in the clearance of FCPP DVAs. The 2021 FCPP application (to be filed in September 2020) would request any April 1, 2021 Federal Carbon Charge or Facility Carbon Charge rate changes, and would not request clearance of any FCPP DVA balances. The 2022 FCPP application (to be filed in September 2021) would request any April 1, 2022 rate changes, and request clearance of the year-end 2020 FCPP DVA balances.

²⁴ Application and Evidence (updated), Exhibit A, Page 5-6 of 15

²⁵ Exhibit I.Staff.1

OEB staff supported this approach, noting that a September filing should provide adequate time for Federal Carbon Charge and Facility Carbon Charge rate changes to be brought into effect on a final basis by April 1 of the following year (avoiding the need for interim rates), and would also enable the OEB to consider the disposition of DVA balances based on audited year-end balances and third-party verification of Enbridge Gas's facility-related emissions. OEB staff noted that the balances in FCPP DVAs in future years are likely to be small, reducing the urgency to dispose of these balances promptly.

Findings

The OEB agrees with Enbridge Gas's proposed approach for seeking rate changes related to the FCPP program for 2021. The OEB concludes that Enbridge Gas's approach of delaying the clearance of FCPP deferral and variance accounts by one year will improve regulatory efficiency.

5 NEXT STEPS

Enbridge Gas shall file a draft rate order with updated rates reflecting this Decision and Order.

This draft rate order should include updated calculations detailing the balances proposed for disposition in the 2019 FCPP deferral and variance accounts, the clearance unit rates, and the bill impacts, for each of the EGD and Union rate zones, similar to that filed in Exhibit D, Tab 1, Schedules 3-5 and Exhibit D, Tab 2, Schedules 4-6, of Enbridge Gas's Application and Evidence.

The OEB does not expect that the changes resulting from this Decision and Order will materially change the estimated total bill impacts for the disposition of the deferral and variance accounts, as presented in Enbridge Gas's Application and Evidence (an increase of \$21.85 for a typical residential customer in the EGD rate zone with annual consumption of 2,400 m³, and increases of \$16.01 and \$16.58 for typical residential customers with annual consumption of 2,200 m³ in the Union South and Union North rate zones, respectively). There will be no change in bill impacts related to the Federal Carbon Charges and Facility Carbon Charges because rates were approved and implemented on an interim basis effective April 1, 2020, at the rates now approved on a final basis.

The OEB has established a schedule such that, absent unforeseen circumstances, Enbridge Gas will be able to incorporate the outcomes of this Decision and Order as part of its October 1, 2020 QRAM application. The review of the draft rate order is largely mechanistic, and therefore the OEB will not grant cost awards for subsequent procedural steps.

The OEB has also scheduled a process for consideration of intervenor costs to this point in the proceeding.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas Inc.'s proposed unit rates for the Federal Carbon Charge and Facility Carbon Charge, as set out in Exhibit D, Tab 1, Schedule 1, and Exhibit D, Tab 2, Schedule 1 of its Application, and previously approved on an interim basis, are approved on a final basis, effective April 1, 2020, for all customers except First Nations on-reserve customers, for whom the Federal Carbon Charge rates remain interim.
2. Enbridge Gas Inc. shall update its 2019 Federal Carbon Pricing Program deferral and variance account balances, to reflect this Decision and Order. Subject to these changes, Enbridge Gas Inc.'s 2019 Federal Carbon Pricing Program deferral and variance account balances and its allocation of the 2019 Federal Carbon Pricing Program deferral and variance account balances by rate class are approved.
3. The amounts in the 2019 FCPP deferral and variance account balances allocated to general service Rate M1, Rate M2, Rate 01, and Rate 10 customers in the Union rate zones shall be recovered over a three-month period, in Enbridge Gas Inc.'s October 1, 2020 QRAM application. Disposition unit rates for the Federal Carbon Charge – Customer Variance Account shall apply on an interim basis for First Nations on-reserve customers.
4. The amounts in the 2019 FCPP deferral and variance account balances allocated to customers in the EGD rate zone and to all other customers in the Union rate zones shall be recovered in three equal monthly installments, in Enbridge Gas Inc.'s October 1, 2020 QRAM application. Disposition unit rates for the Federal Carbon Charge – Customer Variance Account shall apply on an interim basis for First Nations on-reserve customers.
5. Enbridge Gas Inc. shall file a draft rate order consistent with this Decision and Order for each of the EGD rate zone and Union rate zones by August 20, 2020.
6. OEB staff and intervenors may file any comments on the draft rate order by no later than August 27, 2020. No cost awards will be granted for this procedural step.
7. Intervenors shall file with the OEB, and forward to Enbridge Gas Inc., their respective cost claims by August 27, 2020.

8. Enbridge Gas Inc. shall file with the OEB, and forward to intervenors, any objections to the claimed costs by September 3, 2020.
9. Intervenors shall file with the OEB, and forward to Enbridge Gas Inc., any responses to any objections for cost claims by September 10, 2020.
10. Enbridge Gas Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto August 13, 2020

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary

APPENDIX B



SUPREME COURT OF CANADA

CITATION: References re
*Greenhouse Gas Pollution Pricing
Act*, 2021 SCC 11

APPEALS HEARD: September 22, 23,
2020

JUDGMENT RENDERED: March 25,
2021

DOCKETS: 38663, 38781, 39116

BETWEEN:

Attorney General of Saskatchewan
Appellant

and

Attorney General of Canada
Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Attorney General of
New Brunswick, Attorney General of Manitoba, Attorney General of British
Columbia, Attorney General of Alberta, Progress Alberta Communications
Limited, Canadian Labour Congress, Saskatchewan Power Corporation,
SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of
First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission,
Canadian Environmental Law Association, Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul, Amnesty International Canada,
National Association of Women and the Law, Friends of the Earth, International
Emissions Trading Association, David Suzuki Foundation, Athabasca
Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health
Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan
Coalition for Sustainable Development, Saskatchewan Council for International
Cooperation, Saskatchewan Environmental Society, SasKEV, Council of
Canadians: Prairie and Northwest Territories Region, Council of Canadians:
Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick**

Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation

Intervenors

AND BETWEEN:

Attorney General of Ontario

Appellant

and

Attorney General of Canada

Respondent

- and -

Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Progress Alberta Communications Limited, Anishinabek Nation, United Chiefs and Councils of Mniidoo Mnising, Canadian Labour Congress, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, National Association of Women and the Law, Friends of the Earth, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Centre québécois du droit de l'environnement, Équiterre, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab, Assembly of Manitoba Chiefs, City of Richmond, City of Victoria, City of Nelson, District of Squamish, City of Rossland, City of Vancouver and Thunderchild First Nation

Intervenors

AND 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, Progress Alberta Communications Limited, Saskatchewan Power Corporation, SaskEnergy Incorporated, Oceans North Conservation Society, Assembly of First Nations, Canadian Taxpayers Federation, Canada's Ecofiscal Commission, Canadian Environmental Law Association, Environmental Defence Canada Inc., Sisters of Providence of St. Vincent de Paul, Amnesty International Canada, International Emissions Trading Association, David Suzuki Foundation, Athabasca Chipewyan First Nation, Smart Prosperity Institute, Canadian Public Health Association, Climate Justice Saskatoon, National Farmers Union, Saskatchewan Coalition for Sustainable Development, Saskatchewan Council for International Cooperation, Saskatchewan Environmental Society, SaskEV, Council of Canadians: Prairie and Northwest Territories Region, Council of Canadians: Regina Chapter, Council of Canadians: Saskatoon Chapter, New Brunswick Anti-Shale Gas Alliance, Youth of the Earth, Generation Squeeze, Public Health Association of British Columbia, Saskatchewan Public Health Association, Canadian Association of Physicians for the Environment, Canadian Coalition for the Rights of the Child, Youth Climate Lab and Thunderchild First Nation
Intervenors

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 221)

Wagner C.J. (Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. concurring)

REASONS DISSENTING IN PART:
(paras. 222 to 295)

Côté J.

DISSENTING REASONS: Brown J.
(paras. 296 to 456)

DISSENTING REASONS: Rowe J.
(paras. 457 to 616)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

RE: *GREENHOUSE GAS POLLUTION PRICING ACT*

IN THE MATTER OF References to the Court of Appeal for Saskatchewan, the Court of Appeal for Ontario and the Court of Appeal of Alberta respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186

Attorney General of Saskatchewan

Appellant

v.

Attorney General of Canada

Respondent

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Alberta,
Progress Alberta Communications Limited,
Canadian Labour Congress,
Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
Canadian Taxpayers Federation,
Canada's Ecofiscal Commission,
Canadian Environmental Law Association,
Environmental Defence Canada Inc.,
Sisters of Providence of St. Vincent de Paul,
Amnesty International Canada,
National Association of Women and the Law,
Friends of the Earth,
International Emissions Trading Association,**

**David Suzuki Foundation,
Athabasca Chipewyan First Nation,
Smart Prosperity Institute,
Canadian Public Health Association,
Climate Justice Saskatoon,
National Farmers Union,
Saskatchewan Coalition for Sustainable Development,
Saskatchewan Council for International Cooperation,
Saskatchewan Environmental Society,
SaskEV,
Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
New Brunswick Anti-Shale Gas Alliance,
Youth of the Earth,
Centre québécois du droit de l'environnement,
Équiterre,
Generation Squeeze,
Public Health Association of British Columbia,
Saskatchewan Public Health Association,
Canadian Association of Physicians for the Environment,
Canadian Coalition for the Rights of the Child,
Youth Climate Lab,
Assembly of Manitoba Chiefs,
City of Richmond,
City of Victoria,
City of Nelson,
District of Squamish,
City of Rossland,
City of Vancouver and
Thunderchild First Nation**

Intervenors

- and -

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Appellant

v.

Attorney General of Canada

Respondent

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Attorney General of Manitoba,
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United Chiefs and Councils of Mnidoo Mnising,
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Saskatchewan Power Corporation,
SaskEnergy Incorporated,
Oceans North Conservation Society,
Assembly of First Nations,
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Council of Canadians: Prairie and Northwest Territories Region,
Council of Canadians: Regina Chapter,
Council of Canadians: Saskatoon Chapter,
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Centre québécois du droit de l'environnement,
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Generation Squeeze,
Public Health Association of British Columbia,**

**Saskatchewan Public Health Association,
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Interveners

Indexed as: References re *Greenhouse Gas Pollution Pricing Act*

2021 SCC 11

File Nos.: 38663, 38781, 39116.

2020: September 22, 23; 2021: March 25.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Constitutional law — Division of powers — Greenhouse gas emissions — Federal legislation setting minimum national standards of greenhouse gas pricing — Whether greenhouse gas pricing is matter of national concern falling within Parliament’s power to legislate in respect of peace, order and good government of Canada — Constitution Act, 1867, s. 91 “preamble” — Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186.

In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (“GGPPA”). The GGPPA comprises four parts and four schedules. Part 1 establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial greenhouse gas (“GHG”) emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the GGPPA and have it tabled in Parliament.

Saskatchewan, Ontario and Alberta challenged the constitutionality of the first two parts and the four schedules of the GGPPA by references to their respective

courts of appeal, asking whether the *GGPPA* is unconstitutional in whole or in part. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. The Attorney General of British Columbia, who had intervened in the Court of Appeal of Alberta, the Attorney General of Saskatchewan and the Attorney General of Ontario now appeal as of right to the Court.

Held (Côté J. dissenting in part and Brown and Rowe JJ. dissenting): The appeals by the Attorney General of Saskatchewan and the Attorney General of Ontario should be dismissed, and the appeal by the Attorney General of British Columbia should be allowed. The reference questions are answered in the negative.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ.: The *GGPPA* is constitutional. It sets minimum national standards of GHG price stringency to reduce GHG emissions. Parliament has jurisdiction to enact this law as a matter of national concern under the peace, order, and good government (“POGG”) clause of s. 91 of the *Constitution Act, 1867*.

Federalism is a foundational principle of the Canadian Constitution. Its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local and regional level and foster cooperation between Parliament and the provincial legislatures for the common good. Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures. Under the

division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity. Federalism recognizes that within their spheres of jurisdiction, provinces have autonomy to develop their societies. Federal power cannot be used in a manner that effectively eviscerates provincial power.

Courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, the Court has favoured a flexible view of federalism, best described as a modern cooperative federalism, that accommodates and encourages intergovernmental cooperative efforts. However, the Court has also always maintained that flexibility and cooperation, while important, cannot override or modify federalism and the constitutional division of powers.

The review of legislation on federalism grounds consists of the well-established two-stage analytical approach. At the first stage, a court must consider the purpose and effects of the challenged statute or provision with a view to characterizing the subject matter or "pith and substance". A court must then classify the subject matter with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid.

At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its “pith and substance” or its main thrust or dominant or most important characteristic. In determining the purpose of the challenged statute or provision, a court can consider both intrinsic evidence, such as the legislation’s preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees. In considering the effects of the challenged legislation, a court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the side effects that flow from the application of the statute. Where a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute’s enactment as well as at the words used in it.

Three points with respect to the identification of the pith and substance are important to clarify. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government’s sphere of jurisdiction. However, precision should not be confused with narrowness. A court must focus on the law itself and what it is really

about. The pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow. Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In some cases, the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance. Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. The pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence.

At the second stage of the division of power analysis, a court must classify the matter by reference to the heads of power set out in the Constitution. Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. Section 91 does not provide in the context of the POGG power that Parliament can make laws in relation to classes of subjects; instead, it states that Parliament can make laws for the peace, order, and good government of Canada in relation to "Matters". National concern is a well-established but rarely applied doctrine of Canadian constitutional law derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament to make laws for the peace, order, and good government of Canada, in

relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. A matter that falls under the POGG power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92.

Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The effect of finding that a matter is one of national concern is permanent and confers exclusive jurisdiction over that matter on Parliament. However, the scope of the federal power is defined by the nature of the national concern itself and only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power.

A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power. The doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine. Such an approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power. It is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction. However, the fact that the double aspect doctrine can apply does not mean that it will apply in a given case. It may apply if a fact situation can be regulated from different federal and provincial perspectives and each level of

government has a compelling interest in enacting legal rules in relation to that situation. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy.

The double aspect doctrine takes on particular significance where Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation but the federal law is paramount. In such a case, even if the national concern test would otherwise be met, a cautious approach to the double aspect doctrine should act as an additional check. The court must be satisfied that Canada in fact has a compelling interest in enacting legal rules over the federal aspect of the activity at issue and that the multiplicity of aspects is real and not merely nominal.

Turning to the national concern test, there are two points worth noting about the framework as a whole. First, the recognition of a matter of national concern must be based on evidence. An onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction. Second, there is no requirement that a matter be historically new in order to be found to be one of national concern. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. The term “new”, as used in the

jurisprudence, refers to matters that could satisfy the national concern test and includes both “new” matters that did not exist in 1867 and matters that are “new” in the sense that the understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character. Thus, the critical element of the analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new.

Finding that a matter is one of national concern involves a three-step analysis. First, as a threshold question, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. Second, the matter must have a singleness, distinctiveness and indivisibility. Third, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the division of powers. The purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces.

The analysis begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine. This invites a common-sense inquiry into the national importance of the proposed matter. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is important; it operates to limit the application of the national concern doctrine and provides essential context for the analysis that follows.

The second step of the analysis requires that a matter have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. Two principles underpin this requirement: first, to prevent federal overreach, jurisdiction should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

Under the first principle of the singleness, distinctiveness and indivisibility analysis, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction. International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. However, the existence of treaty obligations is not determinative of federal jurisdiction as there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers. Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters. The federal legislative role must be distinct from and not duplicative of that of the

provinces. Federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

The second principle underpinning the singleness, distinctiveness, and indivisibility analysis is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. In order for provincial inability to be established both of these factors are required: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. And there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. The requirement for grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine and can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient. Evaluating extraprovincial harm helps to determine whether a national law

is not merely desirable, but essential, in the sense that the problem is beyond the power of the provinces to deal with it. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

At the third and final step of the national concern analysis, Canada must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. The purpose of the scale of impact analysis is to protect against unjustified intrusions on provincial autonomy and prevent federal overreach. At this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

In this case, the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Both the short and long titles of the *GGPPA* confirm that its true subject matter is not just to mitigate climate change, but to do so through the pan-Canadian application of pricing mechanisms to a broad set of GHG emission sources. Likewise, it is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. In Parliament's eyes, the relevant mischief is the effects of the failure of some provinces

to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards of GHG pricing that apply across Canada, setting a GHG pricing floor across the country.

Similarly, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. This is supported by evidence of the legislative debates. Both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

The legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature. In jurisdictions where Parts 1 and 2 of the *GGPPA* apply, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Part 1 of the *GGPPA* directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. The *GGPPA* does not require those to whom it applies to perform or refrain from

performing specified GHG emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all it does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. The *GGPPA* leaves individual consumers and businesses free to choose how they will respond, or not, to the price signals sent by the marketplace. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally.

Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed GHG pricing scheme — apply only if the Governor in Council has listed a province or territory. The *GGPPA* provides that the Governor in Council may make listing decisions for Parts 1 and 2 of the statute only 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, taking into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions. As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature gives legal effect to the federal government's commitment to give the provinces and territories the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances, as well as to recognize carbon pricing policies already implemented or in development by provinces and territories.

Although evidence of practical effects is not helpful in this case given the dearth of such evidence, the evidence of practical effects to date is consistent with providing flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for provinces and territories not to implement a GHG pricing mechanism or one that is not sufficiently stringent.

Applying the threshold question, Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. There is also a broad consensus among expert international bodies that carbon pricing is a critical measure for the reduction of GHG emissions. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it passes the threshold test and warrants consideration as a possible matter of national concern.

Minimum national standards of GHG price stringency, which are implemented by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. GHGs are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global

warming potential of the gases. GHG emissions are also predominantly extraprovincial and international in their character and implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. Moreover, the regulatory mechanism of GHG pricing is also specific and limited. GHG pricing operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. It is a distinct form of regulation that does not amount to the regulation of GHG emissions generally or encompass regulatory mechanisms that do not involve pricing. The Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing.

Provincial inability is established in this case. First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. While the provinces could choose to cooperatively establish a uniform carbon pricing scheme, doing so would not assure a sustained approach because the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal

standard — a national GHG pricing floor — that applies in all provinces and territories at all times. Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage. Third, a province's failure to act or refusal to cooperate would have grave consequences for extraprovincial interests. It is well established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, coastal regions and on Indigenous peoples.

Although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of life that would fall under provincial heads of power is qualified and limited. First, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory mechanism. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. Second, the matter's impact on areas of life that would generally fall under provincial heads of power is also limited. The discretion of the Governor in Council is necessary in order

to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions in Canada. The impact on those interests justify the limited constitutional impact on provincial jurisdiction.

As a final matter, the fuel and excess emission charges imposed by the *GGPPA* have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges. To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme; if such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself. Influencing behaviour is a valid purpose for a regulatory charge and regulatory charges need not reflect the cost of the scheme. The amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, the required nexus with the scheme will exist where the

charges themselves have a regulatory purpose. There is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. They cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour.

Per Côté J. (dissenting in part): There is agreement with the majority with respect to the formulation of the national concern test. There is also agreement that Parliament has the power to enact constitutionally valid legislation establishing minimum national standards of price stringency to reduce GHG emissions. However, the *GGPPA* is, in its current form, unconstitutional. It cannot be said to accord with the matter of national concern formulated by the majority because the breadth of the discretion that it confers on the Governor in Council results in no meaningful limits on the power of the executive. Minimum standards are set by the executive, not the *GGPPA*. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law and the separation of powers. Clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional.

The *GGPPA*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing scheme. The critical feature of the fuel levy established in Part 1, that being what fuels are covered under the *GGPPA*, is so open-ended, allowing any substance, if prescribed

by the Governor in Council, to fall within the ambit of the fuel charge regime. The operative provisions of Part 1 similarly prescribe vast law-making power to the executive such that the very nature of the regime can be altered. The full breadth of executive powers can be seen most notably within ss. 166 and 168. The only limit whatsoever on the expansive regulation-making powers set out in s. 166 is that, in amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs (s. 166(3)). No such factor applies to the Governor in Council's regulation-making powers under Part 1's provisions, thus, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *GGPPA*. Sections 168(2) and (3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1. Most notably, s. 168(4) states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, the regulation prevails to the extent of the conflict. This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation.

Further, it is clear from a review of Part 2's provisions that the broad powers accorded to the executive permit the Governor in Council to regulate GHG emissions broadly or regulate specific industries in other ways than by setting GHG

emissions limits and pricing excess emissions across the country, despite the majority's assertion to the contrary. The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2): when amending Part 2 of Schedule 1 to modify the list of provinces where the output-based pricing system applies, the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHGs. Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions. There is agreement with *Brown and Rowe JJ.* that Part 2's skeletal framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

Therefore, minimum standards are set by the executive, not the *GGPPA*. Accordingly, the *GGPPA* cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. Rather than establishing minimum national standards, Part 2 empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. The fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. The *GGPPA*, as it is currently written, employs a discretionary scheme that knows no bounds. While it is agreed that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *GGPPA* does not reflect this crucial restriction.

Moreover, certain parts of the *GGPPA* are so inconsistent with our system of democracy that they are independently unconstitutional. Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *GGPPA*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns.

Sections 17 and 91 of the *Constitution Act, 1867*, both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means that every exercise of the federal legislative power must have the consent of all three elements of Parliament. The fundamental principles of the Constitution support this reading of ss. 17 and 19.

First, although Parliamentary sovereignty could appear to support Parliament's ability to delegate whatever they want to whomever they wish, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is that Parliament has the ability to create any law. The negative aspect, however, is that no institution is competent to override the requirements of an Act of Parliament. Henry VIII clauses, as found in the *GGPPA*, run afoul of the negative aspect of parliamentary sovereignty, as they give the executive the authority to override the requirements of primary legislation and create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. Henry VIII clauses are also incompatible with the conception

of parliamentary sovereignty that demands an impartial, independent and authoritative body to interpret Parliament's acts, as they limit the availability of judicial review by providing no meaningful limits against which a court could review.

Second, the rule of law, which provides a shield for individuals from arbitrary state action, requires that all legislation be enacted in the manner and form prescribed by law. This includes the requirements that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law. There are other additional rule of law concerns with the delegation of legislative power to the executive: 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, which gives rise to confusion and uncertainty; Henry VIII clauses endow the executive with authority to act arbitrarily by permitting it to act contrary to the empowering statute, creating an authority without meaningful limits enforceable through judicial review and thus an absolute discretion; and given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly.

Lastly, the Constitution insists on a separation of powers according to the separation of function among the three branches of government — the legislature, the executive and the judiciary. The executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite

the important role played by the executive in the legislative process. The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers: the legislature is the institution best suited to set policy down into legislation, and limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

Per Brown J. (dissenting): The Greenhouse Gas Pollution Pricing Act (“Act”) cannot be supported by any source of federal authority, and it is therefore wholly ultra vires Parliament. The Act’s subject matter falls squarely within provincial jurisdiction. The fact that the Act’s structure and operation is premised on provincial legislatures having authority to enact the same scheme is fatal to the constitutionality of the Act under Parliament’s residual authority to legislate with respect to matters of national concern for the peace, order, and good government of Canada under the Constitution Act, 1867.

There is agreement with Rowe J.’s reasons, and therefore Rowe J.’s review of the jurisprudence on the residual POGG power is adopted. To determine whether an enactment falls within the legislative authority of its enacting body, a reviewing court must apply two steps: first, it must characterize the enactment to determine its pith and

substance or dominant subject matter and, secondly, it must classify the identified subject matter, with reference to the classes of subjects or heads of power enumerated in ss. 91 and 92 of the *Constitution Act, 1867*. Where an enumerated head of power is relied upon, the pith and substance of the impugned law is identified at the characterization step, and that pith and substance is then classified under a head of power or class of subjects. Where Parliament relies upon the national concern branch of POGG as the source of its authority to legislate, the analytical process differs. If it is decided that the pith and substance of the impugned law does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements of singleness, distinctiveness and indivisibility as stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction.

The dominant subject matter of an enactment is determined by considering its purpose and effects. The purpose of characterization is to facilitate classification so as to determine whether the Constitution grants the enacting body legislative authority over the subject matter. The legislation's dominant subject matter must therefore be characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. If an enactment's subject matter could be classified under different heads of power listed under both ss. 91 and 92 of the *Constitution Act, 1867*, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof.

As a sufficiently precise description may well refer to why and how the law operates, it can be appropriate to include reference to the legislative means in the pith and substance analysis. However, it is not appropriate to do so where describing legislation only in terms of its means would not accurately capture its dominant subject matter or where the description of the means is something that only federal legislative authority can undertake, such as minimum national standards. The determinative consideration in identifying an appropriate level of abstraction should be facilitating the subject matter's classification among the classes of subjects described in the Constitution's heads of power so far as necessary to resolve the case.

In this case, describing the *Act's* pith and substance as relating to the regulation of GHG emissions is too broad because it does not facilitate classification under a federal or provincial head of power. Greater specificity in describing how the legislation proposes to regulate GHG emissions is required so as to determine whether the Constitution grants Parliament legislative authority over the subject matter. However, the inclusion of minimum national standards in the pith and substance of the *Act* is equally unhelpful. It adds nothing to the pith and substance of a matter, which is directed not to the fact of a standard, but to the subject matter to which the standard is to be applied. The inclusion of minimum national standards in the pith and substance of a federal statute also effectively decides the jurisdictional dispute, given that only Parliament is capable of imposing minimum national standards — only federally enacted standards can apply nationwide, and, by operation of paramountcy, only federally enacted standards can be a minimum. Furthermore, reference to “integral”

standards also has no relevance to identifying the *Act*'s pith and substance because such a determination would require the Court to consider whether the standards set out in the *Act* are effective, which is not a valid consideration in the pith and substance analysis.

In order to characterize the *Act*'s pith and substance appropriately, its purpose and effects must be determined. In this case, the pith and substance of Parts 1 and 2 of the *Act* must be characterized separately. While the two parts share a purpose — the reduction of GHG emissions — they are otherwise not remotely similar to each other. They each have distinct operational features and the legislative means they employ are mutually distinct. The pith and substance of Part 1 is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

Once identified, the subject matter must be classified, with reference to the classes of subjects or heads of power described in ss. 91 and 92 of the *Constitution Act, 1867*. Courts should look first to the enumerated powers, rather than immediately considering whether a statute's dominant subject matter fits within the residual POGG authority.

In this case, provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all

within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as the law of property and of contracts. In the alternative, the provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorize Parts 1 and 2. Part 2, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 is s. 92A, which gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation and management of non-renewable natural resources in the province.

The identification of several applicable provincial heads of power should be the end of the matter, since all such heads of power are, by the terms of ss. 92 and 92A(1), matters over which the provincial legislatures may exclusively make laws. By the terms of s. 91, the POGG power applies only in relation to matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. This exclusivity of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of the Constitution who were concerned about federal overreach via the POGG power. The federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but exclusively so. The *Act*'s entire scheme is premised on the provinces having jurisdiction to do precisely

what Parliament has presumed to do in the *Act* — it operates only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet. The *Act*'s backstop model is therefore constitutionally impossible: if the provinces have jurisdiction to do what the *Act* does, then the *Act* cannot be constitutional under the national concern branch of POGG. This demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority.

Even so, given the majority's acceptance that some aspect of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction, the question of whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach* must be considered. The POGG jurisprudence offers little guidance on the question of whether the pith and substance of the impugned legislation can or should be coextensive with the matter of national concern, or whether the matter of national concern can or should be broader than the pith and substance of the legislation. It would be unprecedented and undesirable to accept that the matter of national concern must always be the same as the pith and substance of the statute under review, which can include legislative means, because this would effectively confine Parliament to that particular legislative means in responding to the matter of national concern.

It is not possible for a matter formerly under provincial jurisdiction to be transformed, when minimum national standards are invoked, into a matter of national

concern. To accept that allocating national targets or minimum national standards can serve as a basis for recognizing that some aspect of an area of provincial jurisdiction is distinctly national in scope, and therefore lies outside provincial jurisdiction, would be to accept a model of supervisory federalism by which the provinces can exercise their jurisdiction only as long as they do so in a manner that the federal legislation authorizes. This would open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides to legislate uniform treatment.

In this case, a broad characterization of the national concern is unavoidable in order to encompass the pith and substance of both Part 1 and Part 2. The matter said to be of national concern can therefore be identified as the purpose of the *Act* as a whole: the reduction of GHG emissions. This matter does not meet the requirements of *Crown Zellerbach* for a valid national concern: it fails to meet the requirements of singleness and indivisibility. The fact that harms may cross borders is not enough to make out indivisibility. The matter is divisible because GHGs emissions can be connected to the source province. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of the emissions. Nationwide GHG emissions are nothing more than the sum of provincial and territorial GHG emissions. The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is insufficient to meet the requirement of indivisibility in *Crown Zellerbach*.

Even if each of the pith and substance of Parts 1 and 2 as proposed matters of national concern are considered on their own, the pith and substance of each part is not distinct from matters falling under provincial jurisdiction under s. 92; they therefore do not meet the requirements of *Crown Zellerbach*. The reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) does not have the requisite distinctiveness to be recognized as a matter of national concern because the *Act* encourages provinces to enact substantially the same scheme to serve the same regulatory purpose. The provinces clearly have jurisdiction to establish standards of GHG price stringency in the province.

The double aspect doctrine has no application in this case. While this doctrine allows for the concurrent application of both federal and provincial legislation, it does not create concurrent jurisdiction. The *Act* purports to do exactly what the provinces can do, and for precisely the same reason. There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. The imposition of minimum national standards cannot be described as the distinctly federal aspect of the matter.

Even were the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is irreconcilable with the division of powers. Because the power to legislate to reduce GHG emissions effectively authorizes an array of regulations and extends to the

regulation of any activity that requires carbon-based fuel, it has the potential to undo Canada's division of powers. GHG emissions simply cannot be treated as a single regulatory matter. While the *Act* does not forbid any activity, the charges it imposes will affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed activities. These charges thereby stand to have a profound effect on provincial jurisdiction and the division of powers. The division of powers analysis allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867*, sets out spheres of exclusive jurisdiction so that within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act or not act as they see fit, not as long as they do so in a manner that finds approval at the federal Cabinet table.

The delegation granted by the *Act* to the Cabinet is breathtakingly broad. On this point, the guidance provided by Rowe J. is endorsed, both as to the imperative that the division of powers confines the exercise by the federal Cabinet of Parliament's delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

The long-established principles set down in *Crown Zellerbach* should not be departed from. The doctrine of *stare decisis* establishes a high threshold for departing from precedents and that threshold is not met in this case. There is disagreement with the majority's modernization of the national concern doctrine and with the three-step framework it adopts, which dilutes the national concern test set

down in *Crown Zellerbach*. The framework adopted results in a new, distinctly hierarchical and supervisory model of Canadian federalism that subjects provincial legislative authority to Parliament's overriding authority to establish national standards of how such authority may be exercised and replaces the constitutionally mandated division of powers with a judicially struck balance of power, which must account for other interests. No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects the Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into all areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways.

Per Rowe J. (dissenting): The national concern doctrine is a residual power of last resort. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the POGG power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (“*Act*”). Accordingly, there is agreement with Brown J.’s analysis and with his conclusion that the *Act* is *ultra vires* in whole.

Federalism is one of the fundamental underlying principles animating the Canadian Constitution. The primary textual expression of the principle of federalism

can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867*. An essential characteristic of the division of powers is its exhaustiveness, which precludes legislative voids and reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign. The exhaustive nature of the division of powers means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial. The federal residual clause, the POGG power, comes from the opening words of s. 91 of the *Constitution Act, 1867*. The provincial residual clause is in s. 92(16), and provides that the provincial legislatures may exclusively make laws relating to matters of “a merely local or private Nature in the Province”. The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92, as s. 91 confers the power to legislate for peace, order and good government “in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces”. Further, every conferral of provincial legislative jurisdiction is qualified by words such as “in the Province”, including s. 92(16). The result is that the POGG power is limited to only those matters that are not of a provincial nature, as the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power. The scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. The POGG power is also residual to the federal heads of power, as the normal

process of constitutional interpretation is to rely first on a more specific provision before resorting to a more general one.

Since the POGG power is residual to both the enumerated provincial and federal heads of power, matters that come within enumerated federal or provincial heads of power should be located in those enumerated heads and the POGG power accommodates the matters which do not come within any of the enumerated federal or provincial heads. There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction and it is not possible for a matter to fall both within the POGG power and within a federal enumerated head of power at the same time. If a matter cannot fit within any enumerated head, only then may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

Courts have long struggled to define the contours of the POGG power in a way that preserves the division of powers. Early POGG cases suffered from a series of twists and turns, with various national concern statements infusing them at various points. The common theme of these cases, however, is that courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. The POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power.

What some commentators have named “gap” and “national concern” are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the test set out in *Crown Zellerbach*. However, the analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG.

The national concern doctrine, when properly applied, plays an essential role in achieving the goal that the division of powers be collectively exhaustive, in a way that respects provincial jurisdiction. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government do not fit comfortably within the division of powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their distinctiveness from matters under provincial jurisdiction and their indivisibility between various heads of jurisdiction. But when the national concern doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority. Courts must be careful in recognizing matters of national concern, because the national concern branch has great potential to upset the division of powers. Once a matter is qualified as of national concern, Parliament has exclusive jurisdiction over the matter, including its intra-

provincial aspects. Thus, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature's law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences. Courts should never start a division of powers analysis by looking to the federal residual power. To preserve the federal balance, courts should treat POGG as a power of last resort. The scope of the national concern doctrine must be limited to matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of national concern, as opposed to matters of a merely local or private nature that fall under s. 92(16).

The national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e., it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible. The requirements of singleness, distinctiveness and indivisibility serve the purpose of identifying matters that are truly residual in two ways. The matter must be distinct from provincial matters and must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both new matters and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize important matters that can be legislated upon by the provinces or by both orders of government. First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92. This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters in the province. This inquiry includes consideration of the provincial residuum: if the matter is of a merely local or private nature, it would fall under s. 92(16). The matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Second, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction. The fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum.

In evaluating whether the matter has a singleness, distinctiveness and indivisibility, it is relevant to consider what is known as the provincial inability test, that is, 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 aspect of the matter. The provincial inability inquiry has been designed to control the centralization

of powers and to limit the extension of the national concern doctrine to matters that are beyond the power of the provinces to deal with and that must be legislated upon by Parliament, exclusively. Extra-provincial effects, on their own, are insufficient to satisfy the provincial inability test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem. If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity. Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. Further, provincial inability is no more than an indicium of singleness, distinctiveness and indivisibility. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

When determining if a matter can pass muster as a subject matter falling under POGG, the final consideration is whether it has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

under the Constitution. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers. This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does not ask whether the importance of the proposed new federal power outweighs the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Courts must also be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or matter may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective. This doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. The double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy.

The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not

strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would disappear not gradually but rapidly.

Canada's proposed doctrinal expansion of national concern should be rejected because it departs in a marked and unjustified way from the jurisprudence of the Court and, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction. In the instant case, Canada's proposed pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide GHG emissions" has not attained national dimensions. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern analysis. Furthermore, the distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Singleness, distinctiveness and indivisibility should not be collapsed into provincial inability, and provincial inability should not be informed by tests for enumerated heads of power, because this approach fails to give effect to the residual nature of the POGG power.

The device of "minimum national standards" makes wider still the pathway for enhancement of federal jurisdiction. "By means of minimum national standards" could be applied to any matter, and therefore adds nothing to the description of a matter

and has no place. Including “minimum national standards” in the matter of national concern short-circuits the analysis and opens the door to federal “minimum standards” with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision. Finally, the *Act*’s scale of impact on provincial jurisdiction is not reconcilable with the distribution of powers. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. It is not an exercise in cooperative federalism; rather, it is the means to enforce supervisory federalism. The problem is not cured by the double aspect doctrine: since the federal matter is defined in terms of the extent to which it can limit the provinces’ discretion to legislate (the backstop mechanism), this is not two aspects of the same fact situation — it is one aspect, and it gives the federal government the upper hand and the final say. Parliament did not have jurisdiction to enact the *Act* under its general residual power.

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concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J.O., Hoy A.C.J.O. and MacPherson, Sharpe and Huscroft JJ.A.), 2019 ONCA 544, 146 O.R. (3d) 65, 2019 D.T.C. 5090, 436 D.L.R. (4th) 1, 29 C.E.L.R. (4th) 113, [2019] O.J. No. 3403 (QL), 2019 CarswellOnt 10495 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal dismissed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

APPEAL from a judgment of the Alberta Court of Appeal (Fraser C.J.A. and Watson, Wakeling, Hughes and Feehan JJ.A.), 2020 ABCA 74, 3 Alta. L.R. (7th) 1, 2020 D.T.C. 5025, [2021] 1 W.W.R. 1, 446 D.L.R. (4th) 1, 35 C.E.L.R. (4th) 1, [2020] A.J. No. 234 (QL), 2020 CarswellAlta 328 (WL Can.), in the matter of a reference concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*. Appeal allowed, Côté J. dissenting in part and Brown and Rowe JJ. dissenting.

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THE CHIEF JUSTICE —

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I. Overview

[1] In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (“*GGPPA*”). Three provinces challenged the constitutionality of the *GGPPA* by references to their respective courts of appeal. The question divided the courts. In split decisions, the courts of appeal for Saskatchewan and Ontario held that the *GGPPA* is constitutional, while the Court of Appeal of Alberta held that it is unconstitutional. Those decisions have now been appealed to this Court.

[2] The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future. The only way to address the threat of climate change is to reduce greenhouse gas emissions. In the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, states around the world undertook to drastically reduce their greenhouse gas emissions in order to mitigate the effects of climate change. In Canada, Parliament enacted the *GGPPA* as part of the country’s effort to implement its commitment.

[3] However, none of these facts answer the question in these appeals. The issue here is whether Parliament had the constitutional authority to enact the *GGPPA*.

To answer this question, the Court must identify the true subject matter of the *GGPPA* and then classify that subject matter with reference to the division of powers set out in the *Constitution Act, 1867* (“Constitution”). In doing so, the Court must give effect to the principle of federalism, a foundational principle of the Canadian Constitution, which requires that an appropriate balance be maintained between the powers of the federal government and those of the provinces.

[4] Below, I conclude that the *GGPPA* sets minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions, pollutants that cause serious extraprovincial harm. Parliament has jurisdiction to enact this law as a matter of national concern under the “Peace, Order, and good Government” clause of s. 91 of the Constitution. National concern is a well-established but rarely applied doctrine of Canadian constitutional law. The application of this doctrine is strictly limited in order to maintain the autonomy of the provinces and respect the diversity of Confederation, as is required by the principle of federalism. However, Parliament has the authority to act in appropriate cases, where there is a matter of genuine national concern and where the recognition of that matter is consistent with the division of powers. In this case, Parliament has acted within its jurisdiction.

[5] I also conclude that the levies imposed by the *GGPPA* are constitutionally valid regulatory charges. In the result, the *GGPPA* is constitutional.

II. Reference Question

[6] The reference question in each of the three appeals is substantially the same: Is the *Greenhouse Gas Pollution Pricing Act* unconstitutional in whole or in part?

III. Background

A. *The Global Climate Crisis*

[7] Global climate change is real, and it is clear that human activities are the primary cause. In simple terms, the combustion of fossil fuels releases greenhouse gases (“GHGs”) into the atmosphere, and those gases trap solar energy from the sun’s incoming radiation in the atmosphere instead of allowing it to escape, thereby warming the planet. Carbon dioxide is the most prevalent and recognizable GHG resulting from human activities. Other common GHGs include methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and nitrogen trifluoride.

[8] At appropriate levels, GHGs are beneficial, keeping temperatures around the world at levels at which humans, animals, plants and marine life can live in balance. And the level of GHGs in the atmosphere has been relatively stable over the last 400,000 years. Since the 1950s, however, the concentrations of GHGs in the atmosphere have increased at an alarming rate, and they continue to rise. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels, and that increase is expected to reach 1.5°C by 2040 if the current rate of warming continues.

[9] These temperature increases are significant. As a result of the current warming of 1.0°C, the world is already experiencing more extreme weather, rising sea levels and diminishing Arctic sea ice. Should warming reach or exceed 1.5°C, the world could experience even more extreme consequences, including still higher sea levels and greater loss of Arctic sea ice, a 70 percent or greater global decline of coral reefs, the thawing of permafrost, ecosystem fragility and negative effects on human health, including heat-related and ozone-related morbidity and mortality.

[10] The effects of climate change have been and will be particularly severe and devastating in Canada. Temperatures in this country have risen by 1.7°C since 1948, roughly double the global average rate of increase, and are expected to continue to rise faster than that rate. Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases like Lyme disease and West Nile virus.

[11] The Canadian Arctic faces a disproportionately high risk from climate change. There, the average temperature has increased at a rate of nearly three times the global average, and that increase is causing significant reductions in sea ice, accelerated permafrost thaw, the loss of glaciers and other ecosystem impacts. Canada's coastline, the longest in the world, is also being affected disproportionately by climate change, as it experiences changes in relative sea level and rising water temperatures, as well as

increased ocean acidity and loss of sea ice and permafrost. Climate change has also had a particularly serious effect on Indigenous peoples, threatening the ability of Indigenous communities in Canada to sustain themselves and maintain their traditional ways of life.

[12] Climate change has three unique characteristics that are worth noting. First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions. In 2016, for example, Alberta, Ontario, Quebec, Saskatchewan and British Columbia accounted for approximately 90.5 percent of Canada's total GHG emissions, while the approximate percentages were 9.1 percent for the other five provinces and 0.4 percent for the territories. Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories. Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.

B. *Canada's Efforts to Address Climate Change*

[13] Canada's history of international commitments to address climate change began in 1992 with its ratification of the *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1, May 15, 1992 ("UNFCCC"). After failing to meet its commitments under multiple UNFCCC agreements, including the *Kyoto Protocol*, U.N. Doc. FCCC/CP/1997/L.7/Add.1, December 10, 1997, and the *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1, December 18, 2009, Canada agreed to the *Paris Agreement* in 2015. 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", the participating states agreed to hold the global average temperature increase to well below 2.0°C above pre-industrial levels and to pursue efforts to limit that increase to 1.5°C: United Nations, Framework Convention on Climate Change, *Report of the Conference of the Parties on its twenty-first session*, U.N. Doc. FCCC/CP/2015/10/Add.1, January 29, 2016, at p. 2; *Paris Agreement*, art. 2(1)(a). Canada ratified the *Paris Agreement* in 2016, and the agreement entered into force that same year. Canada committed to reducing its GHG emissions by 30 percent below 2005 levels by 2030.

[14] Under the *Paris Agreement*, states are free to choose their preferred approaches for meeting their nationally determined contributions. In Canada, the provinces and the federal government agreed to work together in order to meet the country's international commitments. In March 2016, before Canada had ratified the *Paris Agreement*, all the First Ministers met in Vancouver and adopted the *Vancouver*

Declaration on clean growth and climate change (“*Vancouver Declaration*”): Canadian Intergovernmental Conference Secretariat, March 3, 2016 (online). In that declaration, the First Ministers recognized the call in the *Paris Agreement* for significant reductions in GHG emissions and committed to “[i]mplement[ing] 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”: *ibid*, at p. 3. In the *Vancouver Declaration*, the First Ministers also recognized the importance of a collaborative approach between provincial and territorial governments and the federal government to reducing GHG emissions and noted that “the federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets”: *ibid*.

[15] The *Vancouver Declaration* resulted in the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms (“Working Group”) to study the role of carbon pricing mechanisms in meeting Canada’s emissions reduction targets. The Working Group included at least one representative from each provincial and territorial government as well as the federal government. Its final report identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and outlined three carbon pricing options: (1) a single form broad-based carbon pricing mechanism that would apply across Canada, an option that would not be supportive of existing or planned provincial or territorial pricing policies; (2) broad-based carbon pricing mechanisms across Canada, an option that would give each

province and territory flexibility as to the choice of instruments; and (3) a range of broad-based carbon pricing mechanisms in some jurisdictions, while the remaining jurisdictions would implement other mechanisms or policies designed to meet GHG emissions reduction targets within their borders: Working Group on Carbon Pricing Mechanisms, *Final Report*, 2016 (online), at pp. 1, 44-47 and 50.

[16] Carbon pricing, or GHG pricing, is a regulatory mechanism that, in simple terms, puts a price on GHG emissions in order to induce behavioural changes that will lead to widespread reductions in emissions. By putting a price on GHG emissions, governments can incentivize individuals and businesses to change their behaviour so as to make more environmentally sustainable purchasing and consumption choices, to redirect their financial investments, and to reduce their GHG emissions by substituting carbon-intensive goods for low-GHG alternatives. Generally speaking, there are two different approaches to GHG pricing: (1) a carbon tax that entails setting a price on GHG emissions directly, but not setting a cap on emissions; and (2) a cap-and-trade system that prices emissions indirectly by placing a cap on GHG emissions, allocating emission permits to businesses and allowing businesses to buy and sell emission permits from and to other businesses. A carbon tax sets an effective price per unit of GHG emissions. In a cap-and-trade system, the market sets an effective price per unit of GHG emissions, but a cap is placed on permitted emissions. Both approaches put a price on GHG emissions. I also find it worthwhile to note that while “carbon tax” is the term used among policy experts to describe GHG pricing approaches that directly price

GHG emissions, it has no connection to the concept of taxation as understood in the constitutional context.

[17] Building on the Working Group's final report, the federal government released the *Pan-Canadian Approach to Pricing Carbon Pollution* ("*Pan-Canadian Approach*") in October 2016: Environment and Climate Change Canada, October 3, 2016 (online). In it, the federal government introduced a pan-Canadian benchmark for carbon pricing and stated the benchmark's underlying principles, two of which were that carbon pricing should be a central component of the pan-Canadian framework and that the overall approach should be flexible and recognize carbon pricing policies already being implemented or developed by provinces and territories. The *Pan-Canadian Approach* also set out the criteria for the pan-Canadian benchmark that would be used for determining acceptable minimum carbon pricing systems. Provinces and territories would have the flexibility to implement, by 2018, one of two carbon pricing systems with a common broad scope and legislated increases in stringency. A federal backstop carbon pricing system would be implemented in jurisdictions that either requested it or failed to implement a system that met the benchmark.

[18] In December 2016, based on the *Pan-Canadian Approach*, the federal government released the *Pan-Canadian Framework on Clean Growth and Climate Change* ("*Pan-Canadian Framework*"): Environment and Climate Change Canada, December 9, 2016 (online). In it, the federal government reaffirmed the principles expounded in the *Vancouver Declaration* and the *Pan-Canadian Approach*, and

outlined in greater detail the criteria of the pan-Canadian benchmark for carbon pricing. As in the *Pan-Canadian Approach*, the *Pan-Canadian Framework* required every province and territory to have one of two carbon pricing systems in place by 2018: a carbon tax or carbon levy system similar to the ones that had already been implemented in British Columbia and Alberta, or a cap-and-trade system similar to the ones that had been implemented in Ontario and Quebec. All carbon pricing systems had to have a common broad scope and to increase in stringency over time. All revenues from the carbon pricing system would remain in the jurisdiction of origin. A federal backstop pricing system would apply only in jurisdictions that requested it, that had no carbon pricing system or that had an insufficiently stringent carbon pricing system. All revenues from the federal system would be returned to the jurisdiction of origin.

[19] On the day the federal government released the *Pan-Canadian Framework*, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories. Manitoba adopted the framework in February 2018, but Saskatchewan has not done so yet. Later in 2018, Ontario, Alberta and Manitoba withdrew their support from the *Pan-Canadian Framework*.

[20] In May 2017, after the release of the *Pan-Canadian Framework*, the federal government published the *Technical Paper on the Federal Carbon Pricing Backstop*: Environment and Climate Change Canada, May 18, 2017 (online). This paper provided further details, outlined the components of the proposed federal carbon pricing system and sought feedback from stakeholders. The federal government then

published documents entitled *Guidance on pan-Canadian carbon pollution pricing benchmark*, in August 2017, and *Supplemental benchmark guidance*, in December 2017, which further detailed the scope of the GHG emissions to which the carbon pricing system would apply as well as the minimum legislated increases in stringency: Environment and Climate Change Canada, *Guidance on the pan-Canadian Carbon pollution pricing benchmark*, August 2017 (online); Environment and Climate Change Canada, *Supplemental benchmark guidance*, December 20, 2017 (online).

[21] On the day the *Supplemental benchmark guidance* document was released, the federal Minister of Finance and Minister of Environment and Climate Change wrote to their provincial and territorial counterparts to reaffirm Canada's commitment to carbon pricing under the *Pan-Canadian Framework*. The letter requested the provincial and territorial ministers to explain how they would be implementing carbon pricing and also outlined the next steps in the federal government's process to price carbon.

[22] In the context of this process, the *GGPPA* was introduced in Parliament as Part 5 of Bill C-74, *An Act to implement certain provisions of the budget*, 1st Sess., 42nd Parl., on March 27, 2018, and it received royal assent on June 21, 2018. In the lead-up to the introduction of the *GGPPA*, the federal government had published further guidance on the components of the proposed federal carbon pricing system.

C. *Provincial Action on Climate Change*

[23] At the time the *Pan-Canadian Framework* was released, most of the provinces and territories had already taken significant actions to address climate change, including rehabilitating forests, developing low carbon fuels, capping emissions for oil sands projects and the electricity sector, regulating methane emissions, closing fossil-fuelled and coal-fired electricity generating stations, and investing in renewable energy and transportation. British Columbia, Alberta, Ontario and Quebec were the only provinces with carbon pricing systems. All the other provinces and territories, except Saskatchewan and Manitoba, had indicated that they planned to implement either a carbon tax or levy system or a cap-and-trade system.

[24] Despite the actions that had been taken, Canada's overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada's second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada's five largest emitting provinces, Alberta and Saskatchewan. Canada's remaining emissions reduction between 2005 and 2016 came from two of Canada's remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well

above Canada's 3.8 percent overall GHG emissions reduction — in New Brunswick, Nova Scotia, Prince Edward Island and Yukon.

IV. The GGPPA

[25] The *GGPPA* came into force on June 21, 2018.

A. *Basic Architecture of the GGPPA*

[26] The *GGPPA* comprises four parts and four schedules. Part 1 of the *GGPPA* establishes a fuel charge that applies to producers, distributors and importers of various types of carbon-based fuel. Part 2 sets out a pricing mechanism for industrial GHG emissions by large emissions-intensive industrial facilities. Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. And Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the *GGPPA* and have it tabled in Parliament. Only the first two parts and the four schedules are at issue in these appeals. The parties do not challenge the constitutionality of Parts 3 and 4 of the *GGPPA*.

[27] Because the *GGPPA* operates as a backstop, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* does not automatically apply in all provinces and territories. A province or territory will only be subject to Part 1 or 2 of the *GGPPA*

if the Governor in Council determines that its GHG pricing mechanism is insufficiently stringent. However, the *GGPPA* itself always applies in the sense that provincial and territorial GHG pricing mechanisms are always subject to assessment to ensure they are sufficiently stringent. At the time of the hearing of these appeals, Ontario, New Brunswick, Manitoba, Saskatchewan, Yukon and Nunavut were subject to both Parts 1 and 2 of the *GGPPA*. Alberta was subject only to Part 1, and Prince Edward Island only to Part 2. After the hearing, the *GGPPA* was amended such that Part 1 no longer applies to New Brunswick: *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act and the Fuel Charge Regulations*, SOR/2020-261. The federal government has also announced that Ontario will be subject only to Part 1, but the *GGPPA* has not yet been amended to reflect this announcement.

B. *The Preamble*

[28] The *GGPPA* has a 16-paragraph preamble that sets out the background to and purpose of the legislation. This preamble can helpfully be divided into five parts in which the following points are articulated: (1) GHG emissions contribute to global climate change, and that change is already affecting Canadians and poses a serious risk to the environment, to human health and safety and to economic prosperity both in Canada and internationally (at paras. 1-5); (2) Canada has committed internationally to reducing its GHG emissions by ratifying the *UNFCCC* and the *Paris Agreement* (at paras. 6-8); (3) it is recognized in the *Pan-Canadian Framework* that climate change

requires immediate action by the federal, provincial and territorial governments, and GHG pricing is a core element of that framework (at paras. 9-10); (4) behavioural change that leads to increased energy efficiency is necessary to take effective action against climate change (at para. 11); and (5) the purpose of the *GGPPA* is to implement stringent pricing mechanisms designed to reduce GHG emissions by creating incentives for that behavioural change (paras. 12-16).

[29] In the fifth part of the preamble, it is recognized that some provinces are developing or have implemented GHG pricing systems: para. 14. However, it is also acknowledged that the absence of such systems in some provinces and a lack of stringency in some provincial pricing systems could contribute to significant harm to the environment, to human health and safety and to economic prosperity: para. 15. The preamble concludes with a statement that it is accordingly necessary to create a federal GHG pricing system in order to ensure that GHG pricing applies broadly in Canada: para. 16.

C. Part 1: Fuel Charge

[30] Part 1 of the *GGPPA* establishes a charge on prescribed types of fuel that applies to fuel produced, delivered or used in a listed province, fuel brought into a listed province from another place in Canada and fuel imported into Canada at a location in a listed province: ss. 17(1), 18(1), 19(1) and (2) and 21(1). Part 1 of Sch. 1 contains the list of provinces to which Part 1 of the *GGPPA* applies. The fuel charge applies to 22 types of carbon-based fuel that release GHG emissions when burned, including

gasoline, diesel fuel and natural gas, as well as to combustible waste. Schedule 2 lists the types of fuel to which the fuel charge applies and indicates the applicable rates of charge for each one. Although the fuel charge is paid by fuel producers, distributors and importers, and not directly by consumers, it is anticipated that retailers will pass the fuel charge on to consumers in the form of higher energy prices. The fuel charge is not payable on qualifying fuel delivered to farmers and fishers (s. 17(2)) or on fuel used at prescribed facilities, including industrial facilities to which the pricing mechanism in Part 2 of the *GGPPA* applies (ss. 3 and 18(4)). The fuel charge is administered by the Minister of National Revenue acting through the Canada Revenue Agency.

[31] Section 165 of the *GGPPA* concerns the distribution of the proceeds of the fuel charge. Section 165(2) provides that the Minister of National Revenue must distribute the amount collected in respect of the fuel charge in any listed province less amounts that are rebated, refunded or remitted in respect of those charges, but that the Minister of National Revenue has discretion whether to distribute the net amount to the province itself, other prescribed persons or classes of persons or a combination of the two. The federal government's present policy is to give 90 percent of the proceeds of the fuel charge directly to residents of the province of origin in the form of "Climate Action Incentive" payments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as provided for in s. 13 of the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27. The Climate Action Incentive is a deemed rebate under the *GGPPA* that reduces the amount that must be distributed under s. 165: *Income Tax Act*, s. 122.8(6). The remaining 10 percent of the proceeds is paid out to schools, hospitals, colleges and

universities, municipalities, not-for-profit organizations, Indigenous communities and small and medium-sized businesses in the province of origin. Simply put, the net amount collected from a listed province is returned to persons and entities in that province.

[32] Part 1 of the *GGPPA* also provides the Governor in Council with considerable power to make regulations. For example, s. 166 authorizes the Governor in Council to make regulations to list or delist provinces in relation to the application of the fuel charge under Part 1 of the *GGPPA*. Any such regulations must be made “[f]or 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” (s. 166(2)), and the Governor in Council must, in making them, “take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions” (s. 166(3)).

[33] In addition, the Governor in Council is authorized to make regulations prescribing anything that is to be prescribed or determined by regulation under Part 1: s. 166(1)(a). Specifically, the Governor in Council can make regulations in relation to the fuel charge system (s. 168(2)) by, for example, modifying the listed types of fuel and the applicable rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), or defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). In the event of a conflict between a regulation and Part 1 of the *GGPPA*, s. 168(4) provides that the regulation prevails to the extent of the conflict.

D. *Part 2: Industrial Greenhouse Gas Emissions*

[34] Part 2 of the *GGPPA* establishes an output-based pricing system (“OBPS”) for industrial GHG emissions by large emissions-intensive industrial facilities. The OBPS applies only to a “covered facility” in a province listed in Part 2 of Sch. 1: ss. 169 and 174. Covered facilities include facilities that meet the criteria set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 (“*OBPS Regulations*”): *GGPPA*, s. 169. Under the *OBPS Regulations*, a covered facility is one that meets a specified emissions threshold and is engaged in specific industrial activities: s. 8. The Minister of the Environment may also, upon request, designate an industrial facility located in a backstop jurisdiction (i.e., one listed in Part 2 of Sch. 1) as a covered facility even if it does not meet the criteria in the regulations: *GGPPA*, s. 172. A covered facility is exempt from the fuel charge (ss. 18(3) and 18(4)), but it must pay for any GHG emissions that exceed its applicable emissions limits on the basis of sector-specific output-based standards. This can be done in one of three ways: (1) by remitting surplus compliance units earned by the facility at a time when its GHG emissions were below its annual limit, or surplus credits purchased from other facilities; (2) paying an excess emissions charge; or (3) a combination of the two (ss. 174(1) and (2) and 175). The *OBPS Regulations* require that a covered facility’s emissions limit be generally calculated on the basis of the facility’s production from each industrial activity and an output-based emissions standard in respect of that activity expressed in units of emissions per unit of product: s. 36; Sch. 1. If the efficiency of a facility’s industrial processes meets the applicable efficiency standards, the facility will not exceed its

emissions limit. It is only where an industrial process is not sufficiently efficient in terms of its production per unit of emissions that a person responsible for a covered facility must provide compensation for the facility's excess emissions. A facility whose efficiency exceeds the standards earns surplus credits: *GGPPA*, s. 175. Schedule 3 lists 33 GHGs and sets out the global warming potential of each one as defined in accordance with the OBPS, while Sch. 4 sets out the charges for excess emissions. The OBPS is administered by the Minister of the Environment.

[35] Section 188 of the *GGPPA*, which concerns the distribution of revenues from excess emission charge payments, works similarly to s. 165 of Part 1. Section 188(1) provides that the Minister of National Revenue must distribute all revenues from excess emissions charge payments, but that the Minister has discretion whether to distribute them to the province itself, to persons specified in the regulations or that meet criteria set out in the regulations, or to a combination of both. The federal government has indicated that these revenues will be used to support carbon pollution reduction in the jurisdictions in which they were collected, but has not yet provided further details.

[36] Part 2 of the *GGPPA* — like Part 1 — also provides the Governor in Council with considerable power to make regulations and orders. For example, s. 189 authorizes the Governor in Council to make orders to list or delist provinces in relation to the application of the OBPS in Part 2 of the *GGPPA*. As with s. 166, any such order must be made “[f]or 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” (s. 189(1)), and the Governor in Council must, in making it, “take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions” (s. 189(2)).

[37] As well, the Governor in Council is authorized to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas; in doing so, the Governor in Council may take into account any factor it considers appropriate: ss. 190(1) and (2). The Governor in Council also has the authority to amend Sch. 4 by amending an excess emissions charge or by adding calendar years: s. 191. Finally, the Governor in Council is authorized to make regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units: s. 192.

[38] It is important to understand that Parts 1 and 2 of the *GGPPA* together create a single GHG pricing scheme. Part 1 of the *GGPPA* directly prices GHG emissions. The OBPS created by the *OBPS Regulations* made under Part 2 of the *GGPPA* constitutes a complex exemption to Part 1. The OBPS exempts covered facilities from the blunt fuel charge under Part 1, creating a more tailored GHG pricing scheme that lowers the effective GHG price such facilities would otherwise have to pay under Part 1. Part 2 thus also directly prices GHG emissions, but only to the extent that

covered facilities exceed applicable efficiency standards. Parts 1 and 2 of the *GGPPA* therefore function together to price GHG emissions throughout the Canadian economy.

V. Judicial History

A. *Court of Appeal for Saskatchewan, 2019 SKCA 40, 440 D.L.R. (4th) 398*

[39] The majority of the Court of Appeal for Saskatchewan (Richards C.J.S., Jackson and Schwann JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority identified the pith and substance of the *GGPPA* as “the establishment of minimum national standards of price stringency for GHG emissions”: para. 125. Applying the framework from *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, they found that the establishment of minimum national standards of price stringency for GHG emissions is a matter of national concern. This matter is of genuine national importance and has the requisite singleness, distinctiveness and indivisibility. GHGs are readily identifiable and distinguishable from other gases, and minimum pricing standards are distinguishable from other forms of regulation. Each province is vulnerable to another province’s failure to adequately price GHG emissions. Interprovincial cooperation could not be a basis for a sustainable approach to minimum GHG pricing, because provinces are free to withdraw from cooperative arrangements. As well, recognizing federal authority over minimum national standards of price stringency for GHG emissions would have an acceptable impact on provincial jurisdiction, because it would limit Parliament’s

role to pricing and would not threaten the constitutional validity of provincial initiatives to regulate GHGs.

[40] Ottenbreit and Caldwell JJ.A. dissented. They concluded that Part 1 of the *GGPPA* is the result of an unconstitutional exercise of Parliament's taxation power and that the *GGPPA* as a whole is *ultra vires* Parliament. GHG emissions do not represent a constitutionally distinct matter, and the concepts of "stringency" and "national standards" should not be used to tease an abstraction out of recognizable matters within provincial jurisdiction. The asserted need for a national standard of stringency is based not on a genuine provincial inability to set such a standard, but simply on a policy dispute. Finally, the dissent concluded that the matter's scale of impact on provincial jurisdiction is not reconcilable with the balance of federalism. The *GGPPA* would deprive provinces of the ability to regulate GHGs within their borders. Furthermore, it would be possible for the power delegated to the executive branch by the *GGPPA* to be exercised so as to widen the scope of the statute, thus further eroding provincial authority.

B. *Court of Appeal for Ontario, 2019 ONCA 544, 146 O.R. (3d) 65*

[41] The majority of the Court of Appeal for Ontario (Strathy C.J.O., MacPherson and Sharpe JJ.A.) concluded that the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. The majority characterized the pith and substance of the *GGPPA* as "establishing minimum national standards to reduce greenhouse gas emissions": para. 77. Applying the framework from *Crown Zellerbach*,

they reasoned that this matter is new as it was not recognized at Confederation. It is a matter of national concern, as evidenced by the *GGPPA*'s relationship to Canada's international obligations and by the fact that the statute was the product of extensive efforts to achieve a national response to climate change. The matter meets the singleness, distinctiveness and indivisibility requirement. GHGs are a chemically distinct form of pollution with international and interprovincial impacts. The provinces cannot establish minimum national standards to reduce GHG emissions. No province can control the deleterious effects of GHGs emitted in other provinces or require other provinces to take steps to do so. In assessing the matter's scale of impact on provincial jurisdiction, the majority found that the *GGPPA* strikes an appropriate balance between Parliament and the provincial legislatures. Finally, the majority rejected the Attorney General of Ontario's argument that the levies imposed by the *GGPPA* are unconstitutional regulatory charges. The majority found the levies to be valid because they have a sufficient connection to the regulatory scheme based on their purpose of behaviour modification.

[42] Hoy A.C.J.O. concurred with Strathy C.J.O.'s national concern analysis, although she characterized the pith and substance of the *GGPPA* more narrowly as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions": paras. 165-66 (emphasis added). In her view, including the means — carbon pricing — in the description of the pith and substance is legally permissible and desirable. In some cases, as here, Parliament's choice of means may

be so central to the legislative objective that the main thrust of the law, properly understood, is to achieve a result in a particular way.

[43] Huscroft J.A. dissented. He characterized the pith and substance of the *GGPPA* broadly as the regulation of GHG emissions. At the classification stage, he reasoned that the national concern doctrine requires the identification of a new subject matter that is independent of the means adopted in the relevant law. In this case, the proposed matter of national concern is federal authority over GHG emissions, which fails to meet the singleness, distinctiveness and indivisibility requirement from *Crown Zellerbach*. In addition, recognizing federal jurisdiction on the basis of provincial inability to establish a national standard would allow any matter to be transformed into a matter of national concern by just adding the word “national” to it. The fact that one province’s inaction could undermine another province’s carbon pricing efforts does not establish provincial inability either; this simply reflects a legitimate policy disagreement. Finally, Huscroft J.A. concluded that the matter’s scale of impact on provincial jurisdiction is incompatible with the federal-provincial division of powers. For a matter to be one of national concern, it must have ascertainable and reasonable limits in order to contain its reach.

C. *Court of Appeal of Alberta, 2020 ABCA 74, 3 Alta. L.R. (7th) 1*

[44] The majority of the Court of Appeal of Alberta (Fraser C.J.A., Watson and Hughes J.J.A.) held that the *GGPPA* is unconstitutional. They reasoned that the national concern doctrine can apply only to matters that would originally have fallen within the

provincial power respecting matters of a merely local or private nature under s. 92(16) of the Constitution. The doctrine has no application to matters that would originally have fallen under other enumerated provincial heads of power. The majority characterized the pith and substance of the *GGPPA* as “at a minimum, regulation of GHG emissions”: paras. 211 and 256. This subject falls under various enumerated provincial powers, and in particular the power relating to the development and management of natural resources under s. 92A of the Constitution. Accordingly, the majority reasoned, the national concern doctrine has no application in this case. The majority went on to apply the framework from *Crown Zellerbach*. They found that the regulation of GHG emissions is not a single, distinctive and indivisible matter and that it would have an unacceptable impact on provincial jurisdiction. The *GGPPA* intrudes significantly into the provinces’ exclusive jurisdiction over the development and management of natural resources, thereby depriving provinces of their right to balance environmental concerns with economic sustainability.

[45] Wakeling J.A., writing separately, questioned the need for the national concern doctrine and proposed a significant reformulation of the *Crown Zellerbach* framework. He concluded that the *GGPPA* is *ultra vires* Parliament. Canada was in fact seeking judicial approbation of the “environment” or “climate change” as a new federal head of power. Recognition of such a broad federal power would fundamentally destabilize Canadian federalism. The provinces are already taking action to reduce GHG emissions, and the country is better served when governments at both levels work to reduce GHG emissions within their own areas of jurisdiction.

[46] Feehan J.A., dissenting, found that the *GGPPA* is valid on the basis of the national concern doctrine. He identified the pith and substance of the law as follows: “To effect behavioural change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions” (para. 1056). He found that this is a new matter or a matter of national concern, and that it is single, distinctive and indivisible. The *GGPPA* has a small scale of impact on provincial jurisdiction, since it accommodates existing provincial systems and is designed merely to set minimum national standards in order to ensure equity as between provinces. The provincial inability test is also met, given that one province’s failure to address GHG emissions would have an adverse effect on other provinces.

VI. Analysis

[47] Alberta, Ontario and Saskatchewan challenge the constitutionality of the *GGPPA* on federalism-related grounds. Ontario further argues that the levies imposed by the *GGPPA* are unconstitutional. Canada and British Columbia argue that the *GGPPA* is constitutional on the basis of the national concern doctrine. Below, I will begin by briefly discussing the foundational principle of federalism. I will then undertake the well-established two-stage analytical approach to the review of legislation on federalism grounds: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (“*2018 Securities Reference*”), at para. 86. I will first consider the purpose and effects of the *GGPPA* with a view to characterizing the

subject matter — the pith and substance — of the statute. Then I will classify the subject matter of the *GGPPA* with reference to federal and provincial heads of power under the Constitution in order to determine whether it is *intra vires* Parliament and therefore valid. Finally, independently of the jurisdiction issue, I will consider the constitutionality of the levies imposed by the *GGPPA*.

A. *Principle of Federalism*

[48] Federalism is a foundational principle of the Canadian Constitution. It was a legal response to the underlying political and cultural realities that existed at Confederation, and its objectives are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at para. 43; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22.

[49] Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (“*2011 Securities Reference*”), at para. 54. Under the division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada’s unity: *Canadian Western Bank*, at para. 22. Importantly, the

principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to “Property and Civil Rights” under s. 92(13). Federal power cannot be used in a manner that effectively eviscerates provincial power: *Secession Reference*, at para. 58; *2011 Securities Reference*, at para. 7. A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament’s jurisdiction: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 82.

[50] As this Court observed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124, courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism — what is best described as a modern form of cooperative federalism — that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, “[t]he ‘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”: para. 62. It is in light of this conception of federalism that I approach this case.

B. *Characterization of the GGPPA*

(1) Overarching Principles

[51] At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its “pith and substance”, or true subject matter: *2018 Securities Reference*, at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 28 and 166. The court does so with a view to identifying the statute’s or provision’s main thrust, or dominant or most important characteristic: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 31. To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation’s preamble or purpose clauses, and extrinsic evidence, such as Hansard or 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; *Canadian Western Bank*, at para. 27. In considering the effects of the challenged legislation, the court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the “side” effects that flow from the application of the statute: *Kitkatla*, at para. 54; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 480. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute’s enactment as well as

at the words used in it: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18.

[52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490.

[53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision. In the courts below, a central issue was the permissibility of including the means of the statute in the definition of the

subject matter of the *GGPPA*. In *Ward* and other cases, this Court cautioned against “confus[ing] the purpose of the legislation with the means used to carry out that purpose”: *Ward*, at para. 25; see also *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 24. However, those cases did not establish a blanket prohibition on considering the means in characterizing the pith and substance of a law. Rather, they stand for the basic proposition that Parliament’s or a provincial legislature’s choice of means is not determinative of the legislation’s true subject matter, although it may sometimes be permissible to consider the choice of means in defining a statute’s purpose. This Court has in fact frequently included references to legislative means when defining the pith and substance of laws: *Ward*, at para. 28; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (“*Firearms*”), at paras. 4 and 19; *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2002] 2 S.C.R. 669, at para. 34; *2011 Securities Reference*, at para. 106. And there may be cases in which an impugned statute’s dominant characteristic or main thrust is so closely tied to its means that treating the means as irrelevant to the identification of the pith and substance would make it difficult to define the matter of a statute or a provision precisely. In such a case, a broad pith and substance that does not include the means would be the very type of vague and general characterization, like “health” or “the environment”, that this Court described as unhelpful in *Desgagnés Transport*, at paras. 35 and 167 (citing *Assisted Human Reproduction Act*, at para. 190).

[54] Even this Court’s jurisprudence on the national concern doctrine illustrates that there is nothing impermissible about defining a matter with reference to the legislative means. In *Munro v. National Capital Commission*, [1966] S.C.R. 663, the Court defined the matter in terms of both the overarching objective — ensuring that “the nature and character of the seat of the Government of Canada may be in accordance with its national significance” — and the legislative means for achieving this objective — “development, conservation and improvement of the National Capital Region”: pp. 669 and 671. Similarly, in *Crown Zellerbach*, the Court did not define the matter of the statute broadly in terms of marine pollution. The definition of the matter was in fact a combination of the overarching purpose — controlling marine pollution — and the particular means that had been chosen — controlling the dumping of substances into the sea: pp. 436-37. La Forest J., dissenting, pointed out that regulating the dumping of substances into the sea was only one of multiple means to control marine pollution, given that pollution could also enter the sea through fresh water and through the air: p. 457.

[55] I therefore agree with Hoy A.C.J.O.’s statement in the case at bar that in some cases the choice of means may be so central to the legislative objective that the main thrust of a statute or provision, properly understood, is to achieve a result in a particular way, which would justify including the means in identifying the pith and substance: para. 179.

[56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create “a danger that the whole exercise will become blurred and overly oriented towards results”. The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.

(2) Application to the GGPPA

[57] In this case, the judges in the courts below, the parties and the interveners have proposed various formulations of the GGPPA’s pith and substance. These formulations can be grouped in three basic categories: (1) a broad formulation to the effect that the GGPPA’s pith and substance is the regulation of GHG emissions; (2) a national standards-based formulation to the effect that the GGPPA’s pith and substance is to establish minimum national standards to reduce GHG emissions; and (3) a national standards pricing-based formulation to the effect that the GGPPA’s pith and substance is to establish minimum national standards of GHG price stringency to reduce GHG emissions. I would adopt a national standards pricing-based formulation of the pith and substance of the GGPPA. In my view, the true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. Allow me to explain why.

(a) *Intrinsic Evidence*

[58] This Court has frequently used a statute's title as a tool for the purposes of characterization: *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1077; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1004; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 21. However, a statute's title is not determinative in the pith and substance analysis: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 451. In the case at bar, the statute is titled "*Greenhouse Gas Pollution Pricing Act*". Its long title is "*An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts*". Both of these titles confirm that the purpose of the *GGPPA* is more precise than the regulation of GHG emissions. As the long title makes clear, the true subject matter of the *GGPPA* is not just "*to mitigate climate change*", but to do so "*through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources*". The short title also makes it clear that the *GGPPA* is concerned not simply with regulating GHG emissions, but with pricing them, as the statute is titled the "*Greenhouse Gas Pollution Pricing Act*". Just as Lamer C.J. found in *Swain*, it is in the instant case clear even from the title of the *GGPPA* that its main thrust is national GHG pricing, not, more broadly, the reduction of GHG emissions.

[59] Likewise, the preamble of the *GGPPA* confirms that its subject matter is national GHG pricing. In general, preambles are useful in constitutional litigation in

order to illustrate the “mischief” the legislation is designed to cure and the goals Parliament sought to achieve: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 14.25; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at pp. 15-14 to 15-15. Although a preamble is not conclusive or determinative, it can be a useful tool in interpreting the purpose of a statute or a provision.

[60] It is clear from reading the preamble as a whole that the focus of the *GGPPA* is on national GHG pricing. The preamble begins with a review of the contribution of GHG emissions to global climate change, of the impact of climate change on — and the risks it poses to — Canada and Canadians (at paras. 1-5), and of the international commitments made by Canada in the *UNFCCC* and the *Paris Agreement* to reduce GHG emissions (paras. 6-8). It then focuses on establishing a minimum national standards GHG pricing scheme. It identifies GHG pricing as “a core element” of the *Pan-Canadian Framework* (at para. 10), and recognizes that climate change requires immediate collective action to promote behavioural change which leads to increased energy efficiency (paras. 9 and 11). After that, pricing mechanisms are commented on at length (at paras. 12-16): in particular, it is noted that some provinces are developing or have implemented GHG pricing systems (at para. 14), but that the absence of such systems or a lack of stringency in some provincial GHG pricing systems could contribute to significant harm to the environment and to human health (para. 15). The preamble concludes with a statement that a national GHG pricing scheme is accordingly necessary in order to ensure that, taking provincial pricing

systems into account, “greenhouse gas emissions pricing applies broadly in Canada”: para. 16.

[61] Furthermore, the “mischief” the *GGPPA* is intended to address is clearly identified in the preamble: the profound nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions. In *Firearms*, the Court stated that the mischief approach — one in which a court considers the problem a statute is intended to address — is one way to determine the purpose of impugned legislation: para. 21. In the instant case, the preamble shows that the law is intended to address the “significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity” that could result from “the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems”: para. 15. In Parliament’s eyes, the relevant mischief is not GHG emissions generally, but rather the effects of the failure of some provinces to implement GHG pricing systems or to implement sufficiently stringent pricing systems, and the consequential failure to reduce GHG emissions across Canada. To address this mischief, the *GGPPA* establishes minimum national standards for GHG pricing that apply across Canada, setting a GHG pricing “floor” across the country.

(b) *Extrinsic Evidence*

[62] In considering extrinsic evidence, a court may consider the statute’s legislative history — the events leading up to its enactment, for example, as well as

government policy papers and legislative debates — in order to determine what the legislative purpose is: Hogg, at pp. 15-14 to 15-15; *Kitkatla*, at para. 53. In the case at bar, the extrinsic evidence confirms that the main thrust of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions.

[63] First, it can be seen from the events leading up to the enactment of the *GGPPA* and from government policy papers that there was a focus on GHG pricing and establishing a national GHG pricing benchmark, and that GHG pricing is a distinct portion of the field of governmental responses to climate change. In the *Paris Agreement*, states made general international commitments to reduce GHG emissions. They are not required to adopt GHG pricing systems; rather, they are free to choose their preferred means. Immediately after the adoption of the *Paris Agreement*, however, the First Ministers endorsed the *Vancouver Declaration*, in which they recognized that governments in Canada and around the world were using carbon pricing mechanisms to combat climate change, and Canada and the provinces committed to adopting “a broad range of domestic measures, including carbon pricing mechanisms” in order to reduce GHG emissions: at p. 3 (emphasis added). Moreover, the signers of the *Vancouver Declaration* clearly recognized carbon pricing as a distinct aspect of the field of governmental responses to climate change by establishing a working group on carbon pricing mechanisms that was independent of other working groups on clean technology, innovation and jobs, on specific opportunities for mitigation of climate change, and on adaptation to climate change and climate resilience.

[64] The Working Group on Carbon Pricing Mechanisms was established to explore the role of carbon pricing mechanisms in meeting Canada's GHG emissions reduction targets under the *Paris Agreement*. In its final report, the Working Group identified carbon pricing as one of the most efficient policy approaches for reducing GHG emissions and advocated for broad-based carbon pricing mechanisms across Canada that would give each province and territory flexibility on instrument choice. The federal government then endorsed this recommendation in both the *Pan-Canadian Approach* and the *Pan-Canadian Framework*, and the *Pan-Canadian Approach* introduced a federal benchmark for carbon pricing. Each province and territory would have flexibility to implement either a direct or an indirect carbon pricing system that would have a common scope to ensure effectiveness and minimize interprovincial competitiveness impacts, while a federal backstop, a direct carbon pricing system, would apply only in jurisdictions that did not meet the federal benchmark. This approach would ensure that GHG pricing would be applied across the Canadian economy, and it would recognize GHG pricing policies already implemented or being developed by provinces or territories. The *Pan-Canadian Framework* reaffirmed the *Pan-Canadian Approach* and outlined the federal benchmark for carbon pricing in greater detail. In the *Pan-Canadian Framework*, the federal government reiterated the need for a regulatory framework for carbon pricing that priced GHG emissions across the Canadian economy, highlighted the federal commitment to "ensuring that the provinces and territories have the flexibility to design their own policies and programs to meet emission-reductions targets" and stated that the purpose of the federal benchmark was to preserve the flexibility of the provinces and territories to design their

own GHG pricing policies: Foreword and pp. 7-8. Each province or territory would have flexibility to implement a direct or indirect GHG pricing system within its borders. A federal direct GHG pricing backstop would apply in jurisdictions that did not meet the benchmark.

[65] In my view, it is clear from the Working Group's final report, the *Pan-Canadian Approach* and the *Pan-Canadian Framework* that the federal government's intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions — through a federally imposed national direct GHG pricing backstop — without displacing provincial and territorial jurisdiction over the choice and design of pricing instruments. Courts should generally hesitate to attribute to Parliament an intention to occupy an entire field: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 20. In the instant case, this statement rings all the more true because the extrinsic evidence of the lead-up to the enactment of the *GGPPA* reveals a process of federal-provincial-territorial cooperation in which the federal government's goal was a system where the provincial and territorial governments would be free to design and implement their own GHG pricing programs.

[66] Second, it can also be seen from the legislative debates leading up to the *GGPPA* that the focus of the statute was not broadly on regulating GHG emissions or establishing minimum national standards to reduce GHG emissions, but was, rather, on

establishing minimum national standards of GHG price stringency. During the parliamentary debate on the *GGPPA*, the then Minister of Environment and Climate Change, the Hon. Catherine McKenna, indicated that pricing carbon pollution was “[c]entral to any credible climate plan” and was “a major contribut[or] to helping Canada meet its climate targets under the Paris Agreement”: *House of Commons Debates*, vol. 148, No. 289, 1st Sess., 42nd Parl., May 1, 2018, at p. 18958. The then Parliamentary Secretary to the Minister of the Environment and Climate Change, Jonathan Wilkinson, echoed these comments. He observed that, “[t]o ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon”: *House of Commons Debates*, vol. 148, No. 294, 1st Sess., 42nd Parl., May 8, 2018, at p. 19213 (emphasis added). What is more, he identified carbon pricing as a distinct part of the field of governmental responses to climate change, stating that “the focus of the pricing of carbon pollution is to actually incent choices that drive people toward more efficient use of hydrocarbon resources so that we will reduce our GHG emissions over time. It is an important piece of a broader approach to addressing climate change and to achieving our Paris targets”: p. 19214 (emphasis added).

[67] Similarly, before the House of Commons Standing Committee on Finance, Judy Meltzer, the then Director General, Carbon Pricing Bureau, Department of the Environment, observed that the *GGPPA* was “a step in the development of a federal carbon pricing backstop system” and that “[t]he key purpose of the [*GGPPA*] is to help reduce [GHG] emissions by ensuring that a carbon price applies broadly throughout

Canada, with increasing stringency over time”: House of Commons, Standing Committee on Finance, *Evidence*, No. 146, 1st Sess., 42nd Parl., April 25, 2018, at p. 6 (emphasis added). And finally, before the same Standing Committee, John Moffet, the then Associate Assistant Deputy Minister, Environmental Protection Branch, Department of the Environment, expressed the opinion that “the government’s goal was to ensure that carbon pricing applied throughout Canada” as well as “to send a signal to other countries and businesses planning to invest in Canada that Canada was committed to carbon pricing”: House of Commons, Standing Committee on Finance, *Evidence*, No. 148, 1st Sess., 42nd Parl., May 1, 2018, at p. 5 (emphasis added). He also mentioned another goal of the *GGPPA*, that is, to “make a contribution, but not be the sole contributor to attaining the [*Paris*] target”: House of Commons, Standing Committee on Finance, *Evidence*, No. 152, 1st Sess., 42nd Parl., May 8, 2018, at p. 8.

[68] Although statements made in the course of parliamentary debates should be viewed with caution, given that the purpose of the statute is that of Parliament, not that of its individual members, such statements can nonetheless be helpful in discerning Parliament’s purpose: *Genetic Non-Discrimination*, at paras. 40 and 194; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.), at p. 131; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 47. In the case at bar, it is notable that both elected representatives and senior public servants consistently described the purpose of the *GGPPA* in terms of imposing a Canada-wide GHG pricing system, not of regulating GHG emissions generally.

[69] As an aside, I note that in finding that the *GGPPA* is *ultra vires* Parliament, the majority of the Court of Appeal of Alberta did not deny that Parliament was concerned with setting a minimum national GHG pricing standard in enacting the legislation. But they found that Parliament’s focus on GHG pricing was merely a means to achieve its ultimate purpose of reducing GHG emissions and mitigating the effects of climate change: paras. 213-14. As I explained above, however, a court should characterize the pith and substance — including the purpose being pursued by Parliament or the provincial legislature — precisely. The fact that Parliament’s purpose can be stated at multiple levels of generality does not mean that the most general purpose is the true one, or the one that most accurately reflects the thrust of the legislation. This Court has in fact often declined to attribute the broadest possible purpose to Parliament: see *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 130. When characterizing a matter, a court must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do. Here, that means not denying that Parliament ultimately intended to reduce GHG emissions but, rather, recognizing that its goal in enacting this particular statute was to establish minimum national standards of GHG price stringency to reduce GHG emissions.

(c) *Legal Effects*

[70] A law’s legal effects are discerned from its provisions by asking “how the legislation as a whole affects the rights and liabilities of those subject to its terms”:

Morgentaler, at p. 482. In my view, the legal effects of the *GGPPA* confirm that its focus is on national GHG pricing and confirm its essentially backstop nature.

[71] In jurisdictions where Parts 1 and 2 of the *GGPPA* are applied, the primary legal effect is to create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy. Certain fuel producers, distributors and importers are required to pay a charge for fuel and for combustible waste under Part 1. And as I explained earlier, the OBPS created by the *OBPS Regulations* made under Part 2 creates a complex exemption to Part 1: covered industrial facilities are exempt from the flat fuel charge under Part 1 of the *GGPPA*, but must pay a charge that applies to the extent that they fail to meet applicable GHG efficiency standards. Both Part 1 and Part 2 of the *GGPPA* thus directly price GHG emissions. Part 1 directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards. Significantly, the *GGPPA* does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all the *GGPPA* does is to require persons to pay for engaging in specified activities that result in the emission of GHGs. As the majority of the Court of Appeal for Saskatchewan observed, the *GGPPA* leaves “individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace”: para. 160. The legal effects of the *GGPPA* are thus centrally aimed at pricing GHG emissions nationally. The *GGPPA* does not

represent an attempt to occupy other areas of the field of GHG emissions reduction that were discussed in the *Pan-Canadian Framework*, such as tightening energy efficiency standards and codes, taking sector-specific action with respect to electricity, buildings, transportation, industry, forestry, agriculture, waste and the public sector, and promoting clean technology innovation: pp. 2-3 and 7-25.

[72] Moreover, because the *GGPPA* operates as a backstop, the legal effects of Parts 1 and 2 of the statute — a federally imposed national GHG pricing scheme — apply only if the Governor in Council has listed a province or territory pursuant to s. 166 for Part 1 or s. 189 for Part 2. The *GGPPA* provides that the Governor in Council may make decisions with respect to listing only “[f]or 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)) and must, in making them, “take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions” (ss. 166(3) and 189(2)). As a result, the GHG pricing mechanism described in Parts 1 and 2 of the *GGPPA* will not come into operation at all in a province or territory that already has a sufficiently stringent GHG pricing system. Not only does this confirm the backstop nature of the *GGPPA* — that of creating minimum national standards of GHG pricing — but this feature of the statute gives legal effect to the federal government’s commitment in the *Pan-Canadian Framework* to give the provinces and territories “the flexibility to design their own policies to meet emissions reductions targets, including carbon pricing, adapted to each province and territory’s specific circumstances”, as well as to “recognize carbon

pricing policies already implemented or in development by provinces and territories”: pp. 7-8.

[73] It is notable that the *GGPPA* does not itself define the word “stringency” used in ss. 166 and 189. But this does not mean that the Governor in Council’s discretion with respect to listing is “open-ended and entirely subjective”: *Alta. C.A.* reasons, at para. 221. Rather, the Governor in Council’s discretion is limited both by the statutory purpose of the *GGPPA* and by specific guidelines set out in the statute for listing decisions: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 108; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24. Specifically, the discretion to list a province or territory must be exercised in a way that is consistent with the statutory purpose of reducing GHG emissions by putting a price on them. And any decision of the Governor in Council with respect to listing would have to be consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor: preamble, para. 16, and ss. 166 and 189. Moreover, because the *GGPPA* provides for a legal standard to be applied in assessing provincial and territorial pricing mechanisms, any decision of the Governor in Council in this regard would be open to judicial review to ensure that it is consistent with the purpose of the *GGPPA* and with the specific constraints set out in ss. 166(2) and (3) and 189(1) and (2). In other words, although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance

with the purpose for which it was given. The Governor in Council certainly does not, therefore, have “absolute and untrammelled ‘discretion’”: *Vavilov*, at para. 108, quoting *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140.

[74] Similarly, the Governor in Council’s discretion under the *GGPPA* to make regulations modifying the schedules and, in some cases, provisions of the statute itself does not make the pith and substance of the *GGPPA* broader. Nor does it permit the Governor in Council to include “any substance, material or thing known to mankind” in the system under Part 1 or to boundlessly change the coverage of Part 2 of the *GGPPA* by adding gases or redefining what qualifies as a covered facility in a way that is unrelated to the underlying purpose of the statute: *Alta. C.A.* reasons, at paras. 227 and 237.

[75] Under Part 1 of the *GGPPA*, the Governor in Council has the discretion to make regulations prescribing anything that is to be prescribed or determined by regulation under that Part (s. 166(1)(a)), including regulations in relation to the fuel charge system (s. 168(2)), regulations modifying the listed types of fuel and the rates of charge in Sch. 2 (ss. 166(4) and 168(3)(a)), and regulations defining words or expressions used in Part 1 of the *GGPPA*, in Part 1 of Sch. 1, or in Sch. 2 (s. 168(3)(a) and (b)). First, no aspect of this discretion permits the Governor in Council to regulate GHG emissions broadly in any way other than by implementing a GHG pricing scheme. Second, any exercise of the power to make regulations under Part 1 of the *GGPPA* is constrained by that Part’s own words and statutory purpose. Part 1, as its

very title indicates, establishes a “Fuel Charge”. Any exercise of the regulation-making power that prescribed substances other than fuel or combustible waste would be open to judicial review and could be found to be *ultra vires* the *GGPPA*. Similarly, the Governor in Council could not list a fuel or substance that does not emit GHGs when burned; any regulation to that effect would be *ultra vires* the *GGPPA*, whose purpose is to reduce GHG emissions by putting a price on GHGs.

[76] The Governor in Council also has a discretion under Part 2 of the *GGPPA*, that is, the discretion to make orders adding GHGs to, or deleting them from, Sch. 3 or amending the global warming potential of any gas while taking into account any factor the Governor in Council considers appropriate (ss. 190(1) and (2)), amending an excess emissions payments charge in, or adding calendar years to, Sch. 4 (s. 191), or making regulations pertaining to a number of aspects of the OBPS, including covered facilities, GHG emissions limits, the quantification of GHGs, the circumstances under which GHGs are deemed to have been emitted by a facility, compensation, and permitted transfers of compliance units (s. 192). First, as with Part 1 of the *GGPPA*, no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country. Instead, the OBPS uses GHG intensity standards to set emissions limits and price emissions beyond those limits in order to create incentives for behavioural change across industries. Industrial entities can determine whether to increase their efficiency or to pay to exceed their applicable efficiency standard emission limits. Second, the power to make orders

concerning which gases Part 2 applies to is also limited by the statutory purpose of reducing GHG emissions through GHG pricing. If the Governor in Council were to list a gas that does not contribute to GHG emissions or to indicate a figure for the global warming potential of a gas that was unsupported by scientific evidence, the regulation would be open to judicial review. As for the power to redefine what qualifies as a covered facility, it must be understood in light of the title of Part 2, which specifies that the focus is on “Industrial Greenhouse Gas Emissions”. Any attempt to extend Part 2 to a facility other than an industrial facility would also be *ultra vires* the *GGPPA* and open to judicial review.

(d) *Practical Effects*

[77] A law’s practical effects are “‘side’ effects flow[ing] from the application of the statute which are not direct effects of the provisions of the statute itself”: *Kitkatla*, at para. 54. Where, as here, a court is asked to adjudicate the constitutionality of legislation that has been in force for only a short time, “any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation”: *Morgentaler*, at p. 486.

[78] In my view, the evidence of practical effects in the case at bar is not particularly helpful for characterizing the *GGPPA*. Given the dearth of such evidence, it would be unwise to attempt to predict the economic consequences of the *GGPPA*. It is, moreover, not for the Court to assess how effective the *GGPPA* is at reducing GHG emissions: *Firearms*, at para. 18.

[79] Nonetheless, it should be noted that the evidence of practical effects to date is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes. Practically speaking, the only thing not permitted by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent. The federal backstop GHG pricing regime in Parts 1 and 2 of the *GGPPA* does not have a legal effect to the extent that there is a provincial system of comparable stringency in place, whatever its design. For example, the Governor in Council has declined to list Alberta under Part 2 of the *GGPPA*, because Alberta's self-designed Technology Innovation and Emissions Reduction ("TIER") system is considered to meet federal stringency requirements: Alberta, *TIER Regulation Fact Sheet*, July 2020 (online). The government of Alberta has itself described the TIER system as one "that is cost-efficient and tailored to Alberta's industries and priorities": *TIER Regulation Fact Sheet*. Similarly, Part 2 applies only partially in Saskatchewan, because that province has implemented its own output-based performance standards system for large industrial facilities. Part 2 applies only to electricity generation and natural gas transmission pipelines, which are exempt from Saskatchewan's self-designed system: Sask. C.A. reasons, at para. 50; see also Environment and Climate Change, *Saskatchewan and pollution pricing*, February 21, 2019 (online).

(e) *Conclusion on Pith and Substance*

[80] For the foregoing reasons, I conclude that the true subject matter of the *GGPPA* is establishing minimum national standards of GHG price stringency to reduce GHG emissions. With respect, I cannot accept the broader characterizations of the *GGPPA* advanced by the majorities of the Court of Appeal for Ontario and the Court of Appeal of Alberta. Not only is GHG pricing central to the *GGPPA*, but Parts 1 and 2 of the statute operate as a backstop by creating a national GHG pricing floor. In my view, a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions. Rather, it is the entire matter to which the *GGPPA* is directed, as is evident from the analysis of the purpose and effects of the statute. It is also the most precise characterization of the subject matter of the *GGPPA*, as it accurately reflects both what the statute does — imposing a minimum standard of GHG price stringency — and why the statute does what it does — reducing GHG emissions in order to mitigate climate change: see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“*COPA*”), at para. 17.

[81] I would pause here to note that my colleague Brown J. argues that the phrase “minimum national standards” is an artifice that adds nothing to the pith and substance of the *GGPPA*. I respectfully disagree. Here, “minimum national standards” gives expression to the national backstop nature of the *GGPPA*. In my view, this phrase adds something essential to the pith and substance that goes to the true subject matter of the *GGPPA*, because the statute operates as a national backstop that gives effect to Parliament’s purpose of ensuring that GHG pricing applies broadly across Canada.

“Minimum national standards” expresses the fact that the *GGPPA* functions through the imposition of an outcome-based minimum legal standard on all provinces and territories at all times. This contrasts with the proposed federal legislation the Court considered in *2011 Securities Reference*, which had not been enacted to impose a unified system of securities regulation for Canada that would apply in all the provinces and territories, but would instead have permitted provinces to opt in, in the hope that this would create an effective unified national securities regulation system: para. 31. By contrast, the *GGPPA* applies in all the provinces at all times. It is “national” in scope. At the same time, the backstop system set out in the *GGPPA* also gives the provinces flexibility by allowing them to implement their own GHG pricing mechanisms, provided they meet the federally determined standard of stringency. It imposes “minimum standards”. In this way, the *GGPPA* does not create a blunt unified national system. The national GHG pricing system provided for in it is limited to the imposition of minimum national standards of stringency.

[82] Moreover, the legislation in this case is distinguishable from the equivalency provision of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), that was considered in *Hydro-Québec*. In that case, the equivalency provision was but one feature of the federal legislation at issue, which had a broader pith and substance of prohibiting acts causing the entry of certain toxic substances into the environment: para. 130. In the instant case, as I have mentioned, the *GGPPA* operates as a backstop. The intrinsic evidence, the extrinsic evidence, the legal effects and the practical effects all illustrate that operation as a backstop is the main thrust and

dominant characteristic of the *GGPPA*. In my view, a mechanism that may be a mere feature of one law can be the defining feature of another law such that it goes to that other law's pith and substance. The evidence in this case clearly shows that Parliament acted with a remedial mindset in order to address the risks of provincial non-cooperation on GHG pricing by establishing a national GHG pricing floor.

[83] I also note here that my colleague Côté J. finds that ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional delegations of power to the Governor in Council (at para. 242). I respectfully disagree.

[84] First, it is necessary to review the concept of delegation. As this Court explained in *2018 Securities Reference*, the principle of parliamentary sovereignty “means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations”: para. 73 (emphasis in original). Delegation is common in the administrative state: *ibid*. As this Court further explained, “a delegated power is rooted in and limited by the governing statute [T]he sovereign legislature always ultimately retains the complete authority to revoke any such delegated power”: para. 74.

[85] This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. In *Hodge v. The Queen*, (1883) 9 App. Cas. 117, the starting point of the jurisprudence on delegated

authority, the Privy Council found that the Ontario legislature's delegation of power to a board to regulate and license taverns was constitutional. The Privy Council held that delegating the power to make "important regulations" did not amount to an abdication of the legislature's role and that the choice and the extent of any such delegation were matters for the legislature, not the courts. Next, in *Re George Edwin Gray* (1918), 57 S.C.R. 150, this Court affirmed the constitutionality of a very broad grant of law-making power by Parliament to the Governor in Council that included a "Henry VIII clause", that is, a clause by which Parliament delegates to the executive the power to make regulations that amend an enabling statute: see also *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.), in which a broad delegation to the provincial executive by way of a provincial skeletal statute was upheld. This Court affirmed and applied *Re Gray* in *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1. And in *R. v. Furtney*, [1991] 3 S.C.R. 89, Stevenson J., writing for a unanimous Court, commented in obiter that "[t]he power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in relation to Chemicals*. The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn": p. 104 (citations omitted). This governing law has been consistently applied by courts of appeal: see, e.g., *R. v. P. (J.)* (2003), 67 O.R. (3d) 321, at paras. 20-23 (C.A.); *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2010 FCA 334, [2012] 2 F.C.R. 618, at para. 63; *House of Sga'nisim v. Canada (Attorney General)*, 2013 BCCA 49, 41 B.C.L.R. (5th) 23, at paras. 89-91.

[86] None of the impugned provisions are unconstitutional delegations of power to the Governor in Council. Sections 166(2), 166(4) and 192 of the *GGPPA* are permissible delegations of law-making power to the Governor in Council to implement Parliament's policy choice to legislate a nationwide GHG pricing backstop. Section 166(2) and s. 166(4) allow the Governor in Council to determine where and to what the fuel charge established and detailed in Part 1 of the statute applies. Section 192 permits the Governor in Council to make regulations to implement the OBPS established in Part 2 of the *GGPPA*. Legislatures frequently include provisions with a similar regulation-making scope to that of s. 192 in complex environmental legislative schemes: see, e.g., *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 175.1 to 177 (provisions that have been used to develop a scheme equivalent to the OBPS in *Greenhouse Gas Emissions Performance Standards*, O. Reg. 241/19); *Carbon Tax Act*, S.B.C. 2008, c. 40, s. 84; *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29, ss. 46 to 53; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 37(1), 59, 86, 120, 122(1), 133, 146, 162, 166, 175, 187, 193 and 239; *Environment Quality Act*, CQLR, c. Q-2, s. 46.5 (a provision used to develop Quebec's cap-and-trade system in *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*, CQLR, c. Q-2, r. 46.1). Indeed, it is common for a statute to "set out the legislature's basic objects and provisions", while "most of the heavy lifting [is] done by regulations, adopted by the executive branch of government under orders-in-council": B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online).

[87] To the extent that the *GGPPA* delegates to the executive the power to make regulations that amend the statute, such as in s. 168(4), this too, constitutes a permissible delegation to the Governor in Council. As I explained above, the constitutionality of Henry VIII clauses is settled law, and I would decline to revisit the issue in this case. Furthermore, the power to make regulations under a Henry VIII clause is not exempted from the general rules of administrative law. Any regulation that is made must be consistent both with specific provisions of the enabling statute and with its overriding purpose or object (*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266 (B.C.S.C.), at p. 292, quoted in *Katz Group*, at para. 24), and it must be “within the scope [of] and subject to the conditions prescribed” by that statute (*Re Gray*, at p. 168). Therefore, the scope of the authority delegated in s. 168(4) is limited by and subject to the provisions of the *GGPPA*. The Governor in Council cannot use s. 168(4) of the *GGPPA* to alter the character of Part 1 of the statute, since any exercise of this authority to make regulations that are inconsistent with either the general purpose of reducing GHG emissions through the specific means of establishing minimum national standards of GHG price stringency would be *ultra vires* the *GGPPA* and open to judicial review. Moreover, the Governor in Council’s power under s. 168(4) can be revoked by Parliament.

[88] In the case at bar, Parliament, far from abdicating its legislative role, has in the *GGPPA* instituted a policy for combatting climate change by establishing minimum national standards of GHG price stringency. Sections 166(2), 166(4), 168(4) and 192 of the *GGPPA* simply delegate to the executive a power to implement this

policy. This delegation of power is within constitutionally acceptable limits and the general rules of administrative law apply to constrain the Governor in Council's discretion under all of these provisions.

C. *Classification of the GGPPA*

(1) National Concern Doctrine

[89] Canada argues that the *GGPPA* is constitutional on the basis of the national concern doctrine. This doctrine is derived from the introductory clause of s. 91 of the Constitution, which empowers Parliament “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 power”). According to the doctrine, the federal government has jurisdiction over matters that are found to be of inherent national concern. As Professor Hogg explains, it “is residuary in its relationship to the provincial heads of power”: at p. 17-1 to 17-2. Therefore, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces under s. 92. The national concern test is the mechanism by which matters of inherent national concern, which transcend the provinces, can be identified.

[90] The effect of finding that a matter is one of national concern is permanent: see *Re: Anti-Inflation Act*, at pp. 460-61. For this reason, a finding that the federal

government has authority on the basis of the national concern doctrine raises special concerns about maintaining the constitutional division of powers. As La Forest J. put it in *Crown Zellerbach*, when the federal government asserts its authority on this basis, “[t]he challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution” (p. 448). By grappling with this challenge over time, the courts have developed a workable framework for identifying federal authority on the basis of the national concern doctrine in appropriate, exceptional cases *and* for adequately constraining federal power in accordance with the principle of federalism.

[91] Below, I will trace the development of this framework, beginning with a discussion of the origins of the doctrine in Privy Council cases. I will then review how this Court has dealt with the doctrine, consistently taking a restrained approach to applying it while gradually developing its legal framework. Next, I will identify and clarify some areas of ongoing uncertainty with respect to the national concern doctrine and review the test for applying it. Lastly, I will apply the test to determine whether the *GGPPA* represents a valid exercise of a federal power based on the national concern doctrine.

(a) *Origins of the National Concern Doctrine*

[92] The first two cases in which the Privy Council dealt with the national concern doctrine, *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), and *Attorney-*

General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348 (P.C.) (“*Local Prohibition Reference*”), speak to the potential for expansion of federal power on the basis of the doctrine and to the importance of placing adequate constraints on that power.

[93] The issue in *Russell* was the constitutionality of the *Canada Temperance Act*, 1878, S.C. 1878, c. 16, a federal statute establishing a local-option prohibition scheme, that is, one that required local action in order to come into force in a given county or city. Sir Montague Smith noted that the scope and objects of the law were general — “to promote temperance by means of a uniform law throughout the Dominion” — and that intemperance was “assumed to exist throughout the Dominion”: pp. 841-42. He concluded that the law fell within federal jurisdiction: “Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it” (p. 841). As commentators have noted, the reasoning in *Russell* appeared to open the door to a potentially unlimited scope of federal power: A. S. Abel, “What Peace, Order and Good Government?” (1968), 7 *West. Ont. L. Rev.* 1, at pp. 4-5; Hogg, at pp. 17-8 to 17-12.

[94] The next time the Privy Council considered the national concern doctrine, it recognized the potential breadth of the federal power as defined in *Russell* and sounded a strong note of caution. *Local Prohibition Reference* concerned the constitutionality of a provincial local-option prohibition scheme. The Privy Council accepted “that some matters, in their origin local and provincial, might attain such

dimensions as to affect the body politic of the Dominion” and therefore to fall under federal jurisdiction on the basis of the national concern doctrine: p. 361. However, Lord Watson recognized the risk the national concern doctrine represented for the division of powers in no uncertain terms: a failure to properly confine its application “would practically destroy the autonomy of the provinces”: p. 361. He stressed that federal authority based on the national concern doctrine must be “strictly confined to such matters as are unquestionably of Canadian interest and importance” (p. 360) and urged courts to exercise “great caution . . . 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 [a] matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada” (p. 361). The Privy Council upheld the provincial legislation at issue in that case. Applying the double aspect doctrine, it held that provinces could regulate traffic in alcohol from a local point of view where there was no issue with respect to federal paramountcy: pp. 365-70; see also Hogg, at pp. 17-8 to 17-9.

[95] The cautious approach urged in *Local Prohibition Reference* was reflected in the rejection of federal jurisdiction over the regulation of insurance in *In Re “Insurance Act, 1910”* (1913), 48 S.C.R. 260 (“*Insurance Reference SCC*”), aff’d *Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (“*Insurance Reference PC*”). In a majority opinion that was subsequently affirmed by the Privy Council, Duff J. rejected the idea that the growth of the insurance business to “great proportions” across Canada should ground the application of the POGG power:

p. 304. Duff J. was alive to the risk that an unconstrained approach to that power could result in a continual expansion of federal jurisdiction over the provincial private sector simply as a consequence of business growth.

[96] As Professor G. Le Dain wrote before being appointed to this Court, although it had been decided in the Insurance References that “mere growth and extent was not to be the criterion for the application of the general power”, the criterion that should be applied was not yet clear: “Sir Lyman Duff and the Constitution” (1974), 12 *Osgoode Hall L.J.* 261, at p. 277. The need to be cautious in applying the national concern doctrine followed from *Local Prohibition Reference*, but the limits on the federal power were not fully defined. In a series of cases over the next few decades, the Privy Council, searching for a “concrete, specific and restrictive criterion” in order to limit federal power based on the POGG clause, sought to restrict its application of that clause to emergencies: Le Dain, at pp. 277-81; see also Hogg, at p. 17-9.

[97] These cases did not satisfactorily reconcile the emergency requirement with the reasoning in *Russell* and *Local Prohibition Reference*. The Privy Council ultimately confronted this problem in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (“*Canada Temperance Federation*”). In that case, the issue was the constitutionality of a substantially similar successor to the temperance statute that had been considered in *Russell*. Viscount Simon rejected an argument that the POGG power could apply only in an emergency. In the critical passage of his reasons, he stated the test as follows:

. . . 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 (as, for example, in the *Aeronautics* case and the *Radio* case), 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 on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. [Citations omitted; pp. 205-6.]

Some of the examples Viscount Simon listed, such as war, would of course satisfy an emergency requirement. The precise distinction between emergency cases and national concern cases was ultimately clarified some decades later: see *Re: Anti-Inflation Act*, at pp. 459-461. But the holding of *Canada Temperance Federation* with respect to national concern is clear: an emergency is not required for a case to meet the national concern test; instead, the test is whether the real subject matter of the legislation goes beyond provincial concern and is, from its inherent nature, the concern of the country as a whole. On this basis, Viscount Simon firmly established national concern as a distinct branch of the POGG power that grounded federal jurisdiction over matters that were inherently of national concern.

(b) *Early Application of the National Concern Doctrine by the Court*

[98] This Court stepped into its role as the final court of appeal for Canada in 1949. Over the next two decades, there were only two matters that the Court, relying on the *Canada Temperance Federation* test and heeding the concern for provincial

autonomy highlighted in *Local Prohibition Reference*, found to come within federal jurisdiction on the basis of national concern. The first was aeronautics (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292). The second was the development of the National Capital Region: *Munro*, at p. 671. In the same period, Canadian lower courts identified a third matter of national concern, the control of atomic energy: *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board*, [1956] O.R. 862 (H.C.); *Denison Mines Ltd. v. Attorney-General of Canada*, [1973] 1 O.R. 797 (H.C.).

[99] Ten years after *Munro*, the Court applied the national concern doctrine again, for the first time in the environmental context: *Interprovincial Co-operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477. The issue was whether Manitoba could legislate in relation to pollution that originated outside its provincial boundaries but caused damage within them. The majority in the result, in reasons written by Pigeon J., held that a province has no authority to legislate in relation to acts done outside the province, even if those acts cause damaging pollution to enter the province. Pigeon J. recognized that the federal government can legislate in relation to the pollution of interprovincial rivers, which he described as “a pollution problem that is not really local in scope but truly interprovincial”: p. 514. The concurring and dissenting judges also endorsed the view that the federal government has jurisdiction over interprovincial rivers: pp. 499, 520 and 525-26. Although none of the judges explicitly referenced the POGG power, the application of that power explains the result: *Crown Zellerbach*, at pp. 445-46, per La Forest J. (dissenting, but not on this point); *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1099; W. R. Lederman, “Unity and

Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975), 53 *Can. Bar Rev.* 597, at p. 614.

[100] In applying *Canada Temperance Federation* in its decisions, this Court confirmed that an emergency is not needed in order for a matter to be of national concern, and offered some incremental guidance on the criteria for identifying a matter that is inherently of national concern. Moreover, although the Court did find that the federal government had jurisdiction in a small number of cases in that period, it “exhibited the caution and restraint” displayed in the Privy Council’s approach to the doctrine: Lederman, at p. 609.

(c) *Development of the National Concern Test*

[101] The specific parameters of the limits on the federal power began to take shape in *Re: Anti-Inflation Act*, which marked the Court’s first serious effort to wrestle with the national concern doctrine. The issue was the constitutionality of the federal *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, the purpose of which was to comprehensively contain and reduce inflation. A majority of the Court upheld the law as a valid exercise of Parliament’s POGG power on the basis of the existence of an emergency. Although Beetz J. dissented in the result, his views on the national concern doctrine were endorsed by a majority of the Court.

[102] As in the cases discussed above, Beetz J. stressed the threat the national concern doctrine poses to provincial autonomy. In an emergency case, federal

jurisdiction on the basis of the POGG power is temporary, but the national concern doctrine involves a finding of federal jurisdiction that is permanent: p. 461. Beetz J. emphasized that federal jurisdiction over a matter of national concern is exclusive. Thus, if the federal government were found to have jurisdiction over the proposed matter of “containment and reduction of inflation”, then “the provinces could probably continue to regulate profit margins, prices, dividends and compensation if Parliament saw fit to leave them any room; but they could not regulate them in relation to inflation which would have become an area of exclusive federal jurisdiction”: pp. 444-45. If broad subjects such as “inflation”, “economic growth” or “protection of the environment” were found to be matters of national concern, the federal-provincial balance “would disappear not gradually but rapidly”: p. 445.

[103] In Beetz J.’s view, the national concern doctrine does not allow for an erosion of provincial autonomy such as that. After reviewing the jurisprudence, he explained that the doctrine applies only to “clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern”: p. 457. Elaborating on the framework for identifying a matter that is inherently of national concern, he found that federal authority based on the national concern doctrine had rightly been reserved for “cases where a new matter was not an aggregate but had 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”: p. 458. The Court also had to consider the scale upon which the new matter permitted Parliament to affect provincial matters so as to preserve the federal-

provincial division of powers. The containment and reduction of inflation failed these tests. It lacked specificity and was instead an aggregate of several subjects, such as monetary policy, public spending and restraint of profits, prices and wages, many of which fell under provincial jurisdiction. Moreover, because its scope was so broad, finding that it was a federal matter “would render most provincial powers nugatory”: p. 458. Although Beetz J.’s views on the national concern doctrine were not determinative in *Re: Anti-Inflation Act*, they were subsequently adopted by Le Dain J. in *Crown Zellerbach*, in which the Court gave further structure to the national concern doctrine.

[104] There were several cases after *Re: Anti-Inflation Act* in which another consideration was applied to limit the application of the national concern doctrine: provincial inability. This test took centre stage in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, in which Estey J. endorsed the following statement by Professor Hogg:

... the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.

(p. 945, quoting *Constitutional Law of Canada* (1977), at p. 261)

In *Labatt Breweries*, the brewing and labelling of beer failed the provincial inability test. It was not “a matter of national concern transcending the local authorities’ power to meet and solve it by legislation”: p. 945. Indeed, the proposed matter did not even

concern the extraprovincial distribution of beer, but instead related to the brewing process itself: pp. 943-45. Likewise, in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, the Court explained that the treatment of drug dependency was not a matter of national concern, because, unlike the illegal trade in drugs, one province's failure to provide treatment facilities would not endanger other provinces' interests: p. 131. Bookending this group of cases is *R. v. Wetmore*, [1983] 2 S.C.R. 284, in which Dickson J., dissenting but not on this point, rejected regulation of the pharmaceutical industry as a matter of national concern. Dickson J. referred both to Beetz J.'s framework and to Professor Hogg's formulation of the provincial inability test, and concluded that the matter failed to meet both standards: p. 296.

[105] *Crown Zellerbach* afforded this Court an opportunity to give structure to the national concern doctrine. At issue was the validity of s. 4(1) of the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, which prohibited the dumping of any substance at sea without a permit. The definition of the word "sea" in that Act excluded fresh waters but included internal marine waters within provincial boundaries. In a split decision, the Court found that the law was valid on the basis of the national concern doctrine. Le Dain J., writing for the majority, restated that doctrine. After surveying the jurisprudence, he set out a framework that now serves as a touchstone for analyzing proposed matters of national concern, determining that the following four conclusions were "firmly established":

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. [pp. 431-32]

Le Dain J. elaborated on the final point, the provincial inability test. He reasoned that provincial inability would be established where a “provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests”: p. 434. He characterized provincial inability as “one of the indicia” of singleness or indivisibility: *ibid*.

[106] Applying this framework to the federal ocean dumping law at issue in that case, Le Dain J. held that the law was valid on the basis of the national concern doctrine. He found that marine pollution in general is clearly a matter of concern to Canada as a whole because of its predominantly extraprovincial and international character. Focusing specifically on “the control of pollution by the dumping of substances in

marine waters, including provincial marine waters”, Le Dain J. concluded that this matter is single and distinctive: p. 436. In a relevant international convention, marine pollution by dumping was treated as a distinct and separate form of water pollution. Marine pollution has its own characteristics and scientific considerations that distinguish it from fresh water pollution. It is indivisible, because there is a close relationship between pollution in provincial internal waters and pollution in the federal territorial sea, and because it is difficult to ascertain by visual observation the boundary between these waters. The distinction in the statute between fresh water and salt water ensured that the matter would have “ascertainable and reasonable limits” so that its impact on provincial jurisdiction would be acceptable: p. 438.

[107] In the more than 30 years since *Crown Zellerbach*, the Court has not found that the federal government has jurisdiction over any new matters of national concern. However, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, the Court accepted the earlier finding by lower courts that atomic energy is a matter of national concern: see *Pronto*; *Denison*. In accepting the applicability of the national concern doctrine in that case, this Court was unanimous on the point that federal jurisdiction over atomic energy is grounded in the potential for catastrophic interprovincial and international harm. At issue was whether labour relations comprised part of the matter of atomic energy. A majority of the Court held that labour relations falls within that matter of national concern, finding that labour relations is “integral” to the federal interests that make atomic energy a national concern: pp. 340, 352 and 379-80.

[108] Finally, the most recent case in which the Court considered the national concern doctrine was *Hydro-Québec*. At issue was the constitutional validity of Part II of the *Canadian Environmental Protection Act*, which empowered federal ministers to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions. La Forest J., writing for the majority, upheld the law on the basis of the criminal law power and declined to apply the national concern doctrine. He cautioned against an “enthusiastic adoption” of that doctrine, but acknowledged that a “discrete area of environmental legislative power” can form a matter of national concern if it meets the *Crown Zellerbach* test: paras. 115-16.

[109] From the infancy of the national concern doctrine in *Local Prohibition Reference* to the Court’s most recent consideration of the doctrine in *Hydro-Québec*, the jurisprudence reviewed above shows that the Court has been responsive to the legitimate concern that the doctrine poses a threat to provincial autonomy. The national concern test, properly understood, adequately addresses this risk. The test places a clear limit on the federal POGG power and ensures that the national concern doctrine can be applied only in exceptional cases, where doing so is necessary in order for the federal government to discharge its duty to address truly national problems and is consistent with the division of powers.

(2) Clarifying the National Concern Doctrine

[110] The case law reviewed above firmly establishes the national concern doctrine in Canadian law and explains the fundamental principles underlying its application. This doctrine applies only to matters that transcend the provinces owing to their inherently national character. In *Crown Zellerbach*, this Court explained that a proposed matter of national concern must have a “singleness, distinctiveness and indivisibility”. Furthermore, a finding that the matter is one of national concern must be reconcilable with the division of powers.

[111] As can be seen from the decisions of the courts below and from the parties’ arguments, there is significant uncertainty regarding a number of issues that are central to the national concern doctrine. This is unsurprising, given that there are very few recent cases concerning the doctrine, which in turn flows from the fact that one of its defining features is its restrictive application. This case presents an opportunity to clarify these issues.

[112] In particular, each of the steps of the national concern test requires further discussion. Before turning to those steps, however, I must address two preliminary issues with respect to the “matter” in question in the analysis. First, there is some uncertainty about what the “matter” to which the national concern test applies actually is. Second, this case raises the question of the scope and nature of the federal power over a matter of national concern, and in particular whether the double aspect doctrine can apply in this context. In other words, what are the consequences for the division of powers of identifying a new matter of national concern? The answer to this question

will have a significant impact on the analysis undertaken at the final step of the test, at which the court must determine whether finding that the proposed matter is one of national concern is reconcilable with the division of powers.

[113] Throughout my analysis on these issues, I will be relying in part on this Court's trade and commerce jurisprudence, and in particular on *2011 Securities Reference* and *2018 Securities Reference*. As the Court has observed, the national concern doctrine and the trade and commerce power pose similar challenges to federalism. In both contexts, the Court has interpreted the federal power narrowly to ensure that it does not overwhelm provincial jurisdiction and undermine the federal-provincial division of powers: *Re: Anti-Inflation Act*, at p. 458; *Wetmore*, at p. 294. Although the Court has not addressed the national concern doctrine in any detail for many years, the more recent cases of *2011 Securities Reference* and *2018 Securities Reference*, in which it applied the general branch of the trade and commerce power, offer useful insight and are consistent with the modern approach to federalism. However, my citing these cases should not be taken as an invitation to conflate the two powers. They are distinct, and, as Beetz J. warned in *Re: Anti-Inflation Act*, courts should be "all the more careful" when applying the residual POGG power than when interpreting the enumerated trade and commerce power: p. 458.

(a) "*Matter*" of National Concern

[114] As I explained above, the division of powers analysis follows a familiar pathway. The first stage is to characterize the pith and substance, or matter, of the

impugned statute or provision. The second stage is to classify that matter by reference to the heads of power set out in the Constitution. Having identified the pith and substance of the *GGPPA*, I come now to the classification analysis in relation to the national concern doctrine. The Attorney General of Saskatchewan argues that the classification analysis in this context must depart from the usual framework. Rather than assessing whether the matter of the statute can be classified on the basis of the national concern doctrine, Saskatchewan submits that the classification analysis must be applied to a different “proposed head of power” based on the POGG power, one cast at a level of generality that is broader than the matter of the statute: A.F., at para. 58. This approach cannot be accepted. There is no principled basis for departing from the ordinary division of powers analysis to require that the matter of national concern analyzed by the court at the classification stage be broader than the matter of the statute as identified by the court at the characterization stage. Applying the classification analysis to the matter of the statute in the context of the national concern doctrine is consistent with the constitutional text, with the jurisprudence and with the principle of judicial restraint.

[115] First, as to the constitutional text, s. 91 does not provide in the context of the POGG power that Parliament can make laws in relation to *classes of subjects*. Instead, it states that Parliament can make laws for the peace, order, and good government of Canada “in relation to . . . Matters”. Matters and classes of subjects are distinct. Law-making powers are exercisable in relation to matters, which in turn generally come within broader classes of subjects. A matter that falls under the POGG

power necessarily does not come within the classes of subjects enumerated in ss. 91 and 92. This does not mean, however, that the word “matter” has a different meaning in the context of the POGG power. “Matter” is used in ss. 91 and 92 to refer to the pith and substance of legislation: *Firearms*, at para. 16. Nothing in the words of the Constitution supports the construction of a class of subjects under the POGG power that is broader than the matter of the statute. Instead, the text of the Constitution supports the approach of applying the national concern test to the matter of the statute as identified by the court at the characterization stage.

[116] Second, this approach is consistent with the jurisprudence. In the leading cases on the national concern doctrine, the Court focused on the matter of the statute in considering the classification issue. In *Re: Anti-Inflation Act*, the broad matter of containment and reduction of inflation that Beetz J. rejected was not based on a statute whose real focus was narrower, but was in fact what the Attorney General of Canada identified as the matter of the statute at issue: p. 450. In *Crown Zellerbach*, the majority did not find that marine pollution generally was a matter of national concern, but instead found that the specific matter of the *Ocean Dumping Control Act* — the control of marine pollution by the dumping of substances — was one: see p. 436. In those cases, the pith and substance of the legislation itself determined the breadth and content of the matter to which the national concern test was applied.

[117] Third, this approach is consistent with the principle of judicial restraint. In *Munro*, Cartwright J. emphasized on the subject of the national concern doctrine that

the court should “confine itself to the precise question raised in the proceeding which is before it”: p. 672. Similarly, in *Canadian Western Bank*, this Court stated that courts should not attempt to “define the possible scope of [broad] powers in advance and for all time”, but should instead “proceed with caution on a case-by-case basis”: para. 43. The Attorney General of Saskatchewan proposes that the court go beyond the precise question asked. In fact, however, a more cautious approach is appropriate in the context of the national concern doctrine, given its potential to disrupt the federal-provincial balance. Put simply, if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter.

[118] Finally, I respectfully reject the suggestion that this approach somehow conflates the characterization and classification stages: see Ont. C.A. reasons, at para. 224. It does not. As I explained above, the analyses at the two stages are distinct. At the first stage, a court must follow the accepted approach to the pith and substance analysis in order to characterize the matter of the statute. As both Karakatsanis J. and Kasirer J. recently stated in *Genetic Non-Discrimination*, the court must focus on “the law itself and what it is really about”: paras. 31 and 165. Only then does it proceed to the classification analysis, which in the case at bar involves consideration of the national concern doctrine. If the matter is not legally viable as a matter of national concern, then, as was the case in *Re: Anti-Inflation Act*, the statute cannot be upheld on the basis of that doctrine. If, on the other hand, the matter meets the national concern test, then the statute will be valid. Respectfully, this does not “constitutionalize” the

statute: see Ont. C.A. reasons, at para. 224. It simply determines the validity of the law and resolves the question before the court.

[119] Therefore, the matter to consider in this national concern analysis is establishing minimum national standards of GHG price stringency to reduce GHG emissions. I agree with the majority of the Court of Appeal for Saskatchewan that stringency in this context is not limited to the charge per unit of GHG emissions. It encompasses the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies and the authority to implement regulatory schemes that are necessary in order to implement such a charge: para. 139.

(b) *Exclusive Federal Jurisdiction Based on the National Concern Doctrine*

[120] There is no doubt that a finding that a matter is of national concern confers exclusive jurisdiction over that matter on Parliament: *Re: Anti-Inflation Act*, at p. 444; *Crown Zellerbach*, at pp. 433 and 455; *Hydro-Québec*, at para. 115. However, the nature and consequences of this exclusive federal jurisdiction is contested by the parties in this case and requires clarification. Understanding the consequences of the recognition of a new matter of national concern is critical in order to properly undertake the scale of impact analysis at the third step of the national concern test.

[121] Uncertainty about the nature of exclusive federal jurisdiction based on the national concern doctrine may be rooted in the use of the word “plenary” to describe the power in certain cases. In *Crown Zellerbach*, Le Dain J. characterized Beetz J.’s

views in *Re: Anti-Inflation Act* as follows: “. . . where a matter falls within the national concern doctrine . . . Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects” (p. 433). However, Le Dain J. went on to reject the proposition that there must be “plenary jurisdiction . . . to deal with any legislative problem”: p. 434. In *Ontario Hydro*, a majority of this Court concluded that federal jurisdiction based on the national concern doctrine is *not* plenary and does not give Parliament jurisdiction over “all aspects” of, in that case, atomic energy. Instead, the Court had to determine whether the regulation of labour relations falls within the national concern aspects of atomic energy: pp. 340 and 425; see also M. Olsynski, N. Bankes, and A. Leach, “Breaking Ranks (and Precedent): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74” (2020), 33 *J. Env. Law & Prac.* 159, at pp. 180-81; A. Leach, and E. M. Adams, “Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction” (2020), 29 *Const. Forum* 1, at n. 71.

[122] In my view, describing the power as “plenary” is unhelpful. The word “plenary” speaks to the scope of the power: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 28 and 32. As can be seen from *Ontario Hydro*, in the context of the national concern doctrine, the scope of the federal power is defined by the nature of the national concern itself. Only aspects with a sufficient connection to the underlying inherent national concern will fall within the scope of the federal power. It was not a foregone conclusion that labour relations at a

nuclear generating station would fall within the federal government's jurisdiction over atomic energy, as one might expect if the national concern doctrine grounded a "plenary" federal power. Rather, the question was whether the safety concerns that make atomic energy a matter of inherent national concern had a sufficient connection to labour relations to bring labour relations within the scope of the federal power.

[123] The Attorney General of Ontario asserts, as a general proposition, that "[t]he consequences of recognizing a new matter of national concern are sweeping": A.F., at para. 64. It is true that the recognition of any new matter of national concern has consequences for federalism. However, the scope of such consequences is case-specific because, as I have just explained, the scope of the federal power in the context of the national concern doctrine depends on the nature of the national concern at issue in the case in question.

[124] Thus, there is some truth to Ontario's submission in the case of, for example, the national concern matter of aeronautics. But this flows from the particular nature of the matter of aeronautics and not from the general nature of the national concern doctrine. The siting of aerodromes falls within the federal power over aeronautics, not because aeronautics has some predetermined breadth flowing from its status as a matter of national concern, but because the nature of the matter is such that it must include "terrestrial installations that facilitate flight": *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 27. Moreover, in its early case law on aeronautics, this Court held that the siting of aerodromes is not merely

within the scope of the federal power, but is essential to that power, such that the doctrine of interjurisdictional immunity applies: *Johannesson*, at p. 295; *COPA*, at para. 37. The application of interjurisdictional immunity to any federal power has an obvious impact on provincial jurisdiction. But interjurisdictional immunity does not automatically apply to matters of national concern. It was applied in *COPA* because there was a precedent that compelled its application, not because the national concern doctrine required that it be applied. Today's restrained approach to interjurisdictional immunity suggests that it would not apply to a newly identified matter of national concern: *Canadian Western Bank*, at paras. 47 and 77. The example of aeronautics therefore tells us little about the consequences of identifying any other matter of national concern. Sensibly, the national concern test requires a case-specific inquiry into whether the recognition of a particular matter of national concern is reconcilable with the division of powers in the scale of impact analysis.

[125] A closely related question concerns the applicability of the double aspect doctrine to a matter of national concern. The double aspect doctrine “recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power”: *Desgagnés Transport*, at para. 84. If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply: *ibid.*, at para. 85.

[126] In my view, the double aspect doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine, but whether or not it does apply will vary from case to case. This approach fosters coherence in the law, because the double aspect doctrine can apply to every enumerated federal and provincial head of power, including the general branch of the trade and commerce power (e.g., *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 682; *2018 Securities Reference*, at para. 114. See also S. Choudhry, “Recasting social Canada: A reconsideration of federal jurisdiction over social policy” (2002), 52 *U.T.L.J.* 163, at p. 231, fn. 212; S. Elgie, “Kyoto, The Constitution, and Carbon Trading: Waking A Sleeping *BNA* Bear (Or Two)” (2007), 13 *Rev. Const. Stud.* 67, at p. 88), and can also apply in respect of POGG matters (e.g., *Munro; Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161). Applying the double aspect doctrine to the national concern doctrine is also consistent with the modern approach to federalism, which favours flexibility and a degree of overlapping jurisdiction: *Desgagnés Transport*, at para. 4; see also N. J. Chalifour, P. Oliver and T. Wormington, “Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Pricing Act* Appeals” (2020), 40 *N.J.C.L.* 153, at pp. 204-6; Leach and Adams, at p. 6.

[127] The National Capital Region provides a helpful example of the application of the double aspect doctrine in the national concern context. The finding in *Munro* that the development, conservation and improvement of the National Capital Region is a matter of national concern has not displaced municipal planning and development,

which is based on a provincially delegated authority. Instead, the National Capital Commission and the cities of Ottawa and Gatineau each regulate land use planning, the Commission from the federal perspective of the national nature and character of the national capital and the municipalities from a local perspective: J. Poirier, “Choix, statut et mission d’une capitale fédérale: Bruxelles au regard du droit comparé”, in E. Witte et al., eds., *Bruxelles et son statut* (1999), 61, at pp. 73-74; N. J. Chalifour, “Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament’s *Greenhouse Gas Pollution Pricing Act*” (2019), 50 *Ottawa L. Rev.* 197, at p. 234; Leach and Adams, at p. 7.

[128] However, as I noted above, the fact that the double aspect doctrine *can* apply does not mean that it *will* apply in a given case. It should be applied cautiously so as to avoid eroding the importance attached to provincial autonomy in this Court’s jurisprudence. Beetz J. cautioned that it can be applied only “in clear cases where the multiplicity of aspects is real and not merely nominal”: *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766. In some cases, the double aspect doctrine has not been applied where federal jurisdiction fell under the national concern doctrine: e.g., *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 51.

[129] The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter

of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation — in this case by imposing GHG pricing — but the federal law is paramount.

[130] I recognize that it might be argued that Canada and the provinces are exercising their jurisdiction in relation to different matters rather than to different aspects of the same matter, that is, that Canada's authority is limited to minimum national standards of GHG pricing stringency and that this is obviously different than the matters in relation to which provinces might exercise jurisdiction over GHG pricing. This view finds support in some of the language used by this Court, such as the comment in *Canadian Western Bank* that the double aspect doctrine concerns "the various 'aspects' of the 'matter'": para. 30. However, I do not read *Canadian Western Bank* that narrowly, given this Court's recent guidance in *Desgagnés Transport*, in which it stated that the double aspect doctrine concerns "fact situations". Moreover, the fact that Canada can be understood to be empowered to deal only with a different matter than the provinces does not change the resulting jurisdictional reality that where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount. From the perspective of provincial autonomy, the corrosive effect is the same. Therefore, courts must recognize that this amounts to an invitation to identify a

previously unidentified double aspect, with clear consequences for provincial autonomy.

[131] Beetz J.'s caution about the double aspect doctrine thus applies with particular force where Canada asserts jurisdiction over a matter that involves a minimum national standard. In such a case, even if the national concern test would otherwise be met, Beetz J.'s caution should act as an additional check. The court must be satisfied that Canada in fact has a "compelling interest" in enacting legal rules over the federal aspect of the activity at issue and that the "multiplicity of aspects is real and not merely nominal": *Desgagnés Transport*, at para. 85; *Bell Canada*, at p. 766. As I will explain in greater detail below, the court must be satisfied at the scale of impact step that the consequences of finding that the proposed matter is one of national concern are reconcilable with the division of powers.

(3) National Concern Test

[132] I will now turn to the specifics of the test for identifying matters that are inherently of national concern. As I will explain below, the applicable framework involves a three-step process: the threshold question; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. Before detailing these steps, there are two points worth noting about the framework as a whole.

[133] First, the recognition of a matter of national concern must be based on evidence: see K. Swinton, "Federalism under Fire: The Role of the Supreme Court of

Canada” (1992), 55 *Law & Contemp. Probs.* 121, at p. 134; J. Leclair, “The Elusive Quest for the Quintessential ‘National Interest’” (2005), 38 *U.B.C. L. Rev.* 353, at p. 370. I find the Court’s trade and commerce power jurisprudence instructive in this regard. In the 2011 *Securities Reference*, Canada argued that securities trading had once been primarily a local matter, but that it had since evolved to become a “matter of transcendent national concern” that brought it within the trade and commerce power: para. 114. For this argument to succeed, Canada had to “present the Court with a factual matrix” supporting its assertion of jurisdiction: para. 115. In other words, the onus was on Canada to show that the statute at issue “addresses concerns that transcend local, provincial interests” by producing “not mere conjecture, but evidentiary support”: para. 116. Similarly, an onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction.

[134] Second, there is no requirement that a matter be historically new in order to be found to be one of national concern: *Crown Zellerbach*, at p. 432. Moreover, it is not helpful to link historical newness to a finding of federal jurisdiction. Many new developments may be predominantly local and provincial in character and fall under provincial heads of power. As LeBel and Deschamps JJ. wrote in *Assisted Human Reproduction Act* in the context of the federal criminal law power, reasoning that novelty alone justifies federal jurisdiction would upset the federal-provincial balance: paras. 255-56. I agree with scholars who have characterized newness as an unhelpful or neutral factor in the national concern analysis: Hogg, at p. 17-18; K. Lysyk,

“Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority” (1979), 57 *Can. Bar Rev.* 531, at pp. 571-72.

[135] Given that historical newness is irrelevant to the analysis, it may be helpful to explain certain references to “newness” in the jurisprudence. In *Re: Anti-Inflation Act*, Beetz J. spoke of the application of the national concern doctrine only to “new matters” (p. 458), whereas in *Crown Zellerbach*, Le Dain J. spoke of its applying to both “new matters” *and* matters that had “become” matters of national concern (p. 432). Some commentators suggest that *Crown Zellerbach* therefore represents a departure from Beetz J.’s approach: J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003), 28 *Queen’s L.J.* 411, at p. 429; E. Brouillet, *La Négation de la nation: L’identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 295.

[136] In my view, all this confusion stems from what is meant by the word “new”. In *Re: Anti-Inflation Act*, Beetz J. intended “new” to refer to matters that could satisfy the national concern test. This included both “new” matters that did not exist in 1867 and matters that are “new” in the sense that our understanding of those subject matters has, in some way, shifted so as to bring out their inherently national character: see also Hogg, at pp. 17-17 to 17-18. The critical element of this analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new. The use of the word “become” in *Crown Zellerbach* served to articulate that the newness of the matter can also refer to our belated

understanding of a matter's true or inherent nature: see pp. 427-28 and 430-31. This is what Beetz J. meant when he explained that these matters are ones "which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern": *Re: Anti-Inflation Act*, at p. 457 (emphasis added). There is no inconsistency between *Re: Anti-Inflation Act* and *Crown Zellerbach* on this point. To be clear, the national concern doctrine does not allow Parliament to legislate in relation to matters that come within the classes of subjects assigned exclusively to the provinces. The purpose of the analysis is strictly to determine whether a matter is by nature one of national concern.

[137] It follows that the majority of the Court of Appeal of Alberta erred in adding, as a threshold restriction, that matters that originally fell under provincial heads of power other than s. 92(16) of the Constitution are incapable of acquiring national dimensions: para. 185. Instead, the possibility that an existing matter may be found to be one of national concern provides a principled basis for courts to be responsive to new evidence in their application of the constitutional text. This is as it should be: "Constitutional texts must be interpreted in a broad and purposive manner. Constitutional texts must also be interpreted in a manner that is sensitive to evolving circumstances because they 'must continually adapt to cover new realities'": *Comeau*, at para. 52 (citations omitted).

[138] Let us consider atomic energy, the matter of national concern that this Court identified in *Ontario Hydro*. This matter encompasses the mining of raw

materials such as uranium — materials that existed and were mined prior to the discovery of atomic energy. Before World War II, the dominant characteristic of uranium mining would likely have been the management of natural resources within the province, which would have come within various enumerated provincial classes of subjects: ss. 92(5), 92(9), 92(10) and 92(13) (s. 92A, while also relevant, did not come into being until the Constitution was amended in 1982). But that did not prevent atomic energy, including the production of its raw materials, from being found to be a matter which is, by nature, of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial harm: see *Pronto*; *Denison*; *Ontario Hydro*. In other words, the discovery of atomic energy brought out the inherently national character of uranium mining. The fact that uranium mining would have fallen under provincial heads of power other than s. 92(16) prior to this discovery is irrelevant to the analysis and did not preclude the finding that atomic energy is a matter of national concern. The “historical newness” of atomic energy is equally irrelevant; the dispositive feature of the cases in question was instead that the discovery of atomic energy had led to evidence grounding a new understanding of the inherent nature of the matter as one of national concern.

[139] It also follows that I do not agree with my colleague Rowe J.’s articulation of the national concern test, which consists of two requirements as follows: first, the matter must not come within the enumerated powers; and second, the matter “must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum” (Rowe J.’s

reasons, at para. 545). With great respect, I see a jurisprudential barrier to my colleague's approach, which I find myself unable to resolve. I am not persuaded that the matters of national concern this Court has recognized, such as the development of the National Capital Region (*Munro*; see also: *Re: Anti-Inflation Act*, at p. 457) or the control of marine pollution by dumping (*Crown Zellerbach*), would necessarily meet his test if it were applied in the manner he proposes. Nor, in my view, can *Munro* or *Crown Zellerbach* be read as an application of my colleague's methodology. In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern.

[140] Thus, *Munro* and *Crown Zellerbach* can be explained in light of a more conventional understanding of the national concern doctrine that was articulated in *Crown Zellerbach* itself and which I will explain in greater detail below. Marine pollution is predominantly extraprovincial and international in character, while the development of the national capital is of concern to Canada as a whole. The matters proposed in those cases were specific and identifiable and had ascertainable and reasonable limits. The requirement of provincial inability, understood in the sense of serious extraprovincial harm, was met: "... the failure of either Quebec or Ontario to cooperate in the development of the national capital region would have denied to all Canadians the symbolic value of a suitable national capital", and "... the failure of one province to protect its waters would probably lead to the pollution of the waters of other provinces as well as the (federal) territorial sea and high sea" (Hogg, at p. 17-14).

Lastly, the recognition of these matters was compatible with the division of powers. The result of this analysis leads to the conclusion that these matters, by their nature, transcend the provinces. They were thus shown to fall outside of s. 92 and were appropriate matters for recognition under the national concern doctrine. I therefore respectfully disagree with my colleague's articulation of the national concern test.

[141] To sum up, the purpose of the national concern analysis is to identify matters of inherent national concern — matters which, by their nature, transcend the provinces. “Historical newness” is irrelevant to this analysis, and there is no threshold question whether the matter can be characterized as being new. Instead, the analysis has three steps: the threshold question, which relates not to newness but to whether the matter is of sufficient concern to Canada as whole; the singleness, distinctiveness and indivisibility analysis; and the scale of impact analysis. The onus is on Canada to adduce evidence to satisfy the court that a matter of inherent national concern is made out. I will now discuss each of these three steps in detail.

(a) *Threshold Question*

[142] Courts must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution. The analysis therefore begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine. This invites a common-sense inquiry into the national importance of the proposed matter.

[143] This Court’s analysis in key national concern decisions has begun with an assessment of whether the matter at issue is one “of concern to Canada as a whole”: *Crown Zellerbach*, at p. 436. In *Munro*, Cartwright J. began with an observation that the matter was “the concern of Canada as a whole”: p. 671. The reasons of the majorities of the Saskatchewan and Ontario courts of appeal in the instant case reflect this approach: Richards C.J.S. began his analysis on this subject with the “broad starting point” of “whether this matter is something of genuine national importance” (para. 146); Strathy C.J.O. first asked whether “the matter is both ‘national’ and a ‘concern’” before proceeding to the analysis of singleness, distinctiveness and indivisibility (para. 106). Although this inquiry was not identified as a distinct step of the analysis in *Crown Zellerbach*, it serves an important purpose. The threshold question ensures that the national concern doctrine cannot be invoked too lightly and provides essential context for the analysis that follows. Requiring that this question be asked as the first step of the test is an appropriate, incremental development in the law to ensure that federal power under the national concern doctrine is properly constrained.

[144] At the threshold step, Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine. If Canada discharges this burden, the analysis proceeds. This approach does not open the door to the recognition of federal jurisdiction simply on the basis that a legislative field is “important”; it operates to limit the application of the national concern doctrine.

(b) *Singleness, Distinctiveness and Indivisibility*

[145] The second step of the analysis was explained by Le Dain J. as follows in *Crown Zellerbach*: the matter “must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern” (p. 432). Le Dain J. added that this inquiry includes the provincial inability test: “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” (p. 432).

[146] The phrase “singleness, distinctiveness and indivisibility” requires some explanation. On its own, this phrase does not amount to a readily applicable legal test. Rather, in my view, two principles underpin the singleness, distinctiveness and indivisibility requirement and must be satisfied in order to determine that a matter is one of national concern. In Le Dain J.’s formulation, these characteristics are essential because they are features that *clearly distinguish* a matter of national concern from matters of provincial concern. This is the first principle underpinning the singleness, distinctiveness and indivisibility inquiry: to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The recognition of “provincial inability” as a marker of singleness, distinctiveness and

indivisibility points to a second principle animating the inquiry: federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This means that the matter at issue is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* that a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[147] Regarding the first principle, the proposed federal matter must be specific and readily identifiable. As Beetz J. made clear in *Re: Anti-Inflation Act*, a matter that is “lacking in specificity” or is boundless cannot pass muster as a matter of national concern: p. 458. The specific and identifiable matter must also be qualitatively different from matters of provincial concern. It is clearly not enough for a matter to be quantitatively different from matters of provincial concern — the mere growth or extent of a problem across Canada is insufficient to justify federal jurisdiction: *Insurance Reference SCC*; see also Le Dain, at pp. 277-78; *Wetmore*, at p. 296. The case law points to several factors that properly inform this analysis.

[148] One key consideration for determining whether the matter is qualitatively different from matters of provincial concern is whether it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects. The case law demonstrates that this inquiry is central to the national concern doctrine. The finding that marine pollution is extraprovincial and international

in its character and implications was critical to the recognition of a matter of national concern in *Crown Zellerbach*: p. 436; see also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 64. In *Ontario Hydro*, the judges were unanimous in grounding the federal government's jurisdiction over atomic energy based on the POGG power in the potential for catastrophic interprovincial and international harm. By contrast, in *Hydro-Québec*, the judges who considered the issue concluded that the fact that the statute regulated substances whose effects were entirely intraprovincial and localized was a barrier to its recognition as a matter of national concern. However, they accepted that a matter dealing with toxic substances that originate in a particular province may nonetheless be predominantly extraprovincial and international in character if the substances in question have serious effects that can cross provincial boundaries: paras. 68, 74 and 76.

[149] International agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern. Consideration of international agreements figured into the Court's national concern analysis in *Johannesson* and in *Crown Zellerbach*: see also G. van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (2020), 43 *Dalhousie L.J.* 901, at p. 920. Significantly, the existence of treaty obligations is not determinative of federal jurisdiction: there is no freestanding federal treaty implementation power and Parliament's jurisdiction to implement treaties signed by the federal government depends on the ordinary division of powers: *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Treaty obligations and international

agreements can be relevant to the national concern analysis, however. Depending on their content, they may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.

[150] Furthermore, to be qualitatively different from matters of provincial concern, the matter must not be an aggregate of provincial matters: *Re: Anti-Inflation Act*, at p. 458. The federal legislative role must be distinct from and not duplicative of that of the provinces. Once again, the Court's trade and commerce jurisprudence is helpful in this regard. The Court's opinions with respect to securities regulation show that a regulatory field with an international or extraprovincial dimension can also have local features. While there are aspects of securities regulation that are national in character and have genuine national goals, much of this sphere is primarily focused on local concerns related to investor protection and market fairness: *2011 Securities Reference*, at paras. 115 and 124-28; *2018 Securities Reference*, at paras. 105-6. As the *2011 Securities Reference* and the *2018 Securities Reference* confirm, federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern.

[151] Thus, the first principle underpinning the requirement of singleness, distinctiveness and indivisibility is that federal jurisdiction may only be recognized over a specific and identifiable matter that is qualitatively different from matters of

provincial concern. At this stage, the court should inquire into whether the matter is predominantly extraprovincial and international in its nature or its effects, into the content of any international agreements in relation to the matter, and into whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces.

[152] I will now turn to the second principle, that is, that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. This Court's jurisprudence in relation to the general branch of the trade and commerce power is helpful on this point, too. The starting point for this analysis should be the provincial inability test expressed through the fourth and fifth indicia discussed in *General Motors*, at p. 662: (1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. For provincial inability to be established for the purposes of the national concern doctrine, both of these factors are required.

[153] But there is a third factor that is required in the context of the national concern doctrine in order to establish provincial inability: a province's failure to deal with the matter must have grave extraprovincial consequences. Professor Hogg explains that evaluating extraprovincial harm helps to determine whether a national law "is not merely desirable, but essential, in the sense that the problem 'is beyond the

power of the provinces to deal with it”: p. 17-14, quoting D. Gibson, “Measuring ‘National Dimensions’” (1976), 7 *Man. L.J.* 15, at p. 33. This connects the provincial inability test to the overall purpose of the national concern test, which is to identify matters of inherent national concern that transcend the provinces.

[154] The need for “grave consequences for the residents of other provinces” was adopted by this Court in *Labatt Breweries* (at p. 945) and can be seen woven throughout its national concern jurisprudence. In *Local Prohibition Reference*, the Privy Council suggested arms trafficking as an example of a potential matter of national concern, which is consistent with this requirement of grave extraprovincial consequences flowing from provincial inaction in relation to the matter: *Local Prohibition Reference*, at p. 362. And in *Johannesson*, Locke J. of this Court had emphasized that one province’s failure to provide space for aerodromes could have the “intolerable” extraprovincial consequence of isolating northern regions of Canada: pp. 326-27. Although the extraprovincial harm at issue in *Munro* was of a different nature, it was nonetheless meaningful, as it would have resulted in the denial of a suitable national capital to all Canadians. In *Ontario Hydro*, La Forest J. reasoned that one province’s failure to effectively regulate atomic energy “could invite disaster”, endangering “the safety of people hundreds of miles from a nuclear facility”: p. 379. In contrast, the majority in *Schneider* reasoned that one province’s failure to provide treatment facilities for heroin users “will not endanger the interests of another province”: p. 131. This conception of provincial inability was reaffirmed in *Crown Zellerbach*.

[155] The requirement of grave extraprovincial consequences sets a high bar for a finding of provincial inability for the purposes of the national concern doctrine. This requirement can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences. Mere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient: *Wetmore*, at p. 296. Moreover, as I noted above, the onus is on Canada to establish that provincial inability is made out, and evidence is required, “for the questions of provincial inability and the harm that flows therefrom are both factual in part”: Swinton, at p. 134; see also Leclair (2005), at p. 370.

[156] In *Crown Zellerbach*, Le Dain J. characterized provincial inability as an indicium of singleness and indivisibility. But in much of this Court’s national concern jurisprudence, it has been treated as a strict requirement rather than as a mere optional indicium. Provincial inability has been used on this basis to reject national concern arguments and limit the doctrine’s application: *Labatt Breweries*; *Schneider*; *Wetmore*. In my view, provincial inability functions as a strong constraint on federal power and should be seen as a necessary but not sufficient requirement for the purposes of the national concern doctrine. Treating provincial inability as merely an optional indicium “rob[s] it of its initial, necessity-based, narrowing effect and opens doors for national concern”: G. Baier, “Tempering Peace, Order and Good Government: Provincial Inability and Canadian Federalism” (1998), 9 *N.J.C.L.* 277, at p. 291; see also Leclair (2005), at p. 360.

[157] In conclusion, there are two principles that apply in relation to singleness, distinctiveness and indivisibility: first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. Provincial inability will be established only if the matter is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* if a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences.

[158] A few further words about indivisibility are in order, because my colleagues Brown and Rowe JJ. say that it has been written out of the national concern test in these reasons. The requirement of indivisibility is given effect through both of the principles I have discussed. The first of these principles requires a specific and identifiable matter which is not a boundless aggregate. The second principle requires provincial inability, as it is clearly defined in *Crown Zellerbach* and, indeed, throughout the Court's national concern jurisprudence, which is a marker of indivisibility.

[159] I respectfully disagree with my colleagues' understanding of indivisibility, according to which "interrelatedness" is a criterion for establishing indivisibility (Rowe J.'s reasons, at paras. 545 and 548, citing *Crown Zellerbach*, at p. 434). Le Dain J. referred to interrelatedness only once, in his explanation of why the provincial inability

test helps the court determine whether a matter has the “character of singleness or indivisibility”: p. 434. Thus, if a province’s approach to the intraprovincial aspects of a matter could cause grave extraprovincial harm — that is, if the provincial inability test is met — the matter can be said to have an interrelatedness, which supports a finding of indivisibility. One difficulty with my colleagues’ approach, in my view, is that they treat interrelatedness (a situation in which the provincial inability test is met) as sufficient to establish indivisibility, while at the same time maintaining that meeting the provincial inability test cannot establish indivisibility (Rowe J.’s reasons, at paras. 545 and 560; see also Brown J.’s reasons, at para. 383). Respectfully, I would favour giving effect to the requirement of indivisibility on the basis of the two principles I have set out, which is consistent both with Le Dain J.’s treatment of interrelatedness and with the national concern jurisprudence as a whole, and presents no such analytical difficulties.

(c) *Scale of Impact*

[160] At the final step of the national concern test, Canada must show that the proposed matter has “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution”: *Crown Zellerbach*, at p. 432; *Hydro-Québec*, at para. 66, per Lamer C.J. and Iacobucci J. (dissenting, but not on this point). Determining whether the matter’s scale of impact is reconcilable with the division of powers requires the Court to balance competing interests. As Professor Elgie writes, it does not make sense to treat the acceptable

impact on provincial authority as a static threshold; instead, the effect on provincial jurisdiction should be assessed in the context of the matter at issue: pp. 85-86.

[161] The purpose of the scale of impact analysis is to prevent federal overreach: S. Choudhry, *Constitutional Law and the Politics of Carbon Pricing in Canada* (2019), IRPP Study 74, at p. 15; *2011 Securities Reference*, at para. 61. In other words, it is designed to protect against unjustified intrusions on provincial autonomy. In accordance with this purpose, at this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former.

(d) *Summary of the Framework*

[162] In summary, finding that a matter is one of national concern involves a three-step analysis.

[163] First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. This question arises in every case, regardless of whether the matter can be characterized as historically new. If Canada discharges its burden at the step of this threshold inquiry, the analysis will proceed.

[164] Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of “singleness, distinctiveness and indivisibility”. More important than this terminology, however, are the principles underpinning the inquiry. The first of these principles is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.

[165] If these two principles are satisfied, the court will proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.

[166] The onus is on Canada throughout this analysis, and evidence is required. Where a proposed federal matter satisfies the requirements of all three steps of the framework, there is a principled basis to conclude that the matter is one that, by its nature, transcends the provinces and should be recognized as a matter of national concern.

(4) Application to the GGPPA

(a) *Threshold Question*

[167] Canada has adduced evidence that clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole that it warrants consideration in accordance with the national concern doctrine. To begin, this matter's importance to Canada as a whole must be understood in light of the seriousness of the underlying problem. All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. This context, on its own, provides some assurance that in the case at bar, Canada is not seeking to invoke the national concern doctrine too lightly. The undisputed existence of a threat to the future of humanity cannot be ignored.

[168] That being said, the matter at issue here is not the regulation of GHG emissions generally, and Canada is not seeking to have all potential forms of GHG regulation classified as matters of national concern. Rather, the specific question before the Court is whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern.

[169] The history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in policies to reduce GHG emissions. As discussed above, Canada and all the provinces committed, in the *Vancouver Declaration*, to including carbon pricing in the country's efforts to reduce GHG emissions. The subsequently established Working Group on Carbon Pricing Mechanisms recognized in its final report that many experts regard carbon pricing as a

necessary tool for efficiently reducing GHG emissions: p. 5. The Working Group's final report had the support of all provinces and of Canada at the time it was published, and its affirmation of the importance of carbon pricing is supported by the record in this case. Similarly, the Specific Mitigation Opportunities Working Group, one of the other three working groups established under the *Vancouver Declaration*, listed, in its final report, "broad, economy-wide carbon pricing" as one of "three essential elements of a comprehensive approach to mitigating GHG emissions": Specific Mitigation Opportunities Working Group, *Final Report*, 2016 (online), at p. 17.

[170] Furthermore, there is a broad consensus among expert international bodies such as the World Bank, the Organization for Economic Cooperation and Development and the International Monetary Fund that carbon pricing is a critical measure for the reduction of GHG emissions. For example, the High-Level Commission on Carbon Prices' *Report of the High-Level Commission on Carbon Prices*, May 29, 2017 (online), states: "A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way" (p. 1). And an International Monetary Fund Staff Discussion Note entitled *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change* states: "The central problem is that no single firm or household has a significant effect on climate, yet collectively there is a huge effect — so pricing is necessary to force the factoring of climate effects into individual-level decisions" (M. Farid, et al., *After Paris: Fiscal, Macroeconomic, and Financial Implications of Climate Change*, January 11, 2016 (online), at p. 6). In my view, the

evidence reflects a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions.

[171] In summary, the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.

(b) *Singleness, Distinctiveness and Indivisibility*

[172] As I explained above, the first principle to be considered in the singleness, distinctiveness and indivisibility inquiry is that federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. Recognizing minimum national standards of GHG price stringency to reduce GHG emissions as a matter of national concern satisfies this requirement.

[173] Given that the matter at issue is establishing minimum national standards of GHG price stringency to reduce GHGs, it is important to begin by observing that these gases are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global warming potential of the gases (see Sch. 3 of the *GGPPA*). Moreover, GHG emissions are predominantly extraprovincial and international in their character and

implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects that the dissent in *Hydro-Québec* suggested might appropriately be regulated on the basis of the national concern doctrine: para. 76. In *Interprovincial Co-operatives*, a case concerning one province's emission of pollutants into an interprovincial river, Pigeon J. observed that the Court was "faced with a pollution problem that is not really local in scope but truly interprovincial": p. 514. GHG emissions represent a pollution problem that is not merely interprovincial, but global, in scope.

[174] The international response to GHG emissions over the past three decades confirms this. As early as 1992, the preamble to the *UNFCCC* recognized climate change as "a common concern of humankind", and also acknowledged its "global nature". The acknowledgment that climate change is a common concern of humankind was reiterated in the *Paris Agreement*. As well, the need for an effective international response to climate change was recognized in both agreements. Specifically, the *Paris Agreement* identifies imperatives of holding the increase in the global average temperature to well below 2.0°C above pre-industrial levels and achieving net zero emissions in the second half of the 21st century: arts. 2(1)(a) and 4(1). States parties are therefore required to make nationally determined contributions that are increasingly ambitious and to implement domestic mitigation measures for the purpose of ensuring that those contributions are achieved: arts. 4(2) and (3). Both the *UNFCCC* and the *Paris Agreement* help illustrate the predominantly extraprovincial and international

nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern.

[175] Not only is the type of pollutant to which the matter applies identifiable and qualitatively different from matters of provincial concern, but the regulatory mechanism of GHG pricing is a specific, and limited, one. It operates in a particular way, seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity. The *Vancouver Declaration* and the Working Group on Carbon Pricing Mechanisms that it established reflect the status of carbon pricing as a distinct form of regulation. GHG pricing does not amount to the regulation of GHG emissions generally. It is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste.

[176] Minimum national standards of GHG price stringency, which are implemented in this case by means of the backstop architecture of the *GGPPA*, relate to a federal role in carbon pricing that is qualitatively different from matters of provincial concern. The *2011 Securities Reference* and *2018 Securities Reference* illustrate this point. The proposed legislation at issue in the *2011 Securities Reference* did not have a distinctly national focus; it ran afoul of the division of powers by replicating existing provincial schemes: para. 116. However, the Court held that “[l]egislation aimed at imposing minimum standards applicable throughout the country

and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole" and could be a matter of national importance to which the federal general trade and commerce power applies: para. 114. This was the approach the federal government took in the proposed legislation at issue in the *2018 Securities Reference*. The focus of that legislation was on controlling systemic risks that represented a threat to the stability of the country's financial system as a whole. Its effect was "to address any risk that 'slips through the cracks' and poses a threat to the Canadian economy": para. 92. Rather than displacing provincial securities legislation by ensuring the day-to-day regulation of securities trading, it sought to complement provincial legislation by addressing national economic objectives: para. 96.

[177] The backstop approach taken in the *GGPPA* is analogous to the approach taken in the proposed legislation that was at issue in the *2018 Securities Reference*. The *GGPPA* establishes minimum national standards of price stringency to reduce GHG emissions in order to ensure that Canada's nationally determined contribution under the *Paris Agreement* is achieved. It does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.

[178] Moreover, the Governor in Council's power to make a regulation that applies the *GGPPA*'s pricing system to a province may be exercised only if it is first determined that the province's pricing mechanisms are insufficiently stringent: ss. 166 and 189. This is similar to the situation in the *2018 Securities Reference*, in which the

legislation required the federal regulator to consider the adequacy of existing provincial regulations before designating a benchmark or prescribing a product or practice: para. 92. If each province designed its own pricing system and all the provincial systems met the federal pricing standards, the *GGPPA* would achieve its purpose without operating to directly price GHG emissions anywhere in the country. In other words, the *GGPPA*'s pricing system comes into play only to address the risk of increased GHG emissions that would otherwise "slip through the cracks" as a result of one province's failure to implement a sufficiently stringent pricing mechanism.

[179] The *GGPPA* is tightly focused on this distinctly federal role and does not descend into the detailed regulation of all aspects of GHG pricing. While it is true that the administrative pricing mechanism set out in the *GGPPA* is detailed, it can apply only to provinces that fail to meet the federal stringency standard. Thus, the *GGPPA*'s fundamental role is a distinctly federal one: evaluating provincial pricing mechanisms against an outcome-based legal standard in order to address national risks posed by insufficient carbon pricing stringency in any part of the country. The *GGPPA* does not prescribe any rules for provincial pricing mechanisms as long as they meet the federally designated standard. Even if the *GGPPA* were to apply so as to supplement an insufficiently stringent provincial pricing scheme, the prior existence of similar provincial legislation is not, as this Court confirmed in the *2018 Securities Reference*, a constitutional bar to federal legislation that pursues a qualitatively different national concern: para. 114; see also *General Motors*, at pp. 680-82.

[180] Unlike the proposed legislation that was at issue in the *2011 Securities Reference*, the *GGPPA* does not depend on provinces “opt[ing] in”: para. 31. The *GGPPA* imposes minimum standards of price stringency on all provinces at all times. If a province is not listed, it is because the Governor in Council has determined that the province’s system meets the federally determined standard, not because the province has opted out. Thus, like the *2018 Securities Reference*, the instant case involves the distinctly federal role of setting national targets and stepping in to make up for an absence of provincial legislation or to supplement insufficient provincial legislation. The *GGPPA* deals with the specific regulatory mechanism of GHG pricing in a way that is qualitatively different than how the provinces do so.

[181] The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. I find that provincial inability is established in this case.

[182] First, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The situation here is much like the one in the *2018 Securities Reference*, in which the provinces would be able to enact legislation to address national goals relating to systemic risk but could not do so on a sustained basis, because any province could choose to withdraw at any time: para. 113; see also *2011 Securities Reference*, at paras. 119-21. In the instant case, while the provinces could choose to cooperatively

establish a uniform carbon pricing scheme, doing so would not assure a sustained approach to minimum national standards of GHG price stringency to reduce GHG emissions: the provinces and territories are constitutionally incapable of establishing a binding outcome-based minimum legal standard — a national GHG pricing floor — that applies in all provinces and territories at all times.

[183] Second, a failure to include one province in the scheme would jeopardize its success in the rest of Canada. It is true that a cooperative scheme might continue to *exist* if one province withdrew from it, but the issue here is whether it would be successful. The withdrawal of one province from the scheme would clearly threaten its success for two reasons: emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions; and any province's failure to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of GHG pricing everywhere in Canada because of the risk of carbon leakage.

[184] The evidence in the instant case shows that even significant emissions reductions in some provinces have failed to further the goals of any cooperative scheme, because they were offset by increased emissions in other provinces. Between 2005 and 2016, Canada's total GHG emissions declined by only 3.8 percent: Environment and Climate Change, *National Inventory Report 1990-2016: Greenhouse Gas Sources and Sinks in Canada — Executive Summary*, 2018 (online), at p. 13. In that period, emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1

percent in British Columbia, three of the five provinces with the highest levels of emissions in Canada, as well as by over 10 percent in New Brunswick, Nova Scotia, Prince Edward Island and Yukon. But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan, the other two provinces among the five with the highest levels of GHG emissions: p. 13. As a result, Canada failed to honour its commitment under the *Kyoto Protocol* before withdrawing from that agreement in 2011, and it is not currently on track to honour its *Copenhagen Accord* commitment.

[185] More recently, even though all the provinces made a commitment in the *Vancouver Declaration* in March 2016 to work collectively to significantly reduce GHG emissions, Saskatchewan had withdrawn by the time of the *Pan-Canadian Framework* seven months later, and Ontario and Alberta also subsequently withdrew. Together, these three provinces accounted for 71 percent of Canada's total GHG emissions in 2016: see *National Inventory Report*, at p. 13; Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act* — 2007, 2007 (online), at p. 17. It is true that their withdrawal from the *Pan-Canadian Framework* does not mean that Saskatchewan, Ontario and Alberta will necessarily fail to reduce their GHG emissions. But when provinces that are collectively responsible for more than two thirds of Canada's total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach. The participating provinces can only reduce their own emissions — less than one third of

Canada's total — and are vulnerable to the consequences of the lion's share of the emissions being generated by the non-participating provinces.

[186] What is more, any province's refusal to implement a sufficiently stringent GHG pricing mechanism could undermine GHG pricing everywhere in Canada because of the risk of carbon leakage. Carbon leakage is a phenomenon by which businesses in sectors with high levels of carbon emissions relocate to jurisdictions with less stringent carbon pricing policies: *Report of the High-Level Commission on Carbon Prices*, at p. 23. To be clear, the concern here is not with the economic extraprovincial consequences of carbon leakage. Jurisdictions routinely compete for business, and mere economic effects are not among the grave consequences that would support a finding of provincial inability in the national concern context. Rather, I am referring to the environmental consequences, and the resulting harm to humans, of carbon leakage — the risk that any emissions reductions achieved by pricing in one province would be offset by an increase in emissions in another province as a result of the relocation of businesses. Thus, provincial cooperation may not result in national emissions reductions, as businesses could simply relocate to non-cooperating provinces, leaving Canada's net emissions unchanged and people across Canada vulnerable to the consequences of those emissions.

[187] Third, a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests. It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate

change do not have a direct connection to the source of GHG emissions; every province's GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life.

[188] Furthermore, I reject the notion that because climate change is “an inherently global problem”, each individual province's GHG emissions cause no “measurable harm” or do not have “*tangible* impacts on other provinces”: *Alta. C.A.* reasons, at para. 324; *I.F., Attorney General of Alberta*, at para. 85 (emphasis in original). Each province's emissions are clearly measurable and contribute to climate change. The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.

[189] I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government's

argument that projected increases in other countries' emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. The Supreme Court reasoned that "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere": p. 526. Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that "[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere" and thus contributes to the global harms of climate change: para. 4.6. The Hague District Court's finding that "any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change" was thus confirmed on appeal: *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para. 4.79. In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project's proponent that the project's GHG emissions would not make a meaningful contribution to climate change. The court noted that many courts have recognized that "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources": para. 516 (AustLII).

[190] While each province's emissions do contribute to climate change, there is no denying that climate change is an "inherently global problem" that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.

[191] I am accordingly unpersuaded by Huscroft J.A.'s observation in his dissenting reasons in the Court of Appeal for Ontario that "[t]here are many ways to address climate change and the provinces have ample authority to pursue them, whether alone or in partnership with other provinces": para. 230. The underlying premise of this position is that the provinces will implement sufficient controls on their GHG emissions, using GHG pricing or some other mechanism. But in the absence of a federal law binding the provinces, there is nothing whatsoever to protect individual provinces or the country as a whole from the consequences of one province's decision, in exercising its authority, to take insufficient action to control GHGs, or to take no steps at all. In short, federal action is indispensable, and GHG pricing in particular is an integral aspect of any scheme to reduce GHG emissions.

[192] In my view, the principles underpinning the singleness, distinctiveness and indivisibility inquiry clearly support a finding that the federal government has jurisdiction over the matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions. The matter is specific, identifiable and qualitatively different from any provincial matters. As well, federal jurisdiction is necessitated by the provinces' inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent.

[193] I therefore respectfully disagree with my colleague Brown. J.'s view that the requirement of indivisibility is not met in this case. My colleague places great weight on "the difficulty of knowing the source and physical location" of pollution in *Crown Zellerbach*, asserting that because "no question arises as to physical location" in the case at bar, indivisibility cannot be made out: paras. 380-81. Even if it is assumed that this represents a valid distinction between *Crown Zellerbach* and the case at bar, Le Dain J. clearly confined this aspect of his reasoning to "the matter of marine pollution by the dumping of substances": p. 437. He did not purport to lay down the only way to determine whether indivisibility is made out. This makes sense. A matter can be of inherent national concern even if it does not relate to something that is "difficult" to locate. There is no "difficulty" in determining the location of the National Capital Region, but the matter in *Munro* meets the requirement of indivisibility: pp. 671-72; *Re: Anti-Inflation Act*, at pp. 457-58; see also Rowe J.'s reasons, at para. 548. Likewise, there is no "difficulty" in identifying the sites of atomic energy generation, but atomic energy, too, is a matter of inherent national concern: *Ontario*

Hydro; Pronto; Denison. In the instant case, the indivisibility of the matter — establishing minimum national standards of GHG price stringency — is made out, as my application of the two principles underpinning the singleness, distinctiveness and indivisibility inquiry shows. This is so regardless of the “difficulty” of locating the source or physical location of GHG emissions. “GHG emissions” are not the matter in this case, and the “difficulty” of identifying the source and location of what a matter relates to is not the test for indivisibility.

[194] The analogy between this case and *Crown Zellerbach* is clear. Le Dain J. emphasized the international character of marine pollution; GHG emissions represent a truly global pollution problem that demands a coordinated international response. Le Dain J. focused on the unique scientific characteristics of marine pollution that distinguish it from fresh water pollution; GHG emissions, like marine pollution, are a precisely identifiable form of pollution that can readily be scientifically distinguished from other atmospheric pollutants.

[195] But the case for finding that the matter is of national concern is even stronger here than in *Crown Zellerbach*. This is true for two reasons. First, in the case at bar, there is uncontested evidence of grave extraprovincial harm as a result of one province’s failure to cooperate. In other words, this is a true interprovincial pollution problem of the highest order. This Court’s decisions have consistently reflected the view that interprovincial pollution is constitutionally different from local pollution and that it may fall within federal jurisdiction on the basis of the national concern doctrine:

Interprovincial Co-operatives; *Crown Zellerbach*, at pp. 445-46; *Hydro-Québec*, at para. 76; see also *Morguard Investments*, at p. 1099; Lederman, at p. 614. Second, the proposed federal matter in the instant case relates only to the risk of non-cooperation that gives rise to this threat of grievous extraprovincial harm. In other words, this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

(c) *Scale of Impact*

[196] At this step of the analysis, as I explained above, the court must determine whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that will be affected if Parliament is unable to constitutionally address the matter at a national level. This determination is made in light of the jurisdictional consequences of accepting the proposed matter of national concern. I conclude that, while it is true that finding that the federal government has jurisdiction over this matter will have a clear impact on provincial autonomy, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level.

[197] I accept that finding that this matter is one of national concern has a clear impact on provincial jurisdiction. It leads to the recognition of a previously unidentified area of double aspect in which the federal law is paramount. Provinces can regulate

GHG pricing from a local perspective (e.g., under ss. 92(13) and (16) and 92A), but legislation enacted on the basis of these provincial powers would apply concurrently in a field also occupied by a paramount federal law that establishes minimum standards of GHG price stringency. There is a clear impact on provincial autonomy. Provincial governments and their residents may well wish to pursue GHG pricing standards lower than those set by the federal government in order to protect the vitality of local industries, or may wish to choose policies that do not involve GHG pricing.

[198] However, I am persuaded that there is a real, and not merely nominal, federal perspective on the fact situation of GHG pricing: Canada can regulate GHG pricing from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach to GHG pricing. This is manifestly not the “same aspect of the same matter”. On the contrary, the compelling federal interest is in doing precisely — and only — what the provinces cannot do: protect themselves from the risk of grave harm if some provinces were to adopt insufficiently stringent GHG pricing standards. Moreover, the matter’s impact on the provinces’ freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[199] First, the matter’s impact on the provinces’ freedom to legislate is minimal. It is important to mention that the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally. Here, the matter is limited to GHG pricing of GHG emissions — a narrow and specific regulatory

mechanism. Any legislation that related to non-carbon pricing forms of GHG regulation — legislation with respect to roadways, building codes, public transit and home heating, for example — would not fall under the matter of national concern.

[200] Nor is the freedom of the provinces and territories to legislate in relation to all methods of pricing GHG emissions at issue. Even where the specific regulatory mechanism of GHG pricing is concerned, the extent to which the matter interferes with provincial jurisdiction is strictly limited. Under the *GGPPA*, provinces and territories are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency. If a province wants to exceed the federal standards, it is free to do so without fear of federal legislation rendering its legislation inoperative, because the federal matter concerns minimum standards, not maximum standards. If a province fails to meet the minimum national standards, the *GGPPA* imposes a backstop pricing system, but only to the extent necessary to remedy the deficiency in provincial regulation in order to address the extraprovincial and international harm that might arise from the province's failure to act or to set sufficiently stringent standards. In Saskatchewan, for example, the provincially designed industrial GHG pricing scheme applies to many industrial emitters, but Part 2 of the *GGPPA* applies to electricity generation and natural gas transmission pipelines, the emissions of which Saskatchewan declined to price: see *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, ss. 2(b)(ii), 3(a) and (c)(x). The federal matter thus deals with GHG pricing stringency in a way that relates only to the risk of non-cooperation and the attendant risk of grave

extraprovincial harm and has the ascertainable and reasonable limits required by *Crown Zellerbach* so as to ensure that provincial jurisdiction is not eroded more than necessary.

[201] Second, the matter's impact on areas of provincial life that would generally fall under provincial heads of power is also limited. Although the identified matter of national concern could arguably apply to types of fuel and to industries to which the *GGPPA* does not apply at present, that matter is, crucially, restricted to standards for GHG pricing stringency. As the majority of the Court of Appeal for Saskatchewan pointed out, it leaves "individual consumers and businesses . . . free to choose how they will respond, or not, to the price signals sent by the marketplace": para. 160. Indeed, the federal power recognized in this case is significantly less intrusive than the one at issue in *Crown Zellerbach*, in which, as La Forest J. noted, the effect of finding that the federal government has jurisdiction over ocean pollution caused by the dumping of waste was to "virtually preven[t] a province from dealing with certain of its own public property without federal consent": p. 458.

[202] Nor does the federal "supervisory" jurisdiction of the *GGPPA* increase the matter's scale of impact on provincial jurisdiction. As I explained above, the Governor in Council's discretion under the *GGPPA* is limited by the purpose of the statute, by specific guidelines set out in it and by administrative law principles. The Governor in Council does not have an unfettered discretion to determine whether a provincial GHG

pricing system is desirable, but is confined to determining whether it meets results-based standards.

[203] Moreover, the Governor in Council's decision-making role in the *GGPPA* is an incident of the flexibility the provinces retain in relation to GHG pricing within their borders. If provincial pricing systems are to be taken into account and federal intervention is to be limited to remedying deficiencies in those systems, the *GGPPA* must include a mechanism for determining whether provincial pricing systems meet federal standards. It would not be feasible for the statute itself to indicate which provincial pricing systems meet federal standards, as provincial pricing schemes and policies frequently change. The Governor in Council's decision-making role thus seems to be an incident of a flexible model designed to preserve provincial regulation. Furthermore, the discretion of the Governor in Council is necessary in order to ensure that some provinces do not subordinate or unduly burden the other provinces through their unilateral choice of standards.

[204] Indeed, the design of the *GGPPA* to ensure provincial flexibility is consistent with the *2018 Securities Reference*. In that case, the proposed law also involved a "supervisory" aspect, given that the federal regulator's intervention was contingent upon there being a risk that "slips through the cracks" of a provincial scheme that posed a threat to the Canadian economy: para. 92. The Court found that this feature weighed in favour of constitutionality, because the statute was a "carefully tailored" response to "this provincial incapacity": para. 113.

[205] In summary, although the matter has a clear impact on provincial jurisdiction, its impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited.

[206] On the whole, I am of the view that the scale of impact of this matter of national concern on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution. The *GGPPA* puts a Canada-wide price on carbon pollution. Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing. They are free to design any GHG pricing system they choose as long as they meet the federal government's outcome-based targets. The result of the *GGPPA* is therefore not to limit the provinces' freedom to legislate, but to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.

(d) *Conclusion on the National Concern Doctrine*

[207] In conclusion, the *GGPPA* is *intra vires* Parliament on the basis of the national concern doctrine. Canada has adduced evidence that shows that the proposed matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions is of clear concern to Canada as a whole and that the two principles underpinning the “singleness, distinctiveness and indivisibility” inquiry are satisfied. Considering the impact on the interests that would be affected if Canada were unable to address this matter at a national level, the matter’s scale of impact on provincial jurisdiction is reconcilable with the division of powers.

[208] I wish to emphasize that nothing about this conclusion flows inevitably from the fact that this matter of national concern involves a minimum national standard. My colleague Brown J. warns that my analysis opens the floodgates to federal “minimum national standards” in all areas of provincial jurisdiction. Respectfully, this concern is entirely misplaced. As can be seen from the foregoing reasons, the test for finding that a matter is of national concern is an exacting one. Canada must establish not just that the matter is of concern to Canada as a whole, but also that it is specific and identifiable and is qualitatively different from matters of provincial concern, and that federal jurisdiction is necessitated by provincial inability to deal with the matter. Each of these requirements, as well as the final scale of impact analysis, represents a meaningful barrier to the acceptance of *any* matter of national concern that might be proposed in the future.

[209] This Court’s decision in *Schneider* demonstrates that where one province’s failure to deal with health care “will not endanger the interests of another province”, the national concern doctrine cannot apply: p. 131. This central insight from *Schneider* has application beyond the field of health care, and in my view precludes the application of the national concern doctrine to many of the fields my colleague suggests would be vulnerable to federal encroachment as a result of the case at bar. Many fields my colleague points to are ones in which the effects of one province’s approach are in fact primarily felt in that province only. I note as well that this Court recently emphasized that education is an area of exclusive provincial jurisdiction that has a uniquely intraprovincial character: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 7. *Schneider* itself confirmed that “[the] view that the general jurisdiction over health matters is provincial . . . has prevailed and is now not seriously questioned”: p. 137.

[210] Moreover, nothing in these reasons should be understood to diminish the significant place of s. 92(13), the provincial power over “Property and Civil Rights”, in the Canadian constitutional order. Historically and jurisprudentially, it is well known that this head of power serves as a means to accommodate regional and cultural diversity in law, and that it is of particular importance in this regard to the province of Quebec: see *Citizens Insurance Co. v. Parsons (Canada)* (1881), 7 App. Cas. 96, at pp. 109-12; *Secession Reference*, at paras. 38 and 58-60. As a result, this Court has continued to affirm that this provincial power should be carefully protected: see, e.g., *Re: Anti-Inflation Act*, at pp. 440-41; *2018 Securities Reference*, at para. 100;

Desgagnés Transport, at para. 57. In light of this, the rigorous national concern test represents a meaningful constraint on federal power.

[211] Even in a case in which a matter can be connected to climate change, a truly global pollution problem with grave extraprovincial consequences, I emphasize that much of the reasoning in this decision turns on the evidence before the Court with respect to GHG pricing itself: the critical value of GHG pricing as a tool for the mitigation of climate change, its nature as a distinct and limited regulatory mechanism, how it operates across the economy, and the risk of carbon leakage. Furthermore, finding that this matter is of national concern is appropriate only because the matter amounts to a real, and compelling, federal perspective on GHG pricing, focused on addressing only the well-established risk of grave extraprovincial harm, and doing so in a way that has a qualified and limited impact on provincial jurisdiction.

VII. Validity of the Levies as Regulatory Charges

[212] Finally, I must address Ontario's argument that the fuel and excess emission charges imposed by the *GGPPA* do not have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges.

[213] To be a regulatory charge, as opposed to a tax, a governmental levy with the characteristics of a tax must be connected to a regulatory scheme: *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 43; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1

S.C.R. 131, at para. 24. In *Westbank*, Gonthier J. set out a two-step approach for determining whether a governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. If such a scheme is found to exist, the second step is to establish a relationship between the charge and the scheme itself: *Westbank*, at para. 44; *620 Connaught*, at paras. 25-27.

[214] Ontario does not dispute that the *GGPPA* creates a regulatory scheme. Its argument instead focuses on the second step of the *Westbank* analysis: determining whether the levy has a sufficient nexus with the regulatory scheme. The *GGPPA* does not require that revenues collected under Parts 1 and 2 be expended in a manner connected to the regulatory purpose of the *GGPPA*. Ontario argues that this undermines the levies' characterization as regulatory charges; in its view, the nexus requirement cannot be met solely by showing that the regulatory purpose of a charge is to influence behaviour. It submits that, for there to be a nexus with the regulatory scheme, the revenues that are collected must be used to recover the cost of the scheme or be spent in a manner connected to a particular regulatory purpose, and that a conclusion to the contrary would undermine the "no taxation without representation" principle that underlies s. 53 of the Constitution: *A.F.*, at para. 97.

[215] It is well-established that influencing behaviour is a valid purpose for a regulatory charge. As Rothstein J. put it in *620 Connaught*, a regulatory charge may be intended to "alter individual behaviour", in which case "the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour": para. 20. Two

examples Gonthier J. mentioned in *Westbank* were that “[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [and that a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles”: para. 29. However, the case law on the required nexus in the *Westbank* framework for a behaviour-modifying charge is not settled. In *620 Connaught*, the Court explicitly left the question “[w]hether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct,” for another day: para. 48.

[216] I agree with Strathy C.J.O. that regulatory charges need not reflect the cost of the scheme: paras. 159-60; see also *Canadian Assn. of Broadcasters v. Canada (F.C.A.)*, 2008 FCA 157, [2009] 1 F.C.R. 3. As contemplated in *620 Connaught*, the amount of a regulatory charge whose purpose is to alter behaviour is set at a level designed to proscribe, prohibit, or lend preference to a behaviour. Canada rightly observes that limiting such a charge to the recovery of costs would be incompatible with the design of a scheme of this nature: R.F., at para. 138. Nor must the revenues that are collected be used to further the purposes of the regulatory scheme. Rather, as Gonthier J. suggested in *Westbank*, the required nexus with the scheme will exist “where the charges themselves have a regulatory purpose”: para. 44. Where, as in the instant case, the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective, the nexus between the scheme and the levy inheres in the charge itself.

[217] This Court’s decision in *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, is of no assistance to Ontario. Ontario seizes on an aspect of *Allard* that Iacobucci J. specifically framed as an effort “to determine the scope of s. 92(9) rather than to define ‘taxation’ as such”: p. 398. The provincial licensing power under s. 92(9) raised specific questions about its interplay with the s. 92(2) limitation on provincial taxation to direct, as opposed to indirect, taxation, as well as about its relationship to other provincial heads of power. It had been argued that to give s. 92(9) a meaning independent of the other provincial heads of power, it ought not to be limited to raising money to support a regulatory scheme. In that context, very different from the one in the case at bar, Iacobucci J. remarked in *obiter* that a finding that there was “a power of indirect taxation in s. 92(9) extending substantially beyond regulatory costs could have the more serious consequence of rendering s. 92(2) meaningless”: pp. 404-5 (emphasis in original). It was unnecessary to decide the point, however, because the levy in *Allard* was intended only to cover the costs of the regulatory scheme: p. 412.

[218] It does not follow from *Allard* that a finding that there is a nexus with the regulatory scheme where the levy is a regulatory mechanism would, as Ontario asserts, “render s. 53 meaningless”: A.F., at para. 100. Section 53 codifies the principle of no taxation without representation by requiring any bill that imposes a tax to originate with the legislature: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at para. 30. Section 53 applies expressly to taxation. The *Westbank* approach remains adequate for the purpose of distinguishing between taxes and regulatory charges in order to determine whether s. 53 applies. Holding that the required nexus can be found to exist by establishing that the

charge itself is a regulatory mechanism does not open the door to disguised taxation. Instead, in every case, the court must scrutinize the scheme in order to identify the primary purpose of the levy on the basis of *Westbank*. An attempt to circumvent s. 53 by disguising a tax as a regulatory charge without a sufficient nexus to a regulatory scheme would be colourable.

[219] In the instant case, there is ample evidence that the fuel and excess emission charges imposed by Parts 1 and 2 of the *GGPPA* have a regulatory purpose. Ontario does not assert, nor would such an assertion be supportable, that the levies in this case amount to disguised taxation. The *GGPPA* as a whole is directed to establishing minimum national standards of GHG price stringency to reduce GHG emissions, not to the generation of revenue. As Richards C.J.S. aptly observed, the *GGPPA* “could fully accomplish its objectives . . . without raising a cent”: para. 87. This is true of both Part 1 and Part 2. The levies imposed by Parts 1 and 2 of the *GGPPA* cannot be characterized as taxes; rather, they are regulatory charges whose purpose is to advance the *GGPPA*’s regulatory purpose by altering behaviour. The levies are constitutionally valid regulatory charges.

VIII. A Final Matter

[220] In this case, I have identified the pith and substance of the *GGPPA* having regard to the statute and the regulations in force at the time of these appeals. My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. Although the underlying

premise of my colleague’s comments — that regulations made pursuant to an enabling statute must be consistent with the division of powers and further the purpose of the statute — is uncontroversial, his speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable. I would leave the matter of the validity of regulations under the *GGPPA* for a future case should the issue arise. It is not this Court’s role to express opinions about the substance, arguments or merits of future challenges.

IX. Conclusion

[221] In conclusion, I would answer the reference questions in the negative. The *Greenhouse Gas Pollution Pricing Act* is constitutional. Accordingly, the Attorney General of Saskatchewan’s appeal is dismissed, the Attorney General of Ontario’s appeal is dismissed, and the Attorney General of British Columbia’s appeal is allowed.

The following are the reasons delivered by

CÔTÉ J. —

[222] I have read the carefully crafted reasons of the Chief Justice, and I am in agreement with his formulation of the national concern branch analysis. However, I must respectfully part company with the Chief Justice’s ultimate conclusion that the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (“*GGPPA*” or “*Act*”)

is, in its current form, constitutional. In my view, the *GGPPA*, as presently drafted, cannot be said to accord with the matter of national concern properly formulated by the Chief Justice because the breadth of the discretion conferred by the *Act* on the Governor in Council results in the absence of any meaningful limits on the power of the executive. Additionally, the provisions in the *GGPPA* that permit the Governor in Council to amend and override the *GGPPA* itself violate the *Constitution Act, 1867*, and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers.

[223] This Court must decide the constitutionality of the *GGPPA* based on the totality of the measures it authorizes, and not simply the steps currently taken under the *Act*. Thus, when I consider what the *GGPPA* authorizes, irrespective of whether it has in fact been implemented, it is clear that the *Act*, as it is currently written, vests inordinate discretion in the executive with no meaningful checks on fundamental alterations of the current pricing schemes.

[224] Although delegation of legislative power is not inherently problematic, as discretion provides flexibility and makes it possible to overcome the practical difficulties associated with amending provisions and enacting regulations at the legislative level, when an Act endows a select few with the power to re-write, and thus reengineer, a law which affects virtually every aspect of individuals' daily lives and provincial industrial, economic, and municipal activities, it goes too far.

[225] I would therefore find that the *Act* is unconstitutional in part.

I. The GGPPA Vests a Considerable Amount of Discretion in the Executive

[226] A detailed review of the provisions of the *Act* leads to the conclusion that a considerably high degree of discretion has been vested in the Governor in Council.

A. *Part 1 of the Act*

[227] Part 1 of the *Act* establishes a fuel charge against certain producers, distributors, and importers of various greenhouse gas (“GHG”) producing fuels named in Schedule 2 (which includes aviation gasoline, aviation turbo fuel, butane, ethane, gas liquids, gasoline, heavy and light fuel oils, kerosene, methanol, naphtha, petroleum coke, pentanes plus, propane, coke oven gas, marketable and non-marketable natural gas, still gas and coal) and on combustible waste. In s. 3 of the *Act*, the critical feature of the fuel levy — that being, what fuels are covered by the *Act* — is so open-ended, allowing any substance, if prescribed by the Governor in Council, to fall within the ambit of the fuel charge regime:

combustible waste means

- (a) tires or asphalt shingles whether in whole or in part; or
- (b) a prescribed substance, material or thing. (*déchet combustible*)

...

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*)

[228] The operative provisions of Part 1 similarly prescribe vast legislative law-making power to the executive such that the very nature of the regime can be altered.

For example:

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.

[229] The full breadth of executive powers can be seen most notably within ss. 166 and 168 of the *Act*. Section 166(1)(a) states that the Governor in Council may

make regulations “prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation”. The only limit whatsoever on s. 166’s expansive regulation-making powers is that s. 166(3) stipulates that in making a regulation under subsection (2) — that is, amending Part 1 of Schedule 1 to modify the list of provinces where the fuel levy is payable — “the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions”. No such factor applies to the Governor in Council’s regulation-making powers under Part 1’s provisions. Most importantly, by virtue of s. 166(4), the executive has a wholly-unfettered ability to amend Part 1 of the *Act*:

166(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.

[230] Sections 168(2) and 168(3) also allow the Governor in Council to make and amend regulations in relation to the fuel charge system, its application, and its implementation. These wide-ranging powers set forth a wholly-unfettered grant of broad discretion to amend Part 1 of the *Act*:

168(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.

[231] Most notably, s. 168(4) of the *Act* states that in the event of a conflict between the statute enacted by Parliament and the regulations made by the executive, “the regulation prevails to the extent of the conflict”. This breathtaking power circumvents the exercise of law-making power by the legislative branch by permitting the executive to amend by regulation the very statute which authorizes the regulation. Section 168(4), along with ss. 166(2) and 166(4), all constitute what are known as “Henry VIII clauses”. Their name, Henry VIII clauses, is inspired by the King whose lust for power included the Statute of Proclamations (*An Act that Proclamations made by the King shall be obeyed* (Eng.), 1539, 31 Hen. 8, c. 8), which elevated the King’s proclamations to have the same legal force as Acts of Parliament (J. W. F. Allison, “The Westminster Parliament’s Formal Sovereignty in Britain and Europe from a Historical Perspective” (2017), 34 *Journal of Constitutional History* 57, at pp. 62-63).

B. *Part 2 of the Act*

[232] The output-based pricing system (“OBPS”) created under Part 2 of the *Act* exempts certain industrial enterprises, defined as “covered facilities”, from Part 1’s fuel charge regime. I have concerns about the Chief Justice’s assertion that “no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country” (para. 76). In my view, and with respect, it is clear from a review of Part 2’s provisions that the broad powers accorded to the executive allow for this very result.

[233] Section 192 contains a Henry VIII clause and empowers the Governor in Council to make regulations for a variety of matters, including regulations:

- (a) defining *facility*;
- (b) respecting covered facilities, including the circumstances under which they cease to be covered facilities;
- (c) allowing for the determination of the persons that are responsible for a facility or covered facility;
- (d) respecting designations and cancellations of designations under section 172;
- (e) respecting compliance periods and the associated regular-rate compensation deadlines and increased-rate compensation deadlines;
- (f) respecting the reports and verifications referred to in section 173 and subsections 176(2) and 177(2);
- (g) respecting greenhouse gas emissions limits referred to in sections 173 to 175, subsection 178(1), section 182 and subsection 183(1);
- (h) respecting the quantification of greenhouse gases that are emitted by a facility;

- (i) respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility;
- (j) respecting the methods, including sampling methods, and equipment that are to be used to gather information on greenhouse gas emissions and activities related to those emissions;
- (k) respecting the compensation referred to in sections 174 and 178;
- (l) respecting compliance units, including transfers of compliance units, the circumstances under which transfers of compliance units are prohibited and the recognition of units or credits issued by a person other than the Minister as compliance units;
- (m) respecting the tracking system referred to in section 185 and the accounts in that system;
- (n) providing for user fees;
- (o) respecting the rounding of numbers;
- (p) respecting the retention of records referred to in section 187; and
- (q) respecting the correction or updating of information that has been provided under this Division.

[234] Additionally, a number of provisions in Part 2 allow the executive, in accordance with the regulations crafted by said executive, to: designate a facility as a covered facility, thus making it exempt from paying the fuel charge (s. 172(1)), cancel the designation of a covered facility (s. 172(3)), suspend or revoke compliance units (s. 180(1)), recover compensation owing in compliance units (s. 182), or close an account (s. 186(3)). The sole limit on the executive's expansive discretion found in Part 2, similar to Part 1, is in s. 189(2); when amending Part 2 of Schedule 1 to modify the list of provinces where the OBPS applies, "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". Again, as in Part 1, no such factor applies to the Governor in Council's regulation-making powers under Part 2's provisions.

[235] While the Governor in Council's powers in this regard are ostensibly exercisable to allow for ongoing review, I am in agreement with both Justices Brown and Rowe that Part 2's "skeletal" framework accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive's whim.

II. "Minimum" Standards Are Set By the Executive, Not the Act

[236] As noted above, I agree with the Chief Justice that the use of minimum national standards of price stringency to reduce GHG emissions is legally viable as a matter of national concern. However, the *Act*, as it is currently written, cannot be said to establish national standards of price stringency because there is no meaningful limit to the power of the executive. In my view, it is not the *Act*, but the executive, who sets, constrains, or expands, the standards.

[237] The legislative decision to transfer law and policy-making power to the executive is central to the contours of the *GGPPA*. In his article "The Case for a Canadian Nondelegation Doctrine" (2019), 52 *U.B.C. L. Rev.* 817, (Alyn) James Johnson, a constitutional and administrative law scholar, notes the deleterious consequences of this excessive delegation:

Legislatures are high-profile bodies where law and policy making on contentious issues can occur with a degree of public awareness, scrutiny, and input. Courts and executive bodies, on the other hand, while themselves institutionally distinct, both lack the open and broadly-

deliberative character that gives legislatures their unique position in a democratic society. [Footnote omitted; pp. 825-26.]

This excessively broad delegation of power removes the regulation of GHGs from the legitimizing forum of the legislature and places it into the hands of the few.

[238] The Chief Justice emphasizes that regulation-making power is conscribed to the statutory purpose of reducing GHG emissions through GHG pricing — such as imposing a fuel charge and industrial GHG emissions pricing regimes. But, in my view, this is not a meaningful limitation to the executive's power. As Justice Brown has helpfully outlined, rather than establishing minimum national standards, Part 2 of the *Act* empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis. For instance, the executive could decide to impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated. According to the majority's reasoning, this example, regardless of its improbability, would fulfill the statutory purpose of reducing GHG emissions through GHG pricing and therefore be a valid use of the executive's regulatory powers accorded by the *GGPPA*. This cannot be so.

[239] I recognize that in response, one may argue that Canadian citizens can simply make their displeasure known at election time. However, the fact that the executive is permitted to place a number of conditions on individuals and industries at any time, and is moreover allowed to revise those conditions at any time to any extent, is untenable. This results in provinces having applicable regimes one day, and being

under the federal scheme the next. The meaningful check on the legislation ought to be the separation of powers analysis, not simply a further delegation to the ballot box.

[240] The *Act*, as it is currently written, employs a discretionary scheme that knows no bounds. While I agree with the Chief Justice’s reasons that a matter which is restricted to minimum national GHG pricing stringency standards properly fits within federal authority, the *Act* does not reflect this crucial restriction. Given the boundless discretion that is contained within the provisions, including the ability to expand the ambit of both Parts to fundamentally change the nature of the fuel charge regime or target specific industries, the *Act* cannot be said to accord with the matter.

III. Constitutional Restrictions on Delegated Power

[241] Moreover, I am of the view that certain parts of the *Act* are so inconsistent with our system of democracy that they are independently unconstitutional. I explain why below.

[242] Sections 166(2), 166(4) and 192 all confer on the Governor in Council the power to amend parts of the *Act*. Section 168(4) confers the power to adopt secondary legislation that is inconsistent with Part 1 of the *Act*. Scholars have long warned that executive power to amend or repeal provisions in primary legislation raises serious constitutional concerns (see Hewart L.C.J., *The New Despotism* (1929); D. J. Mullan, “The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality”, in M. J. Mossman and G. Otis, eds., *The Judiciary as Third Branch of*

Government: Manifestations and Challenges to Legitimacy (1999), 313, at p. 375; L. Neudorf, “Reassessing the Constitutional Foundation of Delegated Legislation in Canada” (2018), 41 *Dal. L.J.* 519, at p. 545; Johnson; see also M. Mancini, “The Non-Abdication Rule in Canadian Constitutional Law” (2020), 83 *Sask. L. Rev.* 45). The time has come to acknowledge that clauses that purport to empower a body other than Parliament to amend primary legislation are contrary to ss. 17 and 91 of the *Constitution Act, 1867*. Therefore, ss. 166(2), 166(4), 168(4) and 192 of the *GGPPA* are unconstitutional.

A. *The Architecture of the Constitution of Canada*

[243] The Constitution of Canada is a “comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The rules and principles that compose the Constitution of Canada “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning” (*Secession Reference*, at para. 32). They include both written and unwritten elements (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 92; *Secession Reference*, at para. 32). The question here is whether these rules and principles permit Parliament to authorize the Governor in Council to amend an Act of Parliament.

[244] One of the core features of the Constitution of Canada is the identification and definition of three constituent elements of the state: the executive, the legislative and the judicial (*Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 23; *Provincial Judges Reference*, at para. 108). The *Constitution Act, 1867*, plays a critical role in defining these three constituent elements. Part III of the *Constitution Act, 1867*, defines the Executive Power, Part IV the Legislative Power and Part VII the Judicature. Additionally, Part V establishes the executive and legislative powers for provinces and Part VI establishes the distribution of legislative powers between the Parliament of Canada and provincial legislatures.

[245] Constitutional documents must be interpreted in a broad and purposive manner, informed by not only the proper linguistic, philosophic and historical contexts but also by the foundational principles of the Constitution (*Senate Reference*, at para. 25; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). They must also be read in light of the broader architecture of the Constitution (*Senate Reference*, at para. 26; *Secession Reference*, at para. 50; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57).

[246] We must thus begin with the actual text of the *Constitution Act, 1867*. Under Part IV, the first provision declares that “[t]here shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons” (s. 17). Under Part VI, the first provision provides:

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

[247] A linguistic or ordinary and grammatical reading of these sections leads me to conclude that they simultaneously confer the federal legislative power upon the Parliament of Canada and constrain how the Parliament of Canada may exercise the legislative power. Section 17 begins by emphasizing “[t]here shall be One Parliament for Canada”, meaning that all of the legislative power conferred upon the federal state shall reside in a single Parliament. Then comes the constraint on how legislative power must be exercised, arising from the decision of the Fathers of Confederation to “particularize the participants in the law making process” (*Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 74). Sections 17 and 91 both affirm that the authority to legislate is exclusively exercisable by the Queen, with the advice and consent of the Senate and the House of Commons. This means, at the federal level, every exercise of legislative power — every enactment, amendment and repeal of a statute — must have the consent of all three elements of Parliament: the Queen, the Senate and the House of Commons. In contrast, under Part III “Executive Power”, s. 9 vests the “Executive Government and Authority of and over Canada” exclusively upon the Queen alone.

[248] Our case law also supports this interpretation. In *Hodge v. The Queen* (1883), 9 App. Cas. 117, the Privy Council held that a province could lawfully delegate the power to set regulations regarding liquor licensees to License Commissioners. However, Sir Barnes Peacock for the panel noted that “[i]t is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail” and that there were an “abundance of precedents for this legislation, entrusting a limited discretionary authority to others” (p. 132 (emphasis added)). He also noted that the provincial legislature “retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into his own hands” (p. 132).

[249] In *In re Initiative and Referendum Act*, [1919] A.C. 935, the Privy Council reviewed the constitutionality of Manitoba’s *Initiative and Referendum Act*, S.M. 1916, c. 59. This Act provided that laws may be made and repealed by referendum, and that such laws would have the same effect as laws made by an Act of the Legislature (s. 7). The Manitoba Court of Appeal had found that s. 92 of the *British North America Act, 1867* (now the *Constitution Act, 1867*) vested the power of law making exclusively with the Legislature and the Legislature could not confer that power upon any other body (*Re The Initiative and Referendum Act* (1916), 27 Man. R. 1).

[250] For the Privy Council, Viscount Haldane found that “[t]he language of s. 92 is important. That section commences by enacting that ‘in such Province the

Legislature may exclusively make laws in relation to matters' coming within certain classes of subjects" (p. 943). Although he went on to dismiss the appeal on the basis that Manitoba did not have jurisdiction to interfere with the office of Lieutenant-Governor, in "a deliberate and important *obiter*" (*OPSEU*, at p. 47), Viscount Haldane continued on to discuss the limits of legislative power:

Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge v. The Queen*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. [Emphasis added; footnote omitted; p. 945.]

[251] In *Re: Authority of Parliament in relation to the Upper House*, the Court reiterated this finding that "s. 92 of the Act vests the power to make or repeal laws exclusively in the Legislature and that it did not contemplate the creation of a new legislative body to which the Legislature could delegate its powers of legislation or with which it would share them" (p. 72).

[252] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court affirmed the Constitution requires that each part of a legislature — in the case of Manitoba, both the Legislative Assembly and the Lieutenant-Governor — consent to a bill in order to validly exercise legislative power. Section 4(1) of *An Act Respecting the Operation of Section 23 of the Manitoba Act in Regard to Statutes*, S.M. 1980, c. 3,

provided that statutes could be enacted in one official language and subsequently be translated into the other official language. It authorized the translation to merely be deposited with the Clerk of the House in order to become law. The Court found this to be “an unconstitutional attempt to interfere with the powers of the Lieutenant-Governor. Royal assent is required of all enactments” (*Manitoba Language Rights*, at p. 777).

[253] There is, however, one authority that presents a different view of Parliament’s ability to delegate legislative power. In *Re George Edwin Gray* (1918), 57 S.C.R. 150, a majority of the Supreme Court upheld an Order in Council which contradicted a statute. *Re Gray* was an application for *habeas corpus*. George Gray was a young farmer who had been exempted from military service under *The Military Service Act, 1917*, S.C. 1917, c. 19, because of his farming duties. Section 6 of *The War Measures Act, 1914*, S.C. 1914, c. 2, provided that “[t]he Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada”. Section 13(5) of *The Military Service Act, 1917*, correspondingly provided: “Nothing in this Act contained shall be held to limit or affect . . . the powers of the Governor in Council under *The War Measures Act, 1914*.”

[254] On April 19, 1918, the Senate and House of Commons passed a joint resolution: “That in the opinion of this House, it is expedient that regulations respecting

Military Service shall be made and enacted by the Governor in Council in manner and form and in the words and figures following, that is to say . . .” (*Votes and Proceedings of the House of Commons of the Dominion of Canada*, No. 22, 1st Sess., 13th Parl., April 19, 1918, at p. 242; *Journals of the Senate of Canada*, vol. 54, 1st Sess., 13th Parl., April 19, 1918, at p. 100). The resolution went on to repeat verbatim a set of regulations that the Governor in Council made the next day. These regulations altered the exemptions from military service such that Mr. Gray was no longer exempt. The Order in Council’s military service requirements were contrary to *The Military Service Act, 1917*.

[255] The sole question before the Court was whether there was authority for the Order in Council nullifying the exemption. Writing in the majority, Fitzpatrick C.J. found that while it was argued that Parliament alone may make laws, Parliament could delegate legislative powers so long as it did not amount to abdicating its role (*Re Gray*, at pp. 156-57). He then turned to *The War Measures Act, 1914*, to determine whether the Order in Council was *intra vires*. *The War Measures Act, 1914*, did not expressly authorize the Governor in Council to promulgate orders inconsistent with statutes, but according to Fitzpatrick C.J. express language was not necessary:

It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and

they must be understood to have employed words in their natural sense, and to have intended what they have said. [Emphasis added; pp. 158-59.]

[256] In finding that the statute conferred unlimited power, Fitzpatrick C.J. was most certainly influenced by the urgency of war: “Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention” (p. 160 (emphasis added)). Justices Duff and Anglin were similarly concerned, with Anglin J. even noting that thousands of men had already been drafted and were on their way to Europe under the authority of this Order in Council (pp. 169, 174 and 180). Were it not for the urgency of war, it is difficult to see any justice agreeing to permit the Governor in Council to exercise what appears to be unlimited power, as such power is the very antithesis to the rule of law. As Lord Bingham wrote:

The rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.

(*The Rule of Law* (2010), at p. 54)

[257] In contrast, the dissenting judges refused to accept the “bald proposition” that *The Military Service Act, 1917*, “was liable to be repealed or nullified by an order in council” (*Re Gray*, at p. 164). Even with the emergency of war, overruling statutes by Order in Council was not cognizable, “such conceptions of law as within the realm

of legislation assigned by the ‘British North America Act’ to the Dominion have no existence” (p. 165).

[258] The Chief Justice cites *Re Gray* as establishing the constitutionality of Henry VIII clauses (para. 85). With great respect, I do not read *Re Gray* as being conclusive of the constitutionality of Henry VIII clauses. First, the comments of the majority justices in *Re Gray*, particularly with respect to the unlimited powers of the Governor in Council, demonstrate that their findings are not in accord with our contemporary understandings of core constitutional principles. The justices in *Re Gray* were clearly moved by the great emergency of war. In the case before us, Parliament did not pass the impugned legislation under the emergency branch. Second, *Re Gray* is distinguishable from the present case in that all three of the bodies charged under ss. 17 and 91 with the exclusive authority to make legislation agreed with the Order in Council. Although not passed as an Act of Parliament, the joint resolution of the Senate and House of Commons along with the Order in Council may adequately meet the demands of ss. 17 and 91 in the urgent situation of war. There was no consent of the House of Commons or Senate to the regulations promulgated by the Governor in Council under the *GGPPA*. Third, this reading is inconsistent with our most recent pronouncement on delegation of law-making powers.

[259] The Chief Justice also cites *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] S.C.R. 1, and *R. v. Furtney*, [1991] 3 S.C.R. 89, as cases relying upon the findings in *Re Gray* (Chief Justice’s reasons, at para. 85).

Neither of these cases concerned Henry VIII clauses. In the *Chemicals Reference*, the Governor in Council had established various boards to assist with the Second World War effort. The question at issue was whether the Governor in Council could delegate its power under *The War Measures Act, 1914*, to these other bodies. Not only was there no Henry VIII clause at issue, but the Court unanimously ruled that part of the Order in Council was *ultra vires* for being contrary to the enabling statute (pp. 7, 21, 27, 32 and 37). Despite the broad statements about Parliament's ability to delegate "legislative" power in time of emergency, Duff C.J. also recognized that the *British North America Act, 1867*, may impose limits upon Parliament's ability to commit legislative powers to the executive (p. 10). I use the word "legislative" in quotation marks because Duff C.J. spoke of actions that are legislative in character (p. 12). For the purpose of the present appeals, I define legislative power more narrowly, referring specifically to the formal power to enact, amend or repeal an Act of Parliament. On this definition, no legislative power was at issue in the *Chemicals Reference*.

[260] *Furtney* is part of a different line of jurisprudence regarding inter-governmental delegation that, in my view, only lends support to the unconstitutionality of Henry VIII clauses. In *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, this Court held that Parliament could not delegate its legislative powers to a provincial legislature and similarly, the provincial legislature could not delegate its legislative powers to Parliament. Although Rinfret C.J. distinguished this from cases where a delegation is made to a body subordinate to Parliament, his focus on the word "exclusively" in both ss. 91 and 92, along with the

lack of an express delegation power, supports my reading of ss. 17 and 91 (pp. 34-35). In the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, we affirmed that the *Constitution Act, 1867*, prohibits Parliament from delegating legislative powers to another legislature (para. 75). Throughout the judgment we repeatedly emphasize the ability of Parliament to delegate the power to make “*subordinate*” regulations (paras. 73 and 75-76 (emphasis in original)) or exercise “*administrative*” powers (paras. 123 and 125 (emphasis in original)). At no point do we support the delegation of primary legislative authority.

[261] I thus cannot take *Re Gray* to be conclusive of the issue. I turn now to the fundamental principles of the Constitution which further support my reading of ss. 17 and 91.

B. *Fundamental Principles of the Constitution of Canada*

[262] This Court’s recent jurisprudence demonstrates that the unwritten principles of our Constitution help to inform the written text (*Manitoba Language Rights*, at pp. 750-51; *Secession Reference*, at para. 53; *Provincial Judges Reference*, at paras. 94-95 and 104; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at paras. 44 and 57; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 54).

[263] In my view, there are three fundamental principles that must inform the interpretation of ss. 17 and 91: parliamentary sovereignty, rule of law and the separation of powers.

(1) Parliamentary Sovereignty

[264] Parliamentary sovereignty is a foundational principle in the Westminster system of government that the Constitution of Canada employs. Parliamentary sovereignty is generally thought to mean that Parliament has “the right to make or unmake any law whatever” (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 39-40). Of course, in Canada the sovereignty of Parliament has always been qualified by the written constitution (*Pan-Canadian Securities Reference*, at para. 56). For that reason, the Court has said that it may be more useful to refer to our system of government as one of constitutional supremacy, rather than parliamentary supremacy (*Secession Reference*, at para. 72). Nonetheless, parliamentary sovereignty remains an important constitutional principle, as absent constitutional restraint, Parliament may make or unmake any law.

[265] At first glance, parliamentary sovereignty supports Parliament’s ability to delegate whatever they want to whomever they wish. If Parliament can make or unmake any law whatever, then Parliament can make a law empowering the Governor in Council to amend Acts of Parliament. However, this is not the case. Parliamentary sovereignty contains both a positive and negative aspect. The positive aspect is, as we have seen, that Parliament has the ability to create any law. The negative aspect,

however, is that no institution is competent to override the requirements of an Act of Parliament. Dicey covered both of these aspects in his definition:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. [Footnote omitted; pp. 39-40.]

[266] It is this negative aspect of parliamentary sovereignty that Henry VIII clauses run afoul of. Henry VIII clauses “give the executive the authority to override the requirements of primary legislation and thereby directly violate the principle of parliamentary sovereignty” (A. Tucker, “Parliamentary Scrutiny of Delegated Legislation”, in A. Horne and G. Drewry, eds., *Parliament and the Law* (2018), 347, at p. 359). In the 2010 Mansion House Speech to the Lord Mayor of London, the Lord Chief Justice of England and Wales agreed, declaring that “proliferation of clauses like these will have the inevitable consequence of yet further damaging the sovereignty of Parliament and increasing yet further the authority of the executive over the legislature . . . Henry VIII clauses should be confined to the dustbin of history” (Lord Judge, July 13, 2010 (online), at p. 6; see also Lord Judge, “Ceding Power to the Executive; the Resurrection of Henry VIII”, speech delivered at King’s College London, April 12, 2016 (online), at p. 3).

[267] In *Pan-Canadian Securities Reference*, this Court emphasized the negative aspect of parliamentary sovereignty in its definition of parliamentary sovereignty:

“ . . . the legislature has the *exclusive* authority to enact, amend, and repeal any law as it sees fit, and . . . there is no matter in respect of which it may not make laws” (para. 54 (emphasis in original)). The Court unanimously found that it was consistent with parliamentary sovereignty to limit Parliament’s ability to delegate its legislative powers to provincial legislatures:

To put it simply: while Parliament or a provincial legislature may delegate the regulatory authority to make *subordinate* laws (like binding rules and regulations) in respect of matters over which it has jurisdiction to another person or body, it is nevertheless barred from transferring its *primary* legislative authority — that is, its authority to enact, amend and repeal statutes — with respect to a particular matter over which it has exclusive constitutional jurisdiction to a legislature of the other level of government. [Emphasis added; para. 76.]

[268] Even if one were to reject the idea that parliamentary sovereignty entails accepting that no other body can enact, amend or repeal statutes, the concept of parliamentary sovereignty has other inherent limitations. For instance, in order for Parliament to be sovereign it cannot be limited by the actions of previous Parliaments and therefore “neither Parliament nor the legislatures can, by ordinary legislation, fetter themselves against some future legislative action” (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 119). Similarly, logic limits Parliament from achieving two contradictory purposes simultaneously. For instance, Parliament cannot create a body of limited jurisdiction and simultaneously insulate that body from judicial review because “it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited” (*R. v. Shoreditch*

Assessment Committee, [1910] 2 K.B. 859 (C.A.), at p. 880). Henry VIII clauses create a contradiction within an Act by simultaneously requiring the executive to do something and authorizing the executive to defy that requirement. For instance, in the *GGPPA*, s. 168(2) empowers the Governor in Council to regulate several specific subjects relating to the fuel charge, such as “providing for rebates, adjustments or credits in respect of the fuel charge system” (s. 168(2)(e)). However s. 168(4) provides that the Governor in Council can act contrary to any provision in Part 1. Therefore, Parliament simultaneously attempts to limit the Governor in Council to regulating specific subjects whilst also attempting to permit the Governor in Council to regulate anything they want.

[269] Recently, some of the senior judiciary in England and Wales have accepted that another inherent limit is that parliamentary sovereignty demands an impartial, independent and authoritative body to interpret Parliament’s acts. Because Parliament can only speak through written texts, its work can only be effective when interpreted by such a body (*R. (Cart) v. Upper Tribunal*, [2009] EWHC 3052 (Admin.), [2011] Q.B. 120, at paras. 37-39, per Laws L.J.; *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 189-90 and 208-10). Henry VIII clauses are incompatible with this conception of sovereignty. Henry VIII clauses limit the availability of judicial review by providing no meaningful limits against which a court could review. This is a problem that equally affects the rule of law, a principle to which I now turn.

(2) The Rule of Law

[270] The rule of law is one of the fundamental principles of the Constitution, lying “at the root of our system of government” (*Secession Reference*, at para. 70; see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142). It is also expressly recognized in the preamble to the *Canadian Charter of Rights and Freedoms*: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

[271] The rule of law embraces three related principles (*Imperial Tobacco*, at para. 58). First, “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power” (*Manitoba Language Rights*, at p. 748). Second, “the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” (*Manitoba Language Rights*, at p. 749). Third, “the exercise of all public power must find its ultimate source in a legal rule” (*Provincial Judges Reference*, at para. 10). In other words, “[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action” (*Secession Reference*, at para. 70).

[272] Even in its most formal sense, the rule of law requires that all legislation be enacted in the manner and form prescribed by law (*Imperial Tobacco*, at para. 60). This includes the requirements that legislation receive three readings in the Senate and

House of Commons and that it receive Royal Assent (*Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 37-41). When the Governor in Council amends legislation, it does not follow this prescribed manner and thus violates the rule of law.

[273] There are two additional rule of law concerns with the delegation of legislative power to the executive. The first, as Professor Elmer A. Driedger noted, 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” (*The Composition of Legislation: Legislative Forms and Precedents* (2nd rev. ed. 1976), at p. 198). This gives rise to confusion and uncertainty, which are inimical to the rule of law (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 72).

[274] The second additional concern is that Henry VIII clauses endow the executive with authority to act arbitrarily. They do so by permitting the executive to act contrary to the empowering statute, creating an authority without meaningfully enforceable limits and thus an absolute discretion. Dicey articulated the rule of law’s concern with preventing arbitrary power:

[The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. [p. 202]

[275] In the Canadian context, Justice Rand's famous reasons in *Roncarelli* also warn against absolute power:

. . . there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. [p. 140]

[276] The Chief Justice says that the Governor in Council will be bound by the express terms and overall purpose and object of the *GGPPA* (para. 87). I agree with Brown J. when he says that Henry VIII clauses cannot merely be treated as a matter of administrative law (para. 414). My concerns are constitutional in nature because I do not see the Governor in Council as being constrained by meaningful limits that can be enforced through judicial review. For example, s. 168(4) expressly authorizes the Governor in Council to act contrary to the provisions of Part 1. Further, the overall purpose and object of the *Act* is so broad that the only limit on the Governor in Council is to act within the matter of national concern identified by the Chief Justice. When executive action is only limited by the division of powers and not by its empowering statute, then we can no longer call it executive action. Review for constitutional compliance with the division of powers is not enough. When an empowering Act contains a privative clause, the rule of law is not satisfied merely by judicial review for constitutional compliance.

[277] In order to protect the rule of law, and prevent arbitrary conduct, courts have a constitutional duty to judicially review actions of the executive (*Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 21). In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the majority affirmed that “[j]udicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes” (para. 28).

[278] Given that judicial review is constitutionally required, legislation cannot oust review, either expressly or implicitly (*Crevier*, at p. 238; *Dunsmuir*, at para. 31). When the Governor in Council is given the power to amend an Act, or to act in a manner inconsistent with the Act, it cannot be said that they are meaningfully limited by the Act. In the words of Campbell J.:

This power is constitutionally suspect because it confers upon the government the unprotected authority to pull itself up by its own legal bootstraps and override arbitrarily, with no further advice from the Legislative Assembly, and no right to be heard by those who may be adversely affected by the change, the very legislative instrument from which the government derives its original authority.

(*Ontario Public School Boards’ Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 363)

(3) The Separation of Powers

[279] Like parliamentary sovereignty and the rule of law, the separation of powers is “a fundamental principle of the Canadian Constitution” (*Provincial Judges Reference*, at para. 138). Although it is often said that Canada does not have a strict separation of powers, time and time again this Court has recognized the separation of powers as “an essential feature of our constitution”, “a cornerstone of our constitutional regime”, “[o]ne of the defining features of the Canadian Constitution” and a “backbone of our constitutional system” (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at paras. 52 and 54; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 107; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 3 and 10).

[280] As an abstract theory, the separation of powers may embody three dimensions: the same persons should not form part of more than one branch, one branch should not control or intervene in the work of another, and one branch should not exercise the functions of another (E. C. S. Wade and G. G. Phillips, *Constitutional Law* (3rd ed. 1946), at p. 18).

[281] In Canada, the first two dimensions of the separation of powers are not always met. For instance, it is well accepted that “the same individuals control both the executive and the legislative branches of government” (*Wells*, at paras. 53-54; see also *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at pp. 320-21). However, this does not mean that our Constitution fuses the legislative and executive powers (*Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*,

[1989] 2 S.C.R. 49, at p. 103). Instead, the Constitution of Canada insists on a separation of powers according to the third dimension — the separation of function. In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, Dickson C.J. described the basic functions of each of the three branches:

There is in Canada a separation of powers among the three branches of government — the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy. [pp. 469-70]

[282] The separation of powers does not strictly require that all of these functions remain exclusive. Our Constitution permits one branch to exercise some of the functions of another branch, when it does so in a way that respects both roles. These appeals provide a perfect example. We, members of the judiciary, are called upon to provide advice to three Lieutenant Governors in Council on the constitutionality of the *GGPPA* — something that would typically be an executive function (*Secession Reference*, at para. 15). However, our jurisprudence also clearly establishes that “[t]he separation of powers requires, at the very least, that some functions must be exclusively reserved to particular bodies” (*Provincial Judges Reference*, at para. 139).

[283] In *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, my colleague, Karakatsanis J., confirmed the importance of identifying and protecting each branch’s core functions:

Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. [Emphasis added; paras. 28-29.]

[284] Justice Karakatsanis's reasons aptly articulate one of the normative goals underlying the separation of powers: ensuring that power is allocated according to skillset and institutional capacities. Another reason was provided by McLachlin J. (as she then was) in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, where she emphasized the importance of maintaining the balance of power established between the three branches, finding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389). Maintaining this balance prevents an accumulation of power in any one branch.

[285] The Court's concern for protecting the core functions of each branch from intrusion is perhaps most well developed in the judicial sphere. Grounded in the

judicature provisions of the *Constitution Act, 1867*, both legislative and executive bodies are incapable of intruding upon the core jurisdiction of superior courts or infringing upon the independence of the judiciary (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 2 and 15; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56; *Criminal Lawyers' Association of Ontario*, at paras. 19 and 26; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31). This core judicial function includes the duty to maintain the rule of law and protect citizens from arbitrary action by supervising state action (*MacMillan Bloedel*, at paras. 32-35; *Crevier*, at pp. 234-38).

[286] There are also well developed doctrines to protect core executive functions from judicial intrusion. For instance, our jurisprudence demonstrates the importance of restraint when reviewing certain exercises of royal prerogative (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Secession Reference*, at paras. 26-28; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 36-37; see also *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737). The doctrine of cabinet privilege similarly serves to protect core executive functions (*Carey v. Ontario*, [1986] 2 S.C.R. 637; *Babcock*, at paras. 18-19 and 60).

[287] The Court has also established limits on judicial interference with essential legislative functions, most notably through acknowledging the existence of

parliamentary privilege over core legislative activities. As Binnie J. said, “[e]ach of the branches of the State is vouchsafed a measure of autonomy from the others”; “[p]arliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; see also *New Brunswick Broadcasting Co.*, at p. 377). Parliamentary privilege provides immunity “necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business” (*Vaid*, at para. 41; see also *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at paras. 27 and 127).

[288] In addition to respecting the bounds of parliamentary immunity, courts have refrained from imposing procedural fairness requirements on legislating, other than requiring that legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent (*Authorson*, at paras. 37-41). Recently, a majority of this Court held that the duty to consult does not apply to ministers of the Crown engaged in drafting bills, as this is a legislative function: “Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy” (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765, at para. 2; see also paras. 117, 122, 148, 163-64 and 167).

[289] Most of these protections are against judicial intrusion. However, the Court has also recognized that the executive cannot interfere with the legislative process in a manner that would restrict the power to enact, amend and repeal legislation, despite the important role played by the executive in the legislative process (*Pan-Canadian Securities Reference*, at para. 53). Chief Justice Lamer noted that “there is a hierarchical relationship between the executive and the legislature, whereby the executive must execute and implement the policies which have been enacted by the legislature in statutory form” (*Provincial Judges Reference*, at para. 139).

[290] The separation of powers equally demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature. Doing so supports the two main normative principles underlying the separation of powers.

[291] First, the legislature is the institution best suited to set policy down into legislation. The constitutionally mandated process in ss. 17 and 91 of the *Constitution Act, 1867*, ensures that the legislation is made in public forums that provide opportunities for substantial examination and debate. The legislative process provides equally for high-level policy debates and line-by-line technical edits. Most importantly, legislating through legislatures requires, by “its very nature, the need to build majorities [and] necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top” (*Secession Reference*, at para. 68).

This is why “the role of the legislature is to decide upon and enunciate policy” (*Fraser*, at p. 470).

[292] Second, limiting the power to enact, amend and repeal legislation to the legislature helps to confine power and prevent an even greater concentration of power in the executive. There is no doubt that the executive branch wields great power in this country. In practice, the executive can control the day-to-day operations of the legislature (*Blaikie*, at p. 320). However, an executive branch with the power to legislate on its own, without the legislature at all, wields a much greater and far more dangerous power. As we have seen above, the legislative process takes place in public before the scrutiny of non-government members and the press. When the government does not control a majority of seats in the legislature, the legislative process can require extensive compromise. In contrast, when Cabinet amends the *GGPPA*, it does so shrouded in cabinet secrecy, free from public scrutiny. There can be no doubt as to “the pre-eminent importance of the House of Commons as ‘the grand inquest of the nation’” (*Vaid*, at para. 20).

[293] The Fathers of Confederation and the Framers of the *Constitution Act, 1982*, both recognized the importance of the parliamentary process by requiring that Parliament sit at least once every twelve months (s. 20 of the *British North America Act, 1867* (as enacted) and s. 5 of the *Charter*). There is nothing more core to the legislative power than legislating. When the executive usurps this function, the separation of powers is clearly violated.

IV. Conclusion

[294] When the clear text of ss. 17 and 91 of the *Constitution Act, 1867*, is read in light of the foundational constitutional principles of parliamentary sovereignty, rule of law and separation of powers, I have no doubt that clauses that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional. In addition, the *GGPPA* cannot fall within a matter of national concern defined by minimum standards when such standards are those of the executive, and not those of the Parliament.

[295] Therefore, while I agree with the Chief Justice's formulation of the national concern branch analysis, I do not agree with his application of the law to the facts of this case. As this *Act* is presently drafted, it does not set minimum standards and delegates a legislative power to the executive. Accordingly, while I join the Chief Justice in finding that Parliament has the power to enact constitutionally valid legislation in this realm, I must partially dissent.

The following are the reasons delivered by

BROWN J. —

I. Introduction

[296] With the aim of mitigating climate change, the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (“*Act*”), implements measures — specifically, carbon pricing (in the case of Part 1 of the *Act*) and the regulation of heavy industry (in the case of Part 2) — to discourage activities that emit greenhouse gases (“GHGs”) into the atmosphere.

[297] The issue before us is whether the *Act* is *intra vires* Parliamentary authority. Importantly, the issue is *not* whether Parliament can act to combat climate change. It clearly can — indeed, it can do much of what it seeks to do in the *Act* by, for example, exercising its taxation power under s. 91 of the *Constitution Act, 1867*. Nor is the issue whether Parliament can act to confront this or other existential threats to the country. Again, it clearly can, by relying upon its broad residual power to legislate in response to emergencies for the peace, order, and good government of Canada (“POGG”).

[298] In other words, the constitutionality of the scheme that Parliament has enacted in this case does not govern *whether* Parliament can seek to control GHG emissions so as to meet reduction targets. It can. The question before us goes simply to *how* Parliament has chosen to do so — and, in particular, whether it has chosen a means of doing so that is supported by its legislative authority as conferred by the Constitution of Canada. This question properly directs our attention to the structure and operation of the *Act* — features which receive little to no consideration in the majority’s reasons — and to the jurisdictional basis upon which the Attorney General of Canada seeks to

uphold it. Again, it is worth stressing — since all parties before us say that much is at stake in the fight against climate change — that Parliament’s capacity to contribute meaningfully to that fight *does not* hang on the Court’s answer to the reference question.

[299] The Attorney General of Canada urges us to find that the *Act* represents a constitutionally valid exercise by Parliament *not* of the powers it clearly has to address climate change, but of its residual authority to legislate with respect to matters of “national concern” under POGG. The significance of this cannot be overstated. This power — unlike Parliament’s authority to legislate in the face of national emergencies — *permanently* vests *exclusive* jurisdiction in Parliament over the matter said to be of national concern. Were this simply the straightforward matter, as the Attorney General of Canada says, of requiring polluters to “pay”, the consequences for the division of powers would be minor. But neither the Attorney General nor the majority fairly or completely describes what the *Act* does. In particular, they downplay significantly what the *Act* actually authorizes the Governor in Council — that is, the federal Cabinet — to do, and ignore the detailed regulatory intrusion into matters of provincial jurisdiction authorized by Part 2 of the *Act*. The result is a permanent and significant expansion of federal power at the expense of provincial legislative authority — unsanctioned by our Constitution, and indeed, as I will explain, expressly precluded by it.

[300] The majority accedes to all these things, granting the Attorney General of Canada everything he seeks. But it does not stop there. The majority goes even further,

in substance abandoning and re-writing this Court's jurisprudence on the national concern branch of POGG as stated in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. Specifically, it dilutes the test stated in *Crown Zellerbach*, which required that a national concern exhibit qualities of "singleness, distinctiveness and indivisibility" (p. 432) from a matter falling within provincial legislative authority, by injecting into that test a body of unrelated trade and commerce jurisprudence. The result is a new three-step test. Under this new test, the requirement of "singleness, distinctiveness and indivisibility" is informed by two "principles" that "animat[e]" the inquiry (Chief Justice's reasons, at para. 146). The first of these "animating" principles is two-pronged, and one of those prongs is informed by three "factors" (paras. 147, 151 and 157). The second "animating principle" is to be analyzed by reference to three other requirements (paras. 152-56). To add to the confusion, the inevitable resulting expansion of federal authority under the national concern branch is fortified by the injection of judicial discretion into the scale of impact analysis, by which the scale of impact on provincial jurisdiction is balanced in light of other "interests", which implicitly include the judiciary's view of the *importance* of the matter (paras. 161 and 206). (It is apparently to be assumed that all important matters fall within federal jurisdiction.)

[301] But the true danger in the majority's reasons for judgment does not lie in the blending of trade and commerce jurisprudence with POGG jurisprudence, or in the confusing and confused test that it states. It is in the majority's abandonment of any meaningful constraint on the national concern branch of the POGG power.

[302] I concur with Rowe J.'s reasons and therefore adopt his review of the jurisprudence on the residual POGG power, conferred upon Parliament by the preamble to s. 91 of the *Constitution Act, 1867*. My reasons proceed as follows. First, I will canvass the scheme of the *Act* itself, with a view to explaining its structure and operation so as to characterize its pith and substance, and to classify it among the heads of legislative authority prescribed in the Constitution. In so doing, I will explain why Parliament's reliance on the national concern doctrine to defend the *Act* encounters an insurmountable constitutional problem. The *Act*'s very structure belies any argument that its dominant subject matter relates to a distinctly federal matter, since it applies only where provincial legislatures have not enacted carbon pricing measures, either at all or as stringent as those preferred by the federal Cabinet. In other words, the *Act*'s structure and operation is *premised* on provincial legislatures *having authority* to enact the same scheme. This is fatal to the constitutionality of the *Act* under the POGG national concern branch, since s. 91 states provincial legislative authority is “assigned exclusively” — that is, to the exclusion of Parliament's authority to act. This is a fundamental limiting feature of the federal POGG power for which the majority's reasons do not account.

[303] I will then consider how the Attorneys General of Canada and of British Columbia, seeking to overcome that objection, argue that the imposition of *minimum national standards* is the distinctly federal or national aspect of the matter. But this simply begs the question — minimum national standards *of what*? If the subject of those “minimum national standards” is a matter falling within provincial legislative

authority — which, again, the *Act* by its very structure contemplates — the injection of “minimum national standards” adds nothing. For example, until this Court’s judgment from which I now dissent, it would have been no more constitutional for Parliament to adopt “minimum national standards” governing hospital administration, the location or construction of hydroelectric generating facilities, the inflationary effects of intra-provincial trade and commerce (such as wage and price controls), or the exploration and development of non-renewable natural resources. Now, such things are entirely possible (at least, where a judge views them as being “important”).

[304] It follows that the *Act* is not a valid exercise of Parliament’s residual legislative authority. Nor — though the argument was hardly pursued by the Attorney General of Canada — can the *Act* be upheld as a valid exercise of any other federal head of power, at least not without the benefit of fuller argument than the passing reference contained in the Attorney General’s factum. I would therefore conclude that the *Act* is wholly *ultra vires* Parliament.

[305] Having disposed of the reference question by applying this Court’s jurisprudence, I will then turn to consider the majority’s dilution of the *Crown Zellerbach* test.

II. The Act

[306] The *Act*’s preamble describes climate change as a national problem, which cannot be contained within geographic boundaries and requires immediate action. It

therefore states its intention to create “incentives for . . . behavioural change” by implementing a “federal greenhouse gas emissions pricing scheme”.

[307] Two distinct regulatory mechanisms are authorized by the *Act*. Part 1 creates a regulatory charge on GHG-emitting fuels, which will increase annually until 2022. This charge is levied against certain producers, distributors and importers, with the expectation that they will pass this charge on to end consumers. In this way, it is expected to change public behaviour, thereby reducing demand for and consumption of GHG-emitting fuels. Subject to a number of exceptions, the charge applies to fuels that are produced, delivered or used in a “listed province”, brought into a listed province from another place in Canada, or imported into Canada at a location in a listed province (ss. 17 to 39). The fuel charge currently applies to 22 fuels that emit GHGs when burned, including gasoline, diesel fuel, natural gas and “combustible waste”. The fuels are listed in Sch. 2 of the *Act* and are subject to modification by the federal Cabinet.

[308] The second mechanism, created under Part 2, is described as an output-based pricing system (“OBPS”). The structure of the OBPS casts significant doubt on the correctness of the majority’s characterization of the entire *Act*’s pith and substance as “establishing minimum national standards of GHG price stringency to reduce GHG emissions” (para. 57). Rather, the OBPS is animated by concerns over industrial competitiveness in *specific* emissions-intensive Canadian industries that compete in international markets, and with the consequent economic and

environmental impacts of “carbon leakage” — the movement of industry to jurisdictions with a lower carbon price. Part 2, therefore, is designed not only “to create incentives for . . . behavioural change”, but also to maintain the international competitiveness of *some* emissions-intensive and trade-exposed industries (being those selected by the federal Cabinet) by *exempting* them from the fuel charge established by Part 1, and subjecting them instead to different levels of carbon pricing based on Cabinet’s responsiveness to the competitiveness and carbon leakage concerns of that particular industry.

[309] Part 2 achieves its goal by authorizing the federal Cabinet to limit the total emissions that can be produced without charge by an industrial facility. It applies to facilities located in a listed province that either meet the criteria set out in the regulations or are designated by the Minister of the Environment. Facilities subject to the OBPS that operate within their emissions limit receive surplus credits called compliance units which can be sold or banked to offset future emissions. Facilities that exceed their limit must pay an excess emissions charge, remit compliance units, or both.

[310] The emissions limit of a particular facility is calculated by multiplying its volume of production by a factor — in the language of the *Act*, a sector-specific “output-based standard” — set out in the *Output-Based Pricing System Regulations*, SOR/2019-266 (“*Regulations*”). This standard is typically based on a percentage of the national, production-weighted average emissions intensity of the specific industrial

activity in question (a large exception is electricity generation, where the standards are based on whether solid, liquid or gaseous fuels are used). The percentage used to calculate the standard is adjusted based on an assessment of competitiveness and carbon leakage concerns for that particular industrial activity. This assessment is crucial because the cost per tonne of carbon emitted in relation to any given industrial activity is dictated solely by the percentage used to set the output-based standard.

[311] In the result, Part 2 grants the federal Cabinet the power to set carbon costs on an activity-by-activity basis. Schedule 1 of the *Regulations* sets out the standards for an array of different products, from bitumen to potash to pulp, that give rise to different carbon prices for emissions related to that product.

[312] A key feature of the *Act* is that its application is dependent upon whether and how provinces have exercised their legislative authority to reduce GHG emissions. Meaning, the *Act* is designed to operate as a backstop, applying in only those provinces that have not (1) adopted carbon pricing as the means for reducing GHG emissions, (2) to a stringency that meets the federal Cabinet's preferred measure. To allow for this contingent operation, the *Act* grants the federal Cabinet discretion to determine whether it will apply in a given province. (As I will discuss below, this is a significant consideration militating against the *Act*'s constitutionality.) In Part 1, ss. 166(2) and (3) provide that, "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate", Cabinet may designate the listed provinces in which the fuel charge regime will apply,

taking into account “the stringency of provincial pricing mechanisms for greenhouse gas emissions” as the primary factor. In Part 2, ss. 189(1) and (2) authorize Cabinet to designate the backstop jurisdictions in which Part 2 will apply, “[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the [federal Cabinet] considers appropriate” taking into account, again, “the stringency of provincial pricing mechanisms for greenhouse gas emissions” as the primary factor.

III. Analysis for Constitutionality

[313] A reviewing court must apply two steps to determine whether an enactment falls within the legislative authority of the enacting body. First, the enactment must be characterized to determine its pith and substance or dominant subject matter. Secondly, the identified subject matter must be classified, with reference to the classes of subjects described in ss. 91 and 92 of the *Constitution Act, 1867* (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 30). Each step must be treated distinctly. Characterizing an enactment with reference to the heads of power creates “a danger that the whole exercise will become blurred and overly oriented towards results” (*Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16; see also A. S. Abel, “The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487, at p. 490). At the same time, however, we cannot lose sight of how these two distinct steps interact. As Professor P. W. Hogg explains in *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 1, at p. 15-6:

. . . neither of these two steps has any significance by itself. The challenged statute is characterized . . . as in relation to a “matter” (step 1) only to determine whether it is authorized by some head of power in the Constitution. The “classes of subjects” are interpreted (step 2) only to determine which one will accommodate the matter of a particular statute.

[314] The analytical process differs somewhat, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*.

A. *Characterization*

[315] The pith and substance of a law has been described as “an abstract of the statute’s content”, or the law’s “dominant purpose”, “leading feature”, “true nature and character”, or “dominant or most important characteristic” (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286, citing P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 313; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 482). It is well established that the dominant subject matter of an enactment is determined by considering its purpose and effects (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29).

[316] Determining the appropriate breadth by which to characterize the impugned law is essential. The legislation’s dominant subject matter must be

characterized precisely enough for it to be associated with a specific class of subjects described in the Constitution's heads of power. Characterizations that are too broad, vague, or general "are unhelpful in that they can be superficially assigned to various heads of powers" (*Desgagnés*, at para. 35; see also *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190).

(1) Broad Proposed Characterizations

[317] The Attorneys General of Ontario and Alberta describe the *Act's* pith and substance as relating to the regulation of GHG emissions. I agree with the Attorneys General of Canada and British Columbia that this is too broad because it does not facilitate classification under a federal or provincial head of power. GHG emissions are produced by virtually *all* facets of human activity and can therefore be regulated in innumerable different ways that will correspond to different heads of power. In that sense, identifying "regulating GHG emissions" as the pith and substance of a law suffers from the same deficiency as "regulating the environment" which, as this Court has said, is "not an independent matter of legislation" but rather "a sweeping subject or theme virtually all-pervasive in its legislative implications", that "touch[es] several of the heads of power assigned to the respective levels of government" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 63-64; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 154, quoting W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597, at p. 610). Identifying the pith and substance

requires greater specificity in describing *how* the legislation proposes to regulate GHG emissions. Again, the purpose of characterization must be borne in mind: it is to facilitate classification so as to determine whether the Constitution grants the enacting body — in this case, Parliament — legislative authority over the subject matter.

[318] In support of a broad characterization, Ontario says that legislative purpose must not be confused with the means chosen to achieve it, a proposition various parties attribute to this Court's decision in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 25 (A.F., Attorney General of Ontario, at para. 35; I.F., Attorney General of New Brunswick (38663 and 38781), at para. 20; I.F., Attorney General of Manitoba (38663 and 38781), at para. 25). But *Ward* simply reinforces the view that greater specificity than “regulating GHG emissions” is required. While the provision at issue in *Ward* imposed a prohibition on the “sale, trade or barter” of whitecoat and blueback seals, to refer to the legislation as prohibiting trade in baby seals was insufficiently precise. The same prohibition might relate to property and trade (authorized by s. 92(13)), or to conserving the economic viability of the seal fishery (authorized by s. 91(12)). It was clear from the broader context, however, that the enactment's purpose was to conserve the seal fishery, and the enactment was therefore authorized by the federal government's fisheries power (paras. 23 and 49). This Court's statement in *Ward* was, accordingly, directed to cases where describing legislation *only* in terms of its means would not accurately capture its dominant subject matter. Nothing in *Ward* requires altogether excluding legislative means from the pith and substance analysis.

[319] Moreover, it will not always be possible to clearly distinguish between means and purpose. The end goal at one level of abstraction may be viewed as the means to some broader goal at another level of abstraction. Here, for example, carbon pricing is the chosen means to generate behavioral change, which is the chosen means to reduce GHG emissions, which is the chosen means to combat climate change. Feasibility and efficacy aside, alternatives exist at each level of abstraction: the government might opt to remove GHGs from the atmosphere to combat climate change; it might prohibit certain products or activities to reduce GHG emissions; and it might reward “green” behaviours to generate behavioral change. It cannot therefore be said, as a general proposition, that the dominant subject matter of an enactment must not refer to the means chosen to implement the legislative purpose. That said, and as I will explain below, to incorporate the legislative means within the pith and substance of a statute will have particular consequences when deciding its constitutionality under the national concern branch of POGG.

[320] Whether one views the stated subject matter as the means or the objective depends, then, on the chosen level of abstraction. And the determinative consideration in identifying an appropriate level of abstraction should be *facilitating the subject matter’s classification* among the classes of subjects described in ss. 91 and 92 so far as necessary to resolve the case. If an enactment’s subject matter could be classified under different heads of power listed under both ss. 91 and 92, then the subject matter should be identified with more precision until it is clear which single level of authority (as between federal and provincial) may legislate in respect thereof (*Reference re*

Assisted Human Reproduction Act, at para. 190). A sufficiently precise description may well refer to why *and* how the law operates (*Chatterjee*, at para. 16).

(2) Narrow Proposed Characterizations

[321] I turn now to the characterizations advanced by the Attorneys General of Canada and British Columbia in support of their arguments that the *Act* is *intra vires* Parliamentary authority to regulate matters of national concern under POGG.

[322] I observe at the outset that, when Parliament seeks to permanently and exclusively regulate a matter of national concern, one would expect the Attorney General of Canada to have a single, clear, and consistent position about just *what* he thinks Parliament was doing. More particularly, he should be able to readily — and, again, consistently — identify the narrow and distinct matter that the legislation in question addresses. That has not occurred here. Instead, the Attorney General has offered up a vast array of shifting arguments in various courts at various stages in the proceedings. This alone should provoke deep suspicion about the correctness of those arguments.

[323] To assuage these suspicions, the Attorney General of Canada acknowledges that his approach has “evolved”, having been “informed” along the way “by the characterizations of [the] courts below” (R.F., at para. 61). So where has this “evolution” brought him? Before this Court, it has at last brought him to the revelation

that the *Act*'s dominant subject matter is “establishing minimum national standards integral to reducing nationwide GHG emissions” (para. 56 (emphasis deleted)).

[324] This is similar to the characterization that the Attorney General of British Columbia successfully urged the Court of Appeal for Saskatchewan to adopt: “. . . ‘minimum national standards of stringency for pricing GHG emissions’” (2019 SKCA 40, 440 D.L.R. (4th) 398, at paras. 11 and 431). Before us, British Columbia urged a variation, specifically: “. . . establishing minimum national pricing standards to allocate part of Canada’s targets for GHG emissions reduction” (A.F., at para. 2 (emphasis deleted)).

[325] None of these characterizations can be sustained.

[326] The principal difficulty with these submissions is the invocation of “minimum national standards”. It adds nothing to the pith and substance of a matter, which is directed *not* to the fact of *a standard*, but to *the subject matter* to which the standard is to be applied. In other words, identifying “minimum national standards” as part of the dominant subject matter begs the very question which the characterization analysis seeks to answer: minimum national standards *of what?*

[327] “Minimum national standards” is a *nothing*. It is an *artifice* — or, as the Attorney General of Alberta puts it, a rhetorical “sleight of hand” (R.F., at para. 44). *Only* federally enacted standards can be both “national” (in the sense that only federal legislation can apply nationwide, while provincial legislative authority cannot extend

beyond its borders) *and* a “minimum” (since, if a provincial standard is different from a corresponding federal standard, the operation of paramountcy ensures that the federal standard will prevail). In the result, using “minimum” and “national” to describe the *Act*’s pith and substance is empty and misleading.

[328] None of this is answered by the majority. Indeed, nowhere does the majority justify the inclusion of “minimum national standards” in its characterization of the pith and substance of the *Act*. Instead, the majority simply and peremptorily expresses its “view” that “the federal government’s intention was not to take over the field of regulating GHG emissions, or even that of GHG pricing, but was, rather, to establish minimum national standards of GHG price stringency for GHG emissions”, and that “minimum national standards” adds something “essential” to the pith and substance of the *Act* (paras. 65 and 81). The majority also says that the impugned federal legislation in *Hydro-Québec* (which also included a backstop) was not described by this Court as imposing minimum national standards (at para. 33, per Lamer C.J. and Iacobucci J., dissenting, and at paras. 130 and 146, per La Forest J.), because the backstop nature of that legislation was but a “mere feature” — whereas, in this case, the backstop nature of the *Act* is its “main thrust”, “dominant characteristic”, and “defining feature” (Chief Justice’s reasons, at para. 82). Respectfully, the distinction between a legislative structure that operates as a “mere” feature as opposed to a “dominant” or “defining” one is elusive. Indeed, my colleagues appear also to find it so, since they do not explain it. Little in Part 1 or 2 of the *Act* is cited in support for the proposition that, *here*, the backstop model is a “defining”, as opposed to a “mere”,

feature. We are simply to accept that this is so because the majority declares it to be so, citing *not* the actual statute and what it does, but instead the *Final Report* of the Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms, 2016 (online), two federal reports, and excerpts from debates in the House of Commons (paras. 65-67). While these sources form part of the relevant backdrop, they are not a proxy for serious judicial scrutiny of the *Act* and, in particular, of Part 2 — the slightest attention to which reveals, as I have already described, that it does indeed have the potential to “take over the field of regulating GHG emissions” in the listed industries.

[329] The majority responds to this point by stating that *some* federal legislation — such as the legislation at issue in *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (“*2011 Securities Reference*”), which allowed provinces to opt-in — does not necessarily apply nationally or create a minimum standard. Here, by contrast, the *Act* “applies in all the provinces at all times” (yet it is not a “blunt unified national system”) (Chief Justice’s reasons, at para. 81). This, says the majority, somehow legitimizes the inclusion of “minimum national standards” in its description of the *Act*’s pith and substance (para. 81). With respect, this misses the critical point. It is not that *all* federal legislation imposes minimum national standards, but rather that, by operation of paramountcy and the territorial limits of provincial jurisdiction, only Parliament *is capable* of imposing minimum national standards. The inclusion of “minimum national standards” in the pith and substance of a federal statute effectively decides the jurisdictional dispute. While, as I have explained, it can be appropriate to include reference to the legislative means in the pith and substance, it is entirely

inappropriate to short-circuit the analysis by describing the means as something that only federal legislative authority can undertake.

[330] In short, and remarkably, the majority barely acknowledges that this idea of describing the pith and substance of a statute in terms of “minimum national standards” might be the least bit controversial, saying nothing to justify it, either generally or specifically. Indeed, in the face of objections thereto from the parties, and majority and dissenting judgments at the courts of appeal, one can only surmise that the majority does not wish to truly engage the point. This may well be because the device of “minimum national standards” allows the majority to effectively bypass several steps of their diluted reformulation of the test for the national concern branch from *Crown Zellerbach* — a subject to which I return below.

[331] A final point about “minimum national standards”. Even if “minimum national standards” represented anything meaningful for our purposes, the fact remains that Part 2 of the *Act* imposes *no* explicit standards, whether “minimum” or “national”. Rather, it allows the federal Cabinet to selectively impose an array of carbon prices on an array of different trade-exposed industries, with the stated goal of maintaining their international competitiveness and minimizing carbon leakage.

[332] The Attorney General of Canada’s reference to “integral” standards also has no relevance to identifying the *Act*’s pith and substance. Determining whether the standards implemented through the *Act* are “integral” to reducing Canada’s GHG emissions would require this Court to consider whether the standards set out in the *Act*

are effective. Yet, as this Court has repeatedly maintained, “the efficacy of the law is not a valid consideration in the pith and substance analysis” (*Ward*, at para. 22). Indeed, “the wisdom or expediency or likely success of a particular policy expressed in legislation is not subject to judicial review” (*Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 425). Whether and to what extent any given standard is integral to reducing Canada’s GHG emissions is a matter of policy that has no bearing on the constitutional question facing this Court.

[333] Without “minimum national standards” and “integral” to round out the characterization proposed by the Attorney General of Canada, we are left with “reducing nationwide GHG emissions” which — as a statement of *the goal* of the law without any reference to *the means* proposed to achieve it — obviously lacks the specificity necessary to enable classification. This Court’s description of the *Act*’s subject matter should provide “an abstract of [its] content, instancing the subjects or situations to which it applies and the ways it proposes to govern them” (Abel, at p. 490). In order to determine whether the federal government can enact any particular GHG emission “standard of stringency”, we must describe, concisely but precisely, how that standard operates.

[334] Turning to the Attorney General of British Columbia’s proposed characterization, without “minimum national standards”, we are left with “allocat[ing] part of Canada’s targets for GHG emissions reduction”. However, as the Attorney General of Alberta points out, it is difficult to accept that the *Act* allocates part of

Canada's overall targets when it "neither sets nor allocates any targets" at all (R.F., at para. 45). The *Act* imposes a fuel charge and gives the federal Cabinet policy levers to set carbon prices by industry. This is an odd way to allocate emissions reduction targets.

[335] For these reasons, Canada and British Columbia's proposed characterizations of the *Act*'s pith and substance must be rejected. It is therefore necessary to analyze anew the purpose and effects of the law so as to characterize them appropriately.

(3) Purpose and Effects

[336] There is no real dispute about the *Act*'s purpose. Its broad aim is to reduce Canada's GHG emissions to mitigate climate change. More narrowly, the *Act*'s purpose is to change behaviour. Its preamble states that behavioral change "is necessary for effective action against climate change" and, further, that "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". The *Act* refers to Canada having made international commitments to reducing its GHG emissions.

[337] The difficulty with many of the submissions before us, however, including those of the Attorney General of Canada, is that they attempt to characterize the pith and substance of the *Act* as if Parts 1 and 2 were each doing the same thing in the same way. The majority's pith and substance analysis is based on the same premise (para. 71). This is both *inexplicable* and *superficial*. *Inexplicable*, because the two parts

of the *Act* are not remotely similar to each other; Parliament could have set out each Part in its own statute. Indeed, doing so might have prompted the majority to consider the distinct operational features of each Part. And *superficial*, because it pays little attention to the regulations; where regulations have been passed, they can — and, here, *should* — be scrutinized to ascertain the true intent of the legislature (*Reference re Assisted Human Reproduction Act*, at para. 84). While Part 1 of the *Act* increases the cost of producing, delivering, using, or importing fuels that produce GHG emissions (which is expected to be passed on to consumers through an increase in the ultimate retail cost of those fuels), Part 2 does something quite different: it increases the cost of certain industrial activities by charging large facilities for producing GHG emissions over prescribed limits based on their particular industry and production processes. Part 2 also alleviates the impact of carbon pricing on *some* industries, but *not all*: the OBPS covers only the emissions-intensive trade-exposed industries that carry out an activity that the federal Cabinet chooses to list in the regulations. Picking winners and losers in this way is the stuff of industrial policy, not carbon price stringency.

[338] It becomes even more difficult to reconcile Part 2 with the notion of carbon price stringency when considering the effects of the *Regulations* themselves. My colleague Rowe J. has comprehensively reviewed the provisions in the *Act* that empower the federal Cabinet to make regulations, and I endorse his analysis, to which I add this. The current regulations impose varying carbon costs on the industries subject to the OBPS. The present *Regulations* establish, by my count, 78 separate output-based standards across 38 industrial activities. As these output-based standards depend on a

chosen level of stringency (to be decided based on competitiveness and carbon leakage concerns), the output-based standards — and thus the average cost per tonne of GHG emissions — varies for each of these activities. For example, the 2019 Regulatory Impact Analysis Statement indicates that a stringency of 95 percent of the average emissions intensity is prescribed for iron, steel and cement production, which (with an excess emissions charge of \$40 per tonne of carbon emissions in 2021) sets an average carbon cost of \$2 per tonne; a stringency of 90 percent is prescribed for refineries and petrochemical production, setting an average carbon cost of \$4 per tonne; and a stringency of 80 percent is prescribed for mining, potash and bitumen production and upgrading, setting an average carbon cost of \$8 per tonne (*Canada Gazette*, Part II, vol. 153, No. 14, July 10, 2019, at pp. 5387-88 and 5391).

[339] I stress Part 2 here because, in analysing the scale and sweep of discretion granted to the federal Cabinet under Part 2 of the *Act*, the majority vastly understates what Part 2 actually does. For example, after referring to the federal Cabinet’s power under Part 2 to regulate and issue orders that take it deep into matters of industrial policy, the majority says that, like in Part 1, “no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country” (para. 76). But this ignores the detailed regulation-making powers in Part 2, including the federal Cabinet’s discretion to set — on an industry-by-industry basis — output-based pricing standards under the *Regulations*, and to select which industries are exempt from having to pay the Part 1

fuel charge so as to preserve their international competitiveness. Rather than establish minimum national standards, therefore, it seems more correct to say that the *Act* empowers the federal Cabinet to establish variable and inconsistent standards for an array of different industrial activities.

[340] It follows from the foregoing that the pith and substance of Parts 1 and 2 of the *Act* ought to be characterized separately. And it also follows from the foregoing that the pith and substance of Part 1 of the *Act* is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 of the *Act* is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.

B. *Classification*

[341] I now turn to determining the class of subjects — that is, the heads of power under our Constitution — to which each of the enactment’s two dominant subject matters belongs. While the Attorney General of Canada and my colleagues in the majority have rushed directly to consider whether the *Act*’s dominant subject matter fits within the national concern branch of POGG, doing so is unsound as a matter of constitutional methodology: generally, courts should look *first* to the enumerated powers, resorting to the residual POGG authority only if necessary (*Hydro-Québec*, at para. 110, per La Forest J.; see also Hogg, at pp. 17-4 to 17-7; and D. Gibson, “Measuring ‘National Dimensions’” (1976), 7 *Man. L.J.* 15, at p. 17).

(1) Provincial Jurisdiction

[342] It must be remembered that the *Act*'s entire scheme is *premised* on the provinces *having* jurisdiction to do precisely what Parliament has presumed to do in the *Act* — that is, to impose carbon pricing through a comparable scheme.

[343] Provincial jurisdiction over property and civil rights authorized by s. 92(13) stands out as the most relevant source of legislative authority for the pith and substance of Parts 1 and 2 of the *Act*. Regulating trade and industrial activity, all within the boundaries of specified provinces, is indisputably captured by this broad head of power, which includes the regulation of business not coming within one of the enumerated federal heads of power, as well as, of course, the law of property and of contracts (Hogg, at pp. 21-2 to 21-3 and 21-8 to 21-10; *Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at p. 110; Lederman, at pp. 603-4). Indeed, as I have explained, the *Act* operates as a backstop, operating only where provincial legislative authority is not exercised, or not exercised in a manner acceptable to the federal Cabinet.

[344] The majority acknowledges the importance of s. 92(13), emphasizing its importance for Quebec. Ironically, as I shall explain below, that importance is reinforced by *Quebec*'s conspicuous absence from s. 94's provision for the uniformity of laws governing property and civil rights — an important feature of the terms on which Quebec entered Confederation, and which the majority ignores. Further, the majority's meager appreciation of s. 92(13)'s significance is made evident *both* by the

majority's description of it as a tool merely for preserving "regional and cultural diversity" (para. 210), *and* by the hard reality that, under this legislation, the authority of Quebec and the other provinces under s. 92(13) is now subordinate to federal authority. To announce that the new national concern test invented by the majority is both "rigorous" and a "meaningful constraint" on federal power does not make it so (para. 210). With respect, and as I shall also explain, the majority's new test, far from constraining federal authority, instead enables it to encroach on provincial authority, notably that under s. 92(13).

[345] The provincial residuum in s. 92(16), granting authority over all matters of a local or private nature, could also authorise Parts 1 and 2 of the *Act* in the alternative (Hogg, at pp. 21-4 to 21-5).

[346] Part 2 of the *Act*, as a deep foray into industrial policy, also falls within matters of provincial legislative authority granted by s. 92(10) over local works and undertakings. Also relevant to Part 2 of the *Act* — with its emphasis on heavy industrial emitters, trade exposure, and international competitiveness — is s. 92A. This head of power gives the provinces the exclusive jurisdiction to make laws in relation to the exploration, development, conservation, and management of non-renewable natural resources in the province. Though not intended to derogate from the existing powers of Parliament, the resource amendment fortifies the pre-existing provincial powers in this area and gives the provinces indirect taxation powers, and greater control over, their natural resources (W. D. Moull, "Section 92A of the Constitution Act, 1867" (1983),

61 *Can. Bar Rev.* 715, at p. 716; *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at pp. 375-77; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 84).

[347] The foregoing identification of several areas of provincial legislative authority over the dominant subject matter of a federal statute should — and, as a matter of this Court’s constitutional methodology, *always has* — led this Court to the conclusion that the statute is *ultra vires* Parliament (barring application of the double aspect or ancillary powers doctrines). As McLachlin C.J. wrote for the majority in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 19,

[t]he first step in determining the validity of the amendments brought by by-law No. 260 is to identify their dominant characteristic. This is known as the “matter” of the legislation. Once the matter of the legislation has been determined, the next step is to assign this matter to one or more heads of legislative power. If the matter comes within one of the heads of power allocated to the provinces under the *Constitution Act, 1867*, then the impugned law is valid. If it does not, then the court must consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers. [Emphasis added; citations omitted.]

[348] And so, in this case the identification of several applicable provincial heads of power should truly be the end of the matter. This is because all such heads of power, including those I have just identified as applicable here, are, by the terms of s. 92 (and s. 92A(1)), matters over which provincial legislatures “may exclusively make Laws”. And, by the terms of s. 91, the POGG power applies only “in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”. While the constitutional text of “not coming within the

Classes of Subjects . . . assigned exclusively to . . . the Provinces” is recounted in passing by my colleagues in the majority, they give it no consideration (Chief Justice’s reasons, at para. 89). Instead, they offer up bromides about the need to “maintain the autonomy of the provinces and respect the diversity of Confederation” (paras. 4, 48-50 and 89-90) — which assurances are belied by majority judgment’s eliding of clear constitutional text that was intended to maintain that very provincial autonomy and diversity. The objection, therefore, remains unanswered: the *exclusivity* of provincial jurisdiction over matters falling under s. 92 is fundamental to the Canadian brand of federalism, and was a unique and deliberate choice by the makers of our Constitution who were concerned about federal overreach via the POGG power — a concern, until now, shared by this Court.

[349] The language of “peace, order, and good government” (often in the form of “peace, welfare, and good government”, or “welfare, peace, and good government”) was frequently included in Imperial constituting documents long before the *Constitution Act, 1867* (appearing, for example, in the *Royal Proclamation 1763* (G.B.), 3 Geo. 3 (reproduced in R.S.C. 1985, App. II, No. 1); the Commission appointing James Murray, Captain General and Governor in Chief of the Province of Quebec, November 21, 1763 (reproduced in *Sessional Papers*, vol. XLI, 3rd Sess., 10th Parl., 1907, No. 18, at p. 128); the *Quebec Act, 1774* (G.B.), 14 Geo. 3, c. 83 (reproduced in R.S.C. 1985, App. II, No. 2); *An Act for the better regulating the Government of the Province of the Massachuset’s Bay in New England* (G.B.), 1774, 14 Geo. 3, c. 45; the *Constitutional Act, 1791* (G.B.), 31 Geo. 3, c. 31 (reproduced in

R.S.C. 1985, App. II, No. 3); *An Act to make temporary Provision for the Government of Lower Canada* (U.K.), 1838, 1 & 2 Vict., c. 9; the *Union Act, 1840* (U.K.), 3 & 4 Vict., c. 35 (reproduced in R.S.C. 1985, App. II, No. 4); *An Act to provide for the Government of British Columbia* (U.K.), 1858, 21 & 22 Vict., c. 99; and the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict., c. 63). (See, generally, S. Reid and M. Scott, *Interpretative note on the terms “Peace, order and good government” and “Peace, welfare and good government”*, April 7, 2020 (online).)

[350] What is different, however, about s. 91 of the *Constitution Act, 1867* is the caveat that laws made under the POGG power may “not com[e] within the Classes of Subjects . . . assigned exclusively to . . . the Provinces”. While the above-listed constitutional documents all contain a caveat, it was to the effect that the law-making power being conferred should not be exercised in a manner inconsistent with the laws of the Imperial Parliament. For example, the *Royal Proclamation* cautioned that laws enacted for the “Peace, Welfare, and good Government” should be “as near as may be agreeable to the Laws of England”. But our Constitution imposed a new kind of caveat, by its terms clearly designed to preserve the integrity of provincial legislative authority. And it makes clear that the federal law-making authority for the peace, order, and good government of Canada was intended to be subject to the division of powers. Within their areas of legislative authority, provinces are not only sovereign, but *exclusively so*. Hence the constitutional impossibility of the *Act*’s backstop model: if the provinces *have* jurisdiction to do what the *Act* does — and, that is, again, the very premise of the

Act's scheme — then the *Act* cannot be constitutional under the national concern branch of POGG.

[351] Again, my colleagues in the majority do not grapple with this fundamental objection, despite accepting that the provinces have the jurisdiction under ss. 92(13) and (16) and 92A to do precisely what the *Act* does (para. 197). Instead, they accept the submissions of the Attorneys General of Canada and of British Columbia that *something else* is going on here, that *some aspect* of the *Act* is truly and distinctly national in scope and lies outside provincial jurisdiction which can be regulated by Parliament under the POGG residual authority over matters of national concern. While these submissions are premised on what I have explained is an inadequate description of the pith and substance of the *Act*, I now turn to show that this view is unsustainable on this Court's jurisprudence.

(2) The National Concern Branch of POGG

(a) *Defining the Matter of National Concern*

[352] The Attorneys General of Canada and British Columbia urge us to find that their proposed characterizations of the pith and substance of the *Act* are one and the same as the matters of national concern falling under the POGG power. This point reveals a lack of clarity in the jurisprudence, stemming from the particular way in which the division of powers analysis proceeds under POGG relative to the enumerated heads of power under s. 91. As I have explained, where an enumerated head of power is relied

upon, the pith and substance of the impugned law is identified at the characterization step (for instance, “enhancing public safety by controlling access to firearms through prohibitions and penalties” in *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 4), and that pith and substance is then classified under a head of power or class of subjects (in that case, the criminal law power in s. 91(27)).

[353] The analysis proceeds somewhat differently, however, where, as here, Parliament relies upon the national concern branch of POGG as the source of its authority to legislate. After identifying the pith and substance of the impugned law, and after deciding that it does not fall under an enumerated head of power, the reviewing court must then consider whether the matter said to be of national concern satisfies the requirements stated in *Crown Zellerbach*. If so, the matter is placed under exclusive and permanent federal jurisdiction. The question arises, however, whether the pith and substance of the impugned legislation should or can be *coextensive* with the matter of national concern, or whether the matter of national concern should or can be *broadier* than the pith and substance of the legislation. The POGG jurisprudence offers little guidance on this point. The cases have described the matters of national concern both broadly (as in *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 (aeronautics) and *Ontario Hydro* (atomic energy)) and narrowly (as in *Munro v. National Capital Commission*, [1966] S.C.R. 663 (the development, conservation and improvement of the National Capital Region in accordance with a coherent plan)), depending on the particular question to be resolved. What the cases have not done — with the possible exception of *Crown Zellerbach* — is include, within the description

of the matter of national concern, the *legislative means* of the particular statute under review. (In *Crown Zellerbach*, the matter of national concern is described at p. 436 as both “[m]arine pollution” and “the control of marine pollution by the dumping of substances”, although later cases have described the matter of national concern identified in *Crown Zellerbach* as only “marine pollution”, without the additional reference to legislative means: see *Hydro-Québec*, at para. 115, and *Friends of the Oldman River Society*, at p. 64.)

[354] As a general proposition, if a proposed matter of national concern is described more narrowly — for instance, by including legislative means — it will be easier for that matter to qualify under the test for applying the national concern doctrine stated in *Crown Zellerbach*. This is because, again generally, it is easier to demonstrate that a narrowly defined matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. And, of course, the narrower the matter, the less the impact on provincial jurisdiction. The majority accepts the proposition that identifying the matter of national concern is simply a matter of identifying the pith and substance of the statute under review, which can, as here, include legislative means. Indeed, the majority says it *must* be so; one must always be the same as the other (paras. 115-16). But accepting this view effectively confines Parliament to that particular legislative means in responding to the matter of national concern. This would be unprecedented and undesirable. The arguments of the Attorneys General of Canada and of British Columbia illustrate this point.

[355] The Attorney General of Canada urges us to find that the matter of national concern to be recognized under POGG is precisely the same as its proposed pith and substance of the law, namely, “establishing minimum national standards integral to reducing nationwide GHG emissions”. The Attorney General of British Columbia similarly urges us to accept the matter of national concern in the same terms as his proposed pith and substance of the law: “. . . establishing minimum national pricing standards to allocate part of Canada’s targets for GHG emissions reduction”. To be clear, then, each of these submissions couple a description of *the legislative means* (minimum national standards) with *the purpose* of the law.

[356] Considering first the Attorney General of Canada’s proposed matter of national concern, I have already explained that it is not a court’s place to consider whether regulatory measures are “effective” or “integral”. Doing so is no more appropriate at the classification step than it is at the characterization step — and, in any event, the efficacy of legislation is irrelevant to distinguishing an area of distinctly federal jurisdiction from that of provincial jurisdiction. What is of greater significance here is the invocation, common to the proposals of the Attorney General of Canada and the Attorney General of British Columbia, of “minimum national standards”. As I have also explained, when used to characterize the pith and substance of the *Act*, this phrase is empty and misleading, and it can be rejected for that reason alone. But reliance upon “minimum national standards” is even less tenable as a proposed matter of national concern. Indeed, its acceptance as such would work pernicious effects on federalism.

[357] By way of explanation, the Attorney General of Canada urges us in his factum to find that a matter formerly under provincial jurisdiction is “transformed” (*how*, he does not say) into a matter of national concern when “minimum national standards” are invoked. This is simply not possible. Were it so, Parliament could unilaterally create an area of distinctly federal jurisdiction from matters that fall within exclusive provincial jurisdiction simply by doing the very thing that exclusive provincial jurisdiction was intended to preclude: legislating a national standard in respect of that matter. So understood, *every* subject matter listed under s. 92 of the *Constitution Act, 1867* could be viewed as having a national component. The possibilities are endless: “minimum national standards” governing hospital and health care administration; “minimum national standards” governing the availability of bilingual municipal services; “minimum national standards” governing the location or construction of hydroelectric generating stations; “minimal national standards” of second-language education in public schools; or “minimum national standards” governing the content of public school courses in 18th century Canadian history.

[358] For this to serve as a basis for recognizing that *some aspect* of an area of provincial jurisdiction is truly and distinctly “national” in scope, and therefore actually lies *outside* provincial jurisdiction, “is to create something out of nothing and to subject every area of provincial jurisdiction to the potential setting of national standards that denude provincial power” (D. Newman, “Federalism, Subsidiarity, and Carbon Taxes” (2019), 82 *Sask. L. Rev.* 187, at p. 199). It represents a model of *supervisory* federalism. This is all but acknowledged by my majoritarian colleagues who, in minimizing the

Act’s effects on provincial authority, *repeatedly* stress that provinces are “free” to “implement their own GHG pricing mechanisms”, to “prescribe any rules for provincial pricing mechanisms”, to “design and legislate any GHG pricing system”, or to “design any GHG pricing system they choose” — but *then* adding, *every time*, the caveat “**as long as**” (or “**provided**”) they are “**sufficiently** stringent” to meet “the federally-designated standards”, or “targets” (paras. 27, 61, 65, 72, 79, 81, 178, 179, 183, 186, 200 and 206 (emphasis added)). In other words, the provinces can exercise their jurisdiction however they like, *as long as* they do so in a manner that the federal Cabinet also likes. And yet, “[e]nsuring provincial compliance with Parliament’s wishes” is hardly an appropriate basis for recognizing a new matter of national concern (J. Hunter, “Saving the Planet Doesn’t Mean You Can’t Save the Federation: Greenhouse Gases Are Not a Matter of National Concern” (2021), 100 *S.C.L.R.* (2d) 59, at p. 79).

[359] Much the same can be said about British Columbia’s submission that “allocat[ing] part of Canada’s targets for GHG emissions reduction” is an appropriate matter of national concern. As I have already explained, this is not an accurate description of the pith and substance of the *Act*. More to the point, however, the notion of allocating national *targets* encounters the same objection as Canada’s minimum national *standards*: it is an artifice which, once grafted onto matters that are plainly of provincial jurisdiction (as the backstop scheme of the *Act* itself contemplates) adds nothing. And like minimum national standards, it can be applied to open up any area of provincial jurisdiction to unconstitutional federal intrusion once Parliament decides

to legislate uniform treatment in the form of mandatory, national “targets”. In this sense, there is no difference between Parliament legislating national standards and legislating national targets.

[360] British Columbia responds to this concern by raising the provincial inability test, coupled with a submission that, in most areas of provincial jurisdiction, there is no need for Parliament to interfere by enacting national targets. This is because, the argument goes, provincial legislation on such matters — for instance, education — has primarily *intra*-provincial impacts, such that the costs and benefits of the legislature’s policy choice are felt principally within the province. Education is therefore said to be unlike GHG emissions, since minimum national standards in education “would not indivisibly address a provincial inability” (A.F., Attorney General of British Columbia, at para. 49).

[361] But this submission misconceives the proper focus of the provincial inability test, a subject to which I will return below. For now, it suffices to observe that the existence of extra-provincial impacts does not mean that uniform legislative treatment is truly *essential* — as is made clear by considering, with reference to *Anti-Inflation*, the extra-provincial inflationary impacts of intra-provincial economic activities. It hardly seems likely that a similarly imaginative argument in that case about imposing “minimum national standards” or “allocating national targets” related to the containment and reduction of inflation would have moved Beetz J. from his conclusion that inflation was inappropriate as a matter of national concern.

[362] More fundamentally, I reject the idea that adding “minimum national standards” or the “allocation of nationwide targets” to a proposed matter creates or identifies a distinctly federal aspect of that matter. On this point, various parties invoked the concept of “systemic risk”, borrowed from the securities references — as indeed does the majority (at paras. 176 and 182) — to support a finding that the proposed matter met the requirements of the provincial inability test. In the *2011 Securities Reference*, this Court accepted that federal securities legislation engaged trade as a whole (as is required under the trade and commerce power), but nevertheless found that the law went too far by delving into “detailed regulation of *all* aspects of trading in securities, a matter that has long been viewed as provincial” (para. 114 (emphasis in original)). A more focussed law that was “limited to addressing issues and risk of a *systemic* nature that may represent a material threat to the stability of Canada’s financial system” was later upheld in the *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (“*2018 Securities Reference*”) because “the regulation of systemic risk in capital markets goes to promoting the stability of the economy generally, not the stability of one economic sector in particular” (para. 111 (emphasis in original)).

[363] The submission that the proposed matter is suitable as a matter of national concern because it addresses the systemic risks of climate change has superficial appeal. But this ignores fundamental differences between the respective analyses under the POGG national concern doctrine and under the s. 91(2) trade and commerce power. The federal power to regulate trade and commerce has no requirement for singleness,

distinctiveness and indivisibility. On the contrary, subjects like competition law or systemic risk to capital markets can be diffuse and permeate the economy as a whole, and yet still validly fall under the federal trade and commerce power (see, for instance, para. 87 of the *2011 Securities Reference*, which discusses the diffuse nature of the competition law that was at issue in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641). “Systemic risk” is, therefore, an ill-fitting concept to borrow from the s. 91(2) analysis.

[364] Finally, I note that, in advancing an expansive national concern doctrine so as to augment federal power, both the Attorney General of Canada and the majority rush past s. 94 of the *Constitution Act, 1867*, which provides that “the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights”. As that section makes clear, the Constitution already contemplates that Parliament might wish to enact uniform laws related to property and civil rights in the provinces, as it does by the *Act*. But s. 94 also imposes certain constraints: it does not apply to Quebec and, in the provinces where it does apply, it requires the consent of the provincial legislatures.

[365] In other words, in bypassing s. 94 so as to embrace their centralized vision of Canadian federalism, both the Attorney General of Canada and the majority would (1) strip Quebec of its protection from federally imposed uniformity of laws relative to property and civil rights, and (2) write out of the Constitution the requirement for provincial consent elsewhere. This deprives the provinces, and Quebec in particular, of

part of the bargain negotiated among the partners, without which “the agreement of the delegates from Canada East . . . could [not] have been obtained” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 36-37). As the Privy Council recognized more generally in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at p. 361, s. 94 “would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of s. 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole”.

[366] It is no simple matter to tinker with the Constitution. This is why that task is left by the amending formula to legislatures, who can deliberate upon the complexities in depth, and not to courts which lack the necessary institutional competencies to navigate those complexities — as here, where, by engorging federal power as it does under the residual POGG power, the majority not only risks doing violence to s. 92 (and, for that matter, to s. 92A), but also trips over s. 94.

[367] This goes to a more fundamental point. As I will discuss below, both the Attorney General of Canada and the majority speak of a “balance” — the Attorney General of striking a “balance of federalism”, and the majority of a “federal-provincial balance” (R.F., at para. 69 (emphasis deleted); Chief Justice’s reasons, at paras. 102, 117 and 134). But what my colleagues in the majority do not appreciate is that they are *undoing* a balance. And that is because, as difficult as it may be for them to accept, the “balance” that *they* presume to strike, and that *they* would have *the judiciary* strike in

future cases, has *already been struck* by Part VI of the *Constitution Act, 1867* (“Distribution of Legislative Powers”). The role of the courts is *not to strike* a balance, but *to maintain and preserve* the balance that is already recorded by our Constitution in its division of powers. As this Court wrote in *Reference re Firearms Act*, “it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power” (para. 48 (emphasis added)). Section 94, like ss. 91 and 92, is part of a larger package that itself, and as a whole, reflects a “balance” that was agreed to by both the federal and provincial levels of government or their colonial predecessors.

[368] Of course, re-balancing may occasionally be desirable or necessary — hence, for example, the negotiations that led to s. 92A, and hence certain particulars of the amending formula. But when that need arises, *if it arises*, it is not in the gift of either the Attorney General of Canada or of the Court to meet it. Indeed, their attempting to do so simply upsets the balance — by, as here, effectively stripping Quebec of an immunity held for over 150 years under the Constitution of Canada, which immunity protected, among other things, Quebec’s rights to the use of civil law in private matters, guaranteed nearly 250 years ago by the *Quebec Act*.

[369] For all these reasons, the matters of national concern proposed by the Attorneys General of Canada and British Columbia are constitutionally untenable. While it is unnecessary to resolve here the question of whether a newly recognized matter of national concern under POGG can ever be so narrowly defined to encompass

only the pith and substance of the impugned law (and including the legislative means), I offer the following observations. As noted by Huscroft J.A., in dissent, describing the new matter of national concern so narrowly in effect constitutionalizes the law under review, and the particular means it adopts (2019 ONCA 544, 146 O.R. (3d) 65, at para. 224). It also risks the analysis devolving into results-oriented thinking, which must be avoided in the division of powers analysis (*Chatterjee*, at para. 16). Further, *Crown Zellerbach* suggests that the broader approach is appropriate. Recall that once a matter is recognized to be of national concern under POGG, Parliament is granted an “exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects” (para. 433). This language suggests that, in relation to a matter of national concern, Parliament is granted a scope of jurisdiction — and the ability to employ means — beyond that specifically contemplated by the law under review.

[370] All this said, I decline to conclude that, as a general proposition, it would never be appropriate to describe a matter of national concern so narrowly as to encompass only the law under review and the legislative means it employs. Still, in the case at bar, a broad characterization of the national concern is unavoidable. Defining a matter of national concern that encompasses *both* the reduction of GHG emissions by raising the cost of fuel (Part 1) and the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) requires broad strokes. The legislative means employed by Parts 1 and 2 are mutually distinct. Indeed, each is quite different from the other,

sharing only a purpose: the reduction of GHG emissions. This, and my conclusion stated above that the definition of the matter of national concern should not tie Parliament to a particular legislative means, tend to support the identification of the matter said to be of national concern as the purpose of the *Act: the reduction of GHG emissions*. The only remaining question, then, is whether the reduction of GHG emissions satisfies the test stated in *Crown Zellerbach* for a valid national concern.

(b) *Singleness, Distinctiveness and Indivisibility*

[371] “The reduction of GHG emissions” does not meet the requirements of *Crown Zellerbach*. This would be so, even if it were appropriate to consider each of the pith and substance of Parts 1 and 2 as proposed matters of national concern, since the reduction of GHG emissions by raising the cost of fuel (Part 1) and by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure (Part 2) each fail to meet the requirement of distinctiveness. Neither of these matters is distinct from matters falling under provincial jurisdiction under s. 92. I begin, therefore, by considering why the pith and substance of each of Parts 1 and 2, respectively, fail to meet the requirement of distinctiveness (even if they were appropriate matters of national concern). Then, I consider why the proper matter of national concern as I understand it (“the reduction of GHG emissions”) fails to meet the requirements of singleness and indivisibility.

(i) The Pith and Substance of Each Part Is Not Distinct

[372] Here again, the backstop model of the *Act* is of significance. The principal difficulty in finding that the reduction of GHG emissions (whether by raising the cost of fuel, or by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure) has the requisite distinctiveness to be recognized as a matter of national concern is illustrated by the very quality of the scheme that Parliament has legislated. Through the *Act*, Parliament encourages provinces to enact substantially *the same* scheme to serve *the same* regulatory purpose of altering behaviour. Again, this demonstrates that Parliament has legislated in respect of a matter that falls within provincial legislative authority, specifically, ss. 92(10) (local works and undertakings), (13) (property and civil rights), (16) (matters of a local nature) and 92A (natural resources). The *Act*'s backstop scheme admits of no other conclusion (Newman, at p. 197). This is much like *Hydro-Québec*, where the legislation contained no opt-out for the provinces, but rather empowered the Governor in Council to exempt provinces that had equivalent regulations in force (para. 57, per Lamer C.J. and Iacobucci J., dissenting, but not on this point). The observations of Lamer C.J. and Iacobucci J. on this point are therefore apposite:

The s. 34(6) equivalency provision also implicitly undermines the appellant's submission that the provinces are incapable of regulating toxic substances. If the provinces were unable to regulate, there would be even more reason for the federal government not to agree to withdraw from the field. Section 34(6) demonstrates that the broad subject matter of regulating toxic substances, as defined by the *Act*, is inherently or potentially divisible. [para. 77]

[373] Proponents of the *Act* urge us to find that, even if the *Act* and provincially legislated GHG pricing schemes address the same matter, they each address different

aspects of that matter. This argument rests on the applicability of the double aspect doctrine, whose application here the majority not only accepts but describes as *inevitable* whenever minimum national standards are employed (Chief Justice's reasons, at paras. 125-31). But the majority is simply wrong — the double aspect doctrine has no application here.

[374] The double aspect doctrine arose because “some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 30). It therefore contemplates that “both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various ‘aspects’ of the ‘matter’ in question” (para. 30). Whether the doctrine applies to the national concern doctrine of POGG is a question of some controversy, given this Court’s statement in *Crown Zellerbach* that Parliament acquires “exclusive jurisdiction of a plenary nature to legislate in relation to” the matter of national concern (p. 433; see, for instance, *Lacombe*, at paras. 26-27). Assuming without deciding, however, that the double aspect doctrine may, in some instances, apply to matters of national concern recognized as such under POGG, it has no application here.

[375] As the provinces clearly have jurisdiction to establish standards of GHG price stringency in the province, this leaves as the only difference between the federal aspect and the provincial aspect “minimum national standards”. Obviously, adopting

“minimum national standards” as part of the matter of national concern allows the majority to invoke the double aspect doctrine, since it has defined the matter in terms of something (enacting “national standards”) which, as a practical matter, only Parliament could possibly do. And just as obviously, when the matter is defined in terms of something only Parliament could possibly do, *whatever it is* that the provinces are doing *must be something different*. This reasoning, however, could easily be applied to create federal “aspects” of all sorts of matters falling within provincial jurisdiction. Indeed, the majority suggests *just that*, acknowledging that whenever the device of “minimum national standards” is used, a double aspect “will inevitably result” (para. 129).

[376] The device of minimum national standards, combined with the double aspect doctrine, artificially meets many aspects of the *Crown Zellerbach* test, as diluted by the majority. By definition, “minimum national standards”, being *national*, would presumably, and in every case, qualify as “qualitatively different from matters of provincial concern” and as “predominantly extraprovincial . . . in character” (Chief Justice’s reasons, at para. 148). And, of course provinces, being provinces, are *unable* to establish binding minimum national standards (para. 182). Further, because the *Act* leaves the provinces free to adopt their own schemes *as long as* (or *provided*) they meet federal approval, the impact on provincial jurisdiction is “qualified and limited” (paras. 198, 205 and 211). In short, the device of “minimum national standards”, where applied, deprives the majority’s framework of much of its “exacting” quality.

[377] It is, however, this simple. While the double aspect doctrine “allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction*” (2011 *Securities Reference*, at para. 66 (underlining added)). Like the POGG power itself, the double aspect doctrine must be carefully constrained and applied with caution, because its casual and undisciplined application in the majority’s reasons runs the near-certain risk that ss. 91 and 92 of the *Constitution Act, 1867* will be merged into a “concurrent field of powers governed solely by the rule of paramountcy of federal legislation” (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766). It was for this very reason, in *Bell Canada*, that Beetz J. cautioned that the doctrine “must not be [used] to create concurrent fields of jurisdiction . . . in which Parliament and the legislatures may legislate on the same aspect”; rather, it must be applied only “where the multiplicity of aspects is real and not merely nominal” (p. 766 (emphasis in original)).

[378] Nearly all of the parties and intervenor Attorneys General — aside from the Attorneys General of Canada, New Brunswick and British Columbia — expressed concerns about the application of the double aspect doctrine here. The Attorney General of Quebec offers a particularly compelling and constitutionally sound encapsulation of the problem with the majority’s invocation of the double aspect doctrine in this case, and of the damage to the federation that will follow. The Attorney General of Quebec — no stranger to carbon pricing and legislative action to mitigate climate change — says that the proposed matter does not contemplate two aspects of the same matter; rather, it contemplates the same aspect of the same matter. And because the provinces

may legislate in this area only where such legislation meets the criteria unilaterally set by the federal government, defining the matter so as to artificially conjure a double aspect effectively amounts to a *transfer of jurisdiction* from the provinces to the federal government. This was, of course, also the point of the majority of the Court of Appeal of Alberta: the *Act* purports to do exactly what *the provinces* can do, and for precisely the same reason (2020 ABCA 74, 3 Alta. L.R. (7th) 1, at para. 209). There are simply no distinctly federal aspects of the reduction of GHG emissions that cannot be divided among the enumerated heads of power. And describing the imposition of “minimum national standards” as the distinctly federal aspect of the matter simply brings us back to the arguments that, as I have already explained, get the Attorney General of Canada nowhere. Since such matters fall squarely within provincial jurisdiction, they cannot be matters of “national concern”, given that POGG is a residual power.

(ii) “The Reduction of GHG Emissions” Is Not Single or Indivisible

[379] It is, of course, true that *aspects* of “the reduction of GHG emissions” may be distinct from matters listed in s. 92. Like “inflation” or “the environment”, its nature is inherently diffuse, and it therefore would not *entirely* fall within provincial jurisdiction. Aspects of “the reduction of GHG emissions” would likely come within, for instance, exclusive federal powers over trade and commerce, navigation and shipping, and interprovincial or international works and undertakings (ss. 91(2) and (10) and 92(10)).

[380] But this is of no assistance to the majority here. While aspects of “the reduction of GHG emissions” may be distinct from matters falling under s. 92, as a matter of national concern it still fails to meet the *Crown Zellerbach* requirements of singleness and indivisibility. In *Crown Zellerbach*, it was “not simply the possibility or likelihood of the movement of pollutants across [the boundary between the territorial sea and the internal marine waters of a state]”, but “the difficulty of ascertaining by visual observation” that boundary that meant uniform legislative treatment was required for marine pollution (p. 437). This proposition could not be clearer. The matter was indivisible in that case *not* because pollutants might cross an invisible boundary; rather, the matter was indivisible because of the difficulty of knowing the source and physical location (federal territorial seas vs. provincial inland waters) of the pollution at any given time, and therefore whose regulatory and penal provisions might apply.

[381] Here, however, the territorial jurisdiction from which GHG emissions are emitted is readily identifiable. The matter is divisible, because whenever fuel is purchased, or an industrial activity is undertaken, no question arises as to physical location and, therefore, no difficulty arises in identifying whose jurisdiction might apply. Responsibility for the reduction of GHG emissions among the provinces can therefore be readily identified for regulation at the source of such emissions. This is not a concern which, absent exclusive federal jurisdiction, the provinces could not address. Rather, both Parliament and the provinces may within their respective spheres of legislative authority “operate in tandem” to reduce GHG emissions (*Hydro-Québec*,

at para. 59). The reduction of GHG emissions therefore lacks the degree of unity required to qualify as an indivisible matter of national concern.

[382] My majoritarian colleagues say that I have overstated the regulatory uncertainty aspect of Le Dain J.'s reasoning in *Crown Zellerbach*. They say that there are many routes to establishing indivisibility (at para. 193), and I agree, as does my colleague Rowe J. (see para. 548). My point is not that regulatory uncertainty is a precondition to finding a matter of national concern. Rather, it is that, where the matter in question otherwise lacks specificity and unity — as is the case here, where the matter under consideration is the reduction of GHG emissions, as opposed to, for instance, the matter in *Munro* — the fact that harms may cross borders is not enough to make out indivisibility. Something more is required, and in *Crown Zellerbach*, that was the regulatory and penal uncertainty stemming from an inability to know the jurisdiction in which the pollution had been dumped (p. 437), since the crane depositing the woodwaste in that case was mobile, fixed as it was on a scow. That uncertainty is absent here, and so relying on cross-border harms is simply not enough to make out indivisibility. The emission of GHGs, whether from a factory or an automobile, can be connected to the source province. GHG emissions are therefore *divisible*. This understood, “nationwide GHG emissions” are nothing more than the sum of provincial and territorial GHG emissions (Hunter, at pp. 75-76).

[383] Of course, uniform legislative treatment in the area of GHG emissions reduction might be *desirable*, as it might assist Canada in meeting its international

commitments in relation to GHG emission targets. But the desirability of uniform treatment is hardly the marker of a matter of national concern. Here, the non-participation of one province does not prevent any other province from reducing its own GHG emissions. While a provincial failure to deal effectively with the control or regulation of GHG emissions may cause more emissions from that province to cross provincial boundaries, that is *precisely* what this Court held was insufficient to meet the requirement of indivisibility in *Crown Zellerbach*. To be clear, even if this *could* be said to meet the provincial inability test — that is, even if *Crown Zellerbach* could be read as understanding “provincial inability” as including a provincial failure to act — my conclusion on this point would not change. This is because, properly understood — and contrary to the framework developed by the majority — the provincial inability test is but one indicium of singleness and indivisibility.

[384] Further, I agree with the majority at the Court of Appeal of Alberta, at para. 324, that

there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. . . . The atmosphere that surrounds us all is affected largely by what is being done, or not being done, in other countries. Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world’s GHG emissions.

[385] Obviously, uniform legislative treatment might be desirable in that it could alleviate concerns about carbon leakage. But, and again as the Court of Appeal of Alberta observed, the evidence on this record of the harms of interprovincial carbon

leakage is equivocal at best. Indeed, it tends to suggest that, in most sectors and for most provincial economic activity, such concerns are insignificant (E. Beale, et al., *Provincial Carbon Pricing and Competitiveness Pressures*, November 2015 (online), at p. II; Working Group on Carbon Pricing Mechanisms, *Final Report*, fn. 23; Sask. C.A. reasons, at para. 155, per Richards C.J.S.). This falls well short of establishing the majority's peremptory assertion that uniform treatment is *essential* to address carbon leakage concerns (paras. 183 and 186). And in the absence of actual evidence on this point, the majority's implicit proposition that Part 2 of the *Act* is *desirable* to address concerns about carbon leakage asks us to judge the *wisdom* of this particular policy choice, something that has no bearing on the analysis.

[386] In sum, the reduction of GHG emissions as a matter of national concern fails to meet the requirements of singleness and indivisibility. Like the containment and reduction of inflation, the reduction of GHG emissions

is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory.

(*Anti-Inflation*, at p. 458)

(c) *Scale of Impact*

[387] Even *were* the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers.

[388] The power to legislate to reduce GHG emissions effectively authorizes an array of regulations, “the boundaries of [which] are limited only by the imagination” (Sask. C.A. reasons, at para. 128). It extends to the regulation of any activity that requires carbon-based fuel, including manufacturing, mining, agriculture, and transportation. Indeed, Part 2 of the *Act*, much like the impugned law in the *2011 Securities Reference*, descends into the detailed regulation of industrial GHG emissions reduction by imposing different carbon prices on different industrial activities. As Huscroft J.A. recognized, in dissent, the power to create minimum standards for GHG emissions could potentially authorize minimum standards related to home heating and cooling, public transit, road design and use, fuel efficiency, manufacturing and farming prices (Ont. C.A. reasons, at para. 237).

[389] Unlike previously recognized matters of national concern, including aeronautics, the development and conservation of the national capital region, atomic energy and marine pollution, the power to legislate to reduce GHG emissions has the potential to undo Canada’s division of powers. It is in this respect comparable to the broad topics of environmental regulation and inflation, which this Court has expressly refused to recognize as independent legislative subjects. GHG emissions simply cannot be treated as a single regulatory matter, “because no system in which one government

was so powerful would be federal” (D. Gibson, “Constitutional Jurisdiction over Environmental Management in Canada” (1973), 23 *U.T.L.J.* 54, at p. 85).

[390] In an attempt to minimize the scale of impact on provincial jurisdiction, the Attorney General of British Columbia reminds us that the *Act* does not forbid any *activity*, but only increases the *cost* of certain activities. The *Act*, he argues, is not about regulation, but pricing; it does not allow the federal Cabinet to determine *who* may emit GHGs or set *conditions* on how they do it, but rather allows anyone to emit GHGs if they pay for it (A.F., at paras. 19-21). It follows, on this reasoning, that any impact on provincial jurisdiction is minimal, particularly compared to what it might have been had Parliament resorted to its criminal law power, for instance, to prohibit GHG emissions.

[391] The majority adopts this line of argument, describing “establishing minimum national standards of GHG price stringency to reduce GHG emissions” as an exclusively “pricing-based formulation” of the *Act*’s pith and substance (para. 57). As it explains, “the focus of the [*Act*] is on national GHG pricing” (para. 60; see also para. 70). In so concluding, the majority stresses that “the [*Act*] does not require those to whom it applies to perform or refrain from performing specified GHG emitting activities”, or “tell industries how they are to operate in order to reduce their GHG emissions” (para. 71). Rather, it says, the *Act* simply “require[s] persons to pay for engaging in specified activities that result in the emission of GHGs” (para. 71) — in other words, “just paying money”.

[392] This view ignores two problems. First, “just paying money” is an odd way of describing the impact of a law. The *goal* of the financial charges — “just paying money” — is *to influence behaviour*, in this case both consumer and industrial. And that is precisely the point. As Canada’s Ecofiscal Commission observed during oral submissions, Part 2 of the *Act* “uses pricing to achieve its environmental goals” (transcript, day 2, at p. 77). Further, poised as they are to affect the cost of fuel and dictate the viability of emissions-intensive trade-exposed industries, the charges imposed by the *Act* stand to have a profound effect on provincial jurisdiction and the division of powers.

[393] The point is that “just paying money” hardly captures the intended impact of the *Act*, let alone its potential impact. And yet, this is central to the efforts of the *Act*’s proponents, including the majority, to downplay what the law actually does. Indeed, the majority takes matters even further, by stressing how minimally, in its view, the *Act* actually impacts provincial autonomy. Provinces, observes the majority, may still choose any type of carbon pricing regime they wish. “[F]lexibility and support for provincially designed GHG pricing schemes” remain the order of the day, and provinces are “free to design and legislate any GHG pricing system” they wish, “**as long as**”, of course, their schemes are “sufficiently stringent” and meet the federally-designated standards (Chief Justice’s reasons, at paras. 79 and 200 (emphasis added)). This leads to an impact on provincial jurisdiction that is, in their view, “strictly limited” (para. 200). This, like the flawed idea that the *Act* is just about paying money

— as opposed to the discouragement or prohibition of an activity — informs much of the majority’s classification analysis. It is simply unsustainable.

[394] The second problem with the “just paying money” line of defence is that the contrasting degree of potential impact on provincial jurisdiction of a hypothetical law validly promulgated under Parliament’s criminal law power, or its taxation power for that matter, has absolutely no bearing on whether another matter should be recognized as a matter of national concern. Contrary to the submissions of the Attorneys General of Canada and British Columbia at the hearing of these appeals, the Constitution does not require provinces to happily accept a severe intrusion on their jurisdiction under POGG simply because Parliament *could* have passed a *criminal* law. Likewise, an intrusion into provincial jurisdiction is no less severe simply because it leaves the provinces with authority to enact *more* stringent regulatory requirements. This argument misses the point of the division of powers analysis, which — *pace* the majority — allows no recourse to balancing or proportionality considerations. The *Constitution Act, 1867* does not permit federal overreach *as long as* it preserves provincial autonomy to the greatest extent possible. It sets out spheres of exclusive jurisdiction. It *divides* powers — *exclusive* powers — between Parliament and the provincial legislatures. And within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act — or not act — as they see fit, not *as long as* they do so in a manner that finds approval at the federal Cabinet table (see H. Cyr, “Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism” (2014), 23 *Const. Forum* 20, at pp. 21-22). The very idea

of recognizing federal jurisdiction to legislate “minimum national standards” of matters falling within provincial jurisdiction is corrosive of Canadian federalism.

(3) Other Sources of Federal Legislative Authority

[395] While the Attorney General of Canada focused his submissions on the national concern doctrine, at the conclusion of his factum he pleads, in the alternative, that “Part 1 of the *Act* is validly enacted under Parliament’s taxation power” and, further, that “the entire *Act* is validly enacted under the emergency branch of Parliament’s POGG power, Parliament’s criminal law power, or other existing heads of power, as argued by various Intervenors” (R.F., at paras. 167-68 (emphasis added)). Yet, no actual *argument* is advanced by the Attorney General on *any* of those potential sources of Parliament’s authority, or for that matter on anything other than the national concern branch of POGG. Indeed, that appears to have been the basis upon which Parliament understood itself as proceeding since, when asked during debate about the *Act*’s constitutionality, the reply of the Minister of Environment and Climate Change was to identify that climate change was a “national concern” (*Debates of the Senate*, vol. 150, No. 275, 1st Sess., 42nd Parl., April 2, 2019, at p. 7714 (Hon. Catherine McKenna)). But now, in a storm, any port will apparently do.

[396] Despite the Attorney General’s evident lesser degree of commitment here, I now turn to address the various sources of federal authority “argued by various Intervenors”.

(a) *Gap Branch of POGG*

[397] Several interveners urged us to consider the gap branch of the POGG power as a possible source of federal jurisdiction for the *Act*. For instance, the intervener Athabasca Chipewyan First Nation submitted that the three branches of POGG must be read “fluidly” and that the “scientific newness” of climate change — being a matter unknown at the time of Confederation — should militate in favour of the validity of the *Act*. A version of this idea finds support in academic scholarship. Professor Newman, for instance, suggests that POGG’s national concern branch and gap branch are one and the same (pp. 195-96 and fn. 47).

[398] I agree with Rowe J. that the case law does not support a distinction between the “gap” and “national concern” branches of POGG. Regardless of whether the “gap” branch is understood as housing “new” matters that did not exist at the time of Confederation or as requiring a lacuna in the text of the Constitution, all such matters must still pass the national concern test. As such, the scientific newness of climate change has no bearing on my analysis. As I have already explained, resort to this branch of POGG is not possible here, given that the pith and substance of each of Parts 1 and 2 of the *Act* are properly classified under provincial heads of power.

(b) *Emergency Branch of POGG*

[399] The emergency branch of POGG was also proposed as a possible basis for federal authority by several interveners including the David Suzuki Foundation, the

Canadian Labour Congress, the Intergenerational Climate Coalition, the Athabasca Chipewyan First Nation, and the National Association of Women and the Law and Friends of the Earth. It is curious that the majority does not consider this, since its reasons speak in such terms, describing climate change as “an existential challenge[,] a threat of the highest order to the country, and indeed to the world” (para. 167; see also paras. 187, 190, 195 and 206). Further, the emergency branch’s requirement of temporariness means that the majority’s unconstitutional transfer of jurisdiction from the provinces to Parliament would do less damage to Canadian federalism, and for less time, lasting only until this crisis passes.

[400] It is a problem for the *Act* — although presumably a problem that Parliament could have corrected had it wished to proceed in reliance upon the emergency power — that it does not expressly provide for temporary operation. As I have already recounted, however, the *Act* by its terms is intended to change behaviour. The preamble to the *Act* anticipates what will follow: “. . . increased energy efficiency, . . . the use of cleaner energy, . . . the adoption of cleaner technologies and practices and . . . innovation . . .” In other words, while the *Act* does not come with a “best before” date, it does contemplate *an end*. And while at the outset of an emergency it will often be difficult or impossible to identify with any precision when it might end, the emergency branch *has* been applied in circumstances where it is reasonably apparent that the emergency will, *at some point*, end. Indeed, the point of action is presumably to do what is necessary to ensure that the emergency *will* end. For that reason, “Invocation of exceptional measures is typically justified on the basis that the

ordinary system is not up to handling the threat and that, once the crisis passes, the usual state of affairs can and will return” (S. Burningham, “*The New Normal*”: *COVID-19 and the Temporary Nature of Emergencies*, June 4, 2020 (online) (emphasis added)).

[401] This is not to suggest that Parliament would have lacked “a rational basis” to act here, as required by the caselaw on the emergency branch. Rather, my point is that the Attorney General has not done the necessary (or any) work to show that Parliament justifiably relied upon its emergency power as a source of its authority. This stands in contrast to *Anti-Inflation*, where Parliament manifested such reliance (by specifying an expiration date), and where the Attorney General of Canada made full argument on the point (pp. 383-84 and 417-18).

[402] I should add that the intervener the David Suzuki Foundation urges us to find that the *Act*’s temporary character is to be found in its preambular references to Canada’s commitments under the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015, and that those commitments come with the clear deadline of 2030. Hence, the intervener submits, the *Act* implies a 10-year timeline to achieve required reductions, and it urges us to read in that deadline, by designating an end date to the jurisdiction of Parliament to authorize the *Act* (I.F. (38663 and 38781), at para. 36). While this is an intriguing proposition, considering time-delimited jurisdiction in the emergency doctrine analysis would require a departure from this Court’s jurisprudence. It would also ask this Court to attempt to

forecast when a given emergency may end, an issue usually left to Parliament (and rightly so, given the relative institutional competencies). The current record before this Court is inadequate to support designating 2030 as a suitable end date, or any other year for that matter, for Parliament to lose legislative competency in this area.

[403] Furthermore, the role of this Court — the Attorney General of Canada’s concluding sentences of his factum notwithstanding — is not to root around the Constitution or constitutional doctrine to scrounge up some basis, *any* basis, to rescue federal legislation. (This is particularly so where, as here, the exceptional residual authority of POGG is contemplated and the dominant subject matter of the impugned statute is consigned by our Constitution to the provinces.) The proper question to ask is, therefore, not whether the *Act* is potentially salvageable under the emergency branch of POGG, but rather whether Parliament, in passing the *Act*, did so relying on its legislative authority under the emergency branch of POGG. Both the response of the Minister of Environment and Climate Change to a question about the source of Parliament’s authority, and the submissions of the Attorney General of Canada, make clear that it did not.

(c) *Criminal Law*

[404] The criminal law power can be addressed briefly. While the precise scope of this power remains uncertain in this Court’s jurisprudence, it is tolerably clear that its exercise requires a legislated prohibition that is accompanied by a penalty and backed by a criminal law purpose (*Reference re Genetic Non-Discrimination Act*, 2020

SCC 17, at para. 67). As I have explained, however, the pith and substance of the *Act* relates to a scheme of monetary disincentives intended to *discourage*, rather than *prohibit*, certain activity. The offences and penalties in the *Act* are incidental to its true regulatory nature and, accordingly, the criminal law power is not applicable.

(d) *Taxation*

[405] The Attorneys General of Saskatchewan and Ontario argue that Part 1 of the *Act* imposes a tax, and ask this Court to conclude that the *Act* violates the principle of no taxation without representation, which principle is guaranteed by s. 53 of the *Constitution Act, 1867* (see *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 71).

[406] Section 91(3) of the *Constitution Act, 1867* authorizes the federal government to raise money by any mode or system of taxation, which provides broad jurisdiction to impose both direct and indirect taxation. But as broad as the taxing authority is, it is “subject to the ordinary principles of classification and colourability that apply to all legislative powers” (Hogg, at p. 31-2 (footnotes omitted)). Not every monetary levy is a tax. While monetary measures that relate in pith and substance to the raising of revenue for federal purposes are classified as taxation (*Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1070; see also *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, at para. 30), other monetary measures are regulatory charges that must be supported by some other head of power (*Westbank*, at para. 23; *Exported Natural Gas Tax*, at p. 1068).

[407] This Court has stated the relevant criteria for distinguishing between a tax and a regulatory charge. One consideration applied in the most recent cases has been that regulatory charges are typically connected to a broader regulatory scheme (see, e.g., *Westbank*, at paras. 44-45; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131, at paras. 30-47). And so here, the Attorneys General of Saskatchewan and Ontario argue that the fuel charge under Part 1 of the *Act* is not connected to a broader regulatory scheme. While that is so, it is not dispositive, since regulatory charges *need not always* be connected to a broader scheme. In particular, there are cases where the charge itself *is* the scheme (*Westbank*, at para. 32).

[408] What *is* dispositive, in my view, is whether the charge is implemented primarily for a regulatory purpose, as opposed to a revenue-raising purpose. If so, the charge should be considered regulatory (*Westbank*, at para. 32; *Exported Natural Gas*, at p. 1070). In *Exported Natural Gas*, this Court concluded that one such regulatory purpose is to generally discourage certain behaviour (p. 1075). While the Attorney General of Ontario argues that we should not be so quick to label charges as regulatory, the conclusion I reach supports Canada's division of powers. It "would afford the Dominion an easy passage into the Provincial domain" were every monetary measure to be regarded as a tax (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355 (P.C.), at p. 367).

[409] As I have explained, the charges imposed by the *Act*, in pith and substance, relate to the regulatory purpose of changing behaviour, for the broader purpose of

reducing GHG emissions. The *Act*'s provisions reveal that it does not relate to the raising of revenue for federal purposes. It is therefore unnecessary to consider s. 53 of the *Constitution Act, 1867*.

(4) Broad Delegation to the Cabinet

[410] As a final comment to my analysis of the constitutionality of the *Act*, I observe that the provinces arguing against the *Act*'s constitutionality placed significant emphasis on the scope of delegated authority found within it. This emphasis is understandable, as the sweep of delegation granted by the *Act* to the Cabinet is breathtakingly broad. Indeed, the *Act* goes so far as to delegate authority to amend portions of the *Act* itself through a Henry VIII clause (s. 168(3) and (4); see also Sask. C.A., at paras. 361-66, per Ottenbreit and Caldwell JJ.A., dissenting). The majority notes this, but then speaks reassuringly of how the federal Cabinet's discretion is constrained by the purposes of the *Act* and specific guidelines in the statute, and how any listing decision by federal Cabinet can be judicially reviewed (paras. 72-76).

[411] But this is an incomplete response. The majority does not mention that failure to comply with the purposes of an enabling statute such as the *Act* would signify *not only* that the impugned regulations are *ultra vires* the enabling statute, but that it may also be repugnant to the division of powers. Nor does the majority explain just how a court is to review regulations for compliance with the division of powers.

[412] Further, the examples given by the majority of how a regulation may fail to conform to the purposes of the *Act* are not enlightening. For example, the majority posits that federal Cabinet “could not list a fuel . . . that does not emit GHGs when burned” (para. 75). That may be so, but what the majority might *also* have wished to consider is the obvious possibility that the federal Cabinet will discriminate against provinces or industries in a way that has nothing to do with “establishing minimum national standards of GHG price stringency to reduce GHG emissions”. Indeed, this is a particular risk with Part 2 which, as I have explained, does not exist to establish such standards.

[413] In the absence of useful guidance from the majority on this point, I endorse that provided by Rowe J., both as to the imperative that the division of powers — no less than the purposes of the *Act* — confines the exercise by the federal Cabinet of Parliament’s delegated authority, and as to the appropriate methodology for reviewing regulations for compliance with the division of powers.

[414] Further, my brevity on this issue should not be taken as agreement with the majority’s response to my colleague Côté J.’s reasons on this point. Indeed, the majority largely misses the point, treating the matter of the Henry VIII clause as simply one of *administrative* law (since regulatory decisions can be judicially reviewed), ignoring the potentially significant *separation of powers* concerns that Côté J. identifies. I see those concerns as raising serious questions which, given my conclusion

on the Attorney General of Canada's reliance on the national concern doctrine, are unnecessary for me to decide here.

IV. Canada's Proposed "Modernization" of *Crown Zellerbach*

[415] While counsel before us did not advance this submission, the Attorney General of Canada urges us in his factum to "modernize" the national concern doctrine under POGG in an effort to make it easier for matters — including the one proposed here — to be recognized under the doctrine. I respond to it here because aspects of the proposal were adopted by my colleagues in the majority.

[416] Instead of speaking about a new matter or a provincial matter that has a national aspect, the Attorney General of Canada speaks of matters having been "transform[ed]" in a way that is "constitutionally significant" (R.F., at para. 69). How a matter is "transformed" — and, who or what does the "transforming" — is not explained. Nor is it explained what "constitutional significance" requires.

[417] This is, I observe with as much regret as astonishment, an unserious submission from the chief law officer of the federal Crown. The Attorney General of Canada has a responsibility to the whole country to support and act within, not ignore or undermine, Canada's federal structure: "Because the [Attorney General] is the chief law officer of a democratic government, she must be a guardian of the rule of law. As such, the [Attorney General] is held to a standard of accountability that is unique, that extends beyond the standard that applies to an ordinary litigant" (F. Hawkins, "Duties,

Conflicts, and Politics in the Litigation Offices of the Attorney General” (2018), 12 *J.P.P.L.* 193, at p. 193). As noted by Professor K. Roach, “[t]he Constitution . . . imposes and entrenches special restraints and obligations on the government as part of the supreme law of the land” (“Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law” (2006), 31 *Queen’s L.J.* 598, at p. 610).

[418] Federalism is an essential feature of our Constitution. The Attorney General of Canada must defend it, not undermine it by casually and recklessly urging upon this Court some vaguely conceived notion of “transformation”, so meaningless as to effectively deprive the provinces of the opportunity to respond substantively to it, but yet so clearly intended to effect the expansion of federal jurisdiction.

[419] Beyond the cant of “transformation”, the most we have by way of a concrete proposal from the Attorney General on this point is that a national concern must be “distinctly national”, as measured by the provincial inability test borrowed from the general branch of the federal trade and commerce power, and that it must be reconcilable with the division of powers (or, as the Attorney General now calls it, “the balance of federalism”; R.F., at para. 69 (emphasis deleted)).

[420] It is on the first of those considerations — that a national concern must be “distinctly national” — that I wish to focus, since it is embraced by the majority in its dilution of the *Crown Zellerbach* test (para. 177). This abandons this Court’s jurisprudence, since — under *Crown Zellerbach* — provincial inability is but one

indicator of singleness, distinctiveness and indivisibility, while under Canada's proposed framework it becomes the singular test for distinctiveness (R.F., at para. 70).

[421] The respective tests for provincial inability, as set down for the national concern branch of POGG in *Crown Zellerbach* and for the trade and commerce power in *General Motors*, are different from each other. In *Crown Zellerbach*, Le Dain J. described the provincial inability test as an inquiry into “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”, a threshold that would be met “whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament” (p. 432, citing Gibson (1976), at p. 34). In *General Motors*, however, Dickson C.J. described the provincial inability test in the fourth and fifth factors of the analysis under the general branch of the federal trade and commerce power as follows: “. . . the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting” and “. . . the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” (p. 662).

[422] It is important to note that, despite being released one year after *Crown Zellerbach*, the Court in *General Motors* made *no* reference to *Crown Zellerbach*, or to its test for provincial inability under the national concern doctrine of POGG. Presumably, it did not occur to the Court to do so, since each test has its own aim, distinct from the

other. The *General Motors* test for provincial inability focusses on the prospect of a *legislative scheme* not working unless it is national in scope. By contrast, the *Crown Zellerbach* test for provincial inability is firmly focussed on the *nature of the problem* as being one which cannot be overcome without national action. This is fatal to the Attorney General of Canada's submission. As I have already explained, while this Court held in the *2018 Securities Reference* that legislation aimed at "systemic risk in capital markets" can meet the test for provincial inability under the *General Motors* factors (paras. 111, 113 and 115), it *does not follow* that "systemic risk in capital markets" is a matter sufficiently singular, distinctive and indivisible to make it an appropriately recognized matter of national concern under POGG. Legislation that passes the *General Motors* test can be aimed at a problem that is diffuse — such as the elimination of anti-competitive behaviour — yet still engage trade as a whole.

[423] Provincial inability, as an indicium of singleness, distinctiveness and indivisibility, was intended in *Crown Zellerbach* to confine POGG as a *residual* power by filtering matters that could fit under any enumerated head of power, *including trade and commerce*. The point is that, *by its residual nature*, the national concern branch of POGG must *not include* matters that satisfy the trade and commerce test. Hence, while the control of systemic risk was recognized as a valid federal objective under the trade and commerce power in the *2018 Securities Reference*, it would *not* qualify as a national concern under POGG, failing under "distinctiveness" (since it falls under the trade and commerce power) and "indivisibility" (because of its pervasive and diffuse character).

[424] The Attorney General of Canada’s argument on this point is also revealing. The proposed “modernized” framework includes the *General Motors* provincial inability test, squarely aimed at provincial legislative inability, as the sole criterion to determine whether a matter is “distinctly national”. And this is because such a framework would support Canada’s submission that the provinces acting in concert would be legislatively unable to pass mandatory minimum national standards related to GHG emissions. But such an approach ignores the important statement in *Crown Zellerbach* that the provincial inability test is but “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” (p. 434).

[425] As the above analysis suggests, Canada’s proposed framework would make it easier for a matter to be recognized as a national concern under POGG whenever minimum national standards are said to be required. The departure from this Court’s jurisprudence that Canada proposes — and that the majority pronounces — would therefore enable the federal government to more easily invade provincial jurisdiction, and has the potential to upset the fundamental distribution of legislative power under the Constitution.

[426] As Abella and Karakatsanis JJ. forcefully expressed in their concurring judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the doctrine of “[s]tare decisis places significant limits on this Court’s ability to overturn its precedents” (para. 255). While the Court was divided in *Vavilov* about

whether those strictures were satisfied, the point is that horizontal *stare decisis* promotes certainty and predictability in the development of the law, contributes to the integrity of the judicial process and safeguards this Court’s institutional legitimacy (paras. 260-61). If this applies to our statements of the law governing the standard by which judges review the decisions of administrative tribunals, it surely applies to our precedents on adjudicating the division of powers under the Constitution.

[427] In my view, the high threshold for departing from the long-established principles set down in *Crown Zellerbach* is not met here. And putting even that determinative consideration aside, at the very least, and for the sake of doctrinal clarity, I say with respect that the majority should acknowledge that it is completely re-writing the framework for the national concern branch of POGG. Instead, it insists upon linking its novel framework to *Crown Zellerbach*, as if its reasons represent *not* the confusing and confused eliding of the constraints of *Crown Zellerbach* that I will now demonstrate them to be, but as something of an inevitable and even obvious exegesis. I turn, then, to the majority’s framework.

V. The Majority’s Dilution of *Crown Zellerbach*

[428] The majority accepts aspects of the Attorney General of Canada’s proposal to “modernize” the national concern doctrine, but takes it further still. And so — although this appears nowhere in this Court’s judgment in *Crown Zellerbach* — the majority divines from that judgment, at paras. 142-66, the following “three-step process” (para. 132):

- 1) **Threshold question:** is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?
- 2) **Singleness, distinctiveness and indivisibility:** as this is not a “readily applicable legal test”, the two “principles” that follow must be satisfied (para. 146).

- a. First, the matter must be “*specific and identifiable*” and “*qualitatively different* from matters of provincial concern” (para. 146 (emphasis added)).

Three factors or considerations may inform whether something is “qualitatively different”:

- i. Whether “the matter is predominantly extraprovincial and international in its nature or its effects” (para. 151);
 - ii. Whether international agreements related to the matter exist; and
 - iii. Whether “the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces” (para. 151).
- b. Secondly, federal jurisdiction should be recognized “only where the evidence establishes *provincial inability* to deal with the matter” (para. 152).

Three factors must be present:

- i. The “legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting” (para. 152);
 - ii. The “failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country” (para. 152); and
 - iii. A “province’s failure to deal with the matter must have grave extraprovincial consequences” (para. 153).
- 3) **Scale of impact:** this requires the court to balance the intrusion on provincial autonomy against the impact on other interests that will be affected if federal jurisdiction is not granted.

[429] As will be apparent from the above, the majority has accepted Canada's proposal that principles from the trade and commerce jurisprudence ought to be adopted into the national concern analysis. But the majority adds additional elements that were previously considered irrelevant to the national concern analysis. I will discuss each of them in turn.

A. *"Threshold Question": Whether the Matter Is of Sufficient Concern to Canada as a Whole*

[430] The majority's new framework requires a reviewing court to ask whether "the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine", which, we are told "invites a common-sense inquiry into the national importance of the proposed matter" (para. 142). While framed as "a threshold question", I observe that the importance of the matter implicitly permeates the entire analysis, reappearing in the majority's discussion of "scale of impact", where that step of the test is understood as an exercise in balancing "competing interests" (paras. 142 and 160).

[431] My colleague Rowe J. addresses why importance should not be a relevant consideration under "singleness, distinctiveness and indivisibility". It therefore suffices for me to stress two points here.

[432] First, the majority reasons appear to suffer from the misconception that, if a matter is *important*, it follows that it is a matter for Parliament and the federal

government. This is remarkably dismissive of provincial jurisdiction. I agree with Professor Gibson, who says:

If importance of the subject matter is the measure of “national dimensions” there can be little hope for federalism in Canada’s future. Since there are very few functions of government which are not of great importance, to grant federal jurisdiction over all such functions would be to make the supposedly autonomous provincial legislatures mere “tenants at sufferance” of the federal Parliament.

((1976), at p. 31)

[433] Secondly, in considering the importance of the matter urged by the Attorney General of Canada, the majority emphasizes that carbon pricing is “a necessary tool”, an “essential elemen[t]”, and a “critical measure” (paras. 169-70). But these considerations have no bearing on the division of powers. I acknowledge that the majority might be taken as responding to this point by positioning this as only a “threshold” question. Even so understood, however, the majority’s analysis allows the efficacy or wisdom of a policy choice to colour the analysis that follows. It is, in effect, a backdoor to injecting into the division of powers framework the judiciary’s views of such matters. In a literal and dangerous sense, this risks *politicizing* the judiciary, pulling it (as here) into expressing views *not* on the *constitutionality* of one side or another on deeply contentious policy questions within the federation, but on their *merits*.

B. *Singleness, Distinctiveness and Indivisibility*

[434] The majority explains that the phrase “singleness, distinctiveness and indivisibility” does not articulate a “readily applicable legal test” (para. 146). It should, the majority says, therefore be understood in light of two “animating” principles: “. . . first, federal jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern; and second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter” (para. 157).

(1) The First Principle: “A Specific and Identifiable Matter That Is Qualitatively Different From Matters of Provincial Concern”

[435] Under the principle that singleness, distinctiveness and indivisibility will require “a specific and identifiable matter that is qualitatively different from matters of provincial concern”, the majority identifies three factors “that properly inform th[e] analysis” of whether something is “qualitatively different” (paras. 146-47).

[436] The first factor is “whether [the matter] is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects” (para. 148). It is far from clear what my colleagues in the majority understand by a matter’s “inherent nature”. They appear to equate it with a matter’s “character and implications” (para. 173). But the meaning of a matter’s “implications” is not explained (aside from a reference to “serious effects that can cross provincial boundaries”, at para. 148). And identifying a matter’s “predominantly extraprovincial and international

... character” by considering its “inherent nature” appears to veer into presupposing the answer to the very question that the framework is intended to address: whether the matter is a national concern. None of this is helpful.

[437] The second factor is whether international agreements related to the matter exist (para. 149). This, as Rowe J. makes plain, undermines *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.). Further, it serves as no constraint whatsoever on the recognition of a national concern. That is, while *the absence* of international agreements will not militate against recognition of a national concern, *the presence* of such agreements — depending on their content — may *support* recognition of a national concern.

[438] The third factor is “whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces” (para. 151). Here, the majority says that this factor is satisfied, because the *Act* works “on a distinctly national basis” — echoing the language urged upon us by the Attorney General of Canada — in establishing minimum national standards to meet Canada’s obligations under the *Paris Agreement*, which constitutes a federal role in pricing that is qualitatively different from matters of provincial concern (para. 177).

[439] In other words, the majority says that “minimum national standards” can qualify as a national concern under POGG because, *inter alia*, they work in a *national* way. But this simply illustrates how the concept of minimum national standards has been employed to create a federal aspect of the matter out of thin air. *How else*, after

all, *would* national standards work, if not *nationally*? This consideration adds nothing to the analysis, and therefore achieves nothing except to facilitate the recognition of Parliament's legislative authority over a matter simply by casting Parliament as doing something that Parliament almost always does: legislating in a *national* way, by creating minimum *national* standards.

[440] None of this supports the majority's reference to having developed an "exacting" test with "meaningful barrier[s]" (para. 208). Rather, and as I have already observed, it is a departure from *Crown Zellerbach* that operates not to *constrain* the recognition of POGG matters, but effectively to *facilitate* it via the artifice of "minimum national standards".

[441] In its dilution of the national concern test, the majority has lost sight of what that test is supposed to achieve: the identification of matters that are *distinctive* (being different from those falling under any other enumerated power, and thus beyond the constitutional powers of the provinces to address), and *indivisible* (being a matter for which responsibility cannot be divided between Parliament and the provinces). While the majority's "principle" of "qualitativ[e] differen[ce] from matters of provincial concern" (para. 146) echoes *Crown Zellerbach*'s requirement of *distinctiveness*, its three "factors" in effect adulterate that requirement to the point that there is no principle left. Almost any provincial head of power is open to federal intrusion simply by recasting the federal matter as one of "minimum national standards".

[442] This leaves, of course, *Crown Zellerbach*'s requirement of *indivisibility* — which is nowhere accounted for in the majority's dilution. While the majority does caution that "the matter must not be an aggregate of provincial matters" and insists that the "requirement of indivisibility is given effect through [the two] principles" set out in their framework (at paras. 150 and 158), this does not capture the concerns of Beetz J. in *Anti-Inflation*. In that case, Beetz J. explained that matters like inflation are aggregates of subjects coming under federal *and* provincial jurisdiction, and that they lack a degree of unity that makes them indivisible. The point is that many matters, like inflation, are qualitatively *distinct* from provincial heads of power, but they still do not qualify as a national concern under POGG because they are not *indivisible*, since they can be divided between both orders of government. Yet, and as Rowe J. explains, the majority now allows for such matters to be subsumed under federal jurisdiction as a national concern, thereby discarding Beetz J.'s careful, compelling and (until now) important judgment in *Anti-Inflation*.

(2) The Second Principle: "Federal Jurisdiction Should Be Found to Exist Only Where the Evidence Establishes Provincial Inability to Deal With the Matter"

[443] The majority says that "federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter" (para. 152). The "starting point" for this analysis, says the majority, is the understanding of provincial inability stated in the fourth and fifth indicia from the *General Motors* test (para. 152). To this, they add that "a province's failure to deal with the matter must

have grave extraprovincial consequences” (para. 153). These three factors must be satisfied to meet the criterion of provincial inability, which is now a necessary but insufficient condition for the recognition of a matter of national concern (para. 156).

[444] I have already described the problem with using principles from the trade and commerce jurisprudence in the national concern analysis in responding to the submissions on this point from the Attorney General of Canada, which is that reliance on the test governing the federal trade and commerce power is inappropriate; the tests for provincial inability are different, and the point of the provincial inability analysis was — before now — to filter out matters that could fit under any enumerated head of power, so that POGG would be truly residual. But there are other problems with this “principle”, as stated by the majority.

[445] First, by forcing trade and commerce jurisprudence into the national concern test, the majority requires constitutional incapacity to establish provincial inability (para. 182). The majority analogizes to the *2018 Securities Reference*, in which provincial legislation addressing systemic risk was considered unsustainable because of the ability of the provinces to withdraw at any time. But it will always be the case that provinces are unable to fetter themselves against future legislative action. This requirement is therefore meaningless.

[446] Secondly, in discussing the final requirement, the need for “grave extraprovincial consequences”, the majority furnishes examples which are indeed grave, including serious harm to human life, contagious disease, and arms trafficking

(paras. 153-55). But the majority fails to link those grave consequences to provincial inability, properly understood. And this is because the majority does not appear to appreciate that the extra-provincial effects must be such that all or part of the matter is beyond the scope of provinces' legislative authority under s. 92 to address, whether independently or in tandem.

[447] Finally, the majority also stresses the requirement of “grave extraprovincial consequences” as demonstrating the “exacting” nature of its test (paras. 155, 208-9 and 211). But this standard is peremptory, almost uselessly subjective and susceptible to change (as the majority’s description of the extra-provincial harm in *Munro* as “meaningful” makes clear (para. 154)). And far from *constraining* federal intrusion, this standard effectively *invites* it into other areas of provincial jurisdiction whose exercise could also cause “grave extraprovincial consequences”, such as public health and pandemic response (*pace* the majority’s reference to “one province’s failure to deal with health care”, at para. 209), the management of provincial public lands, the construction of hydroelectric dams, the development and management of non-renewable and forestry resources, the inflationary effects of intra-provincial trade and commerce (including the regulation of wages and prices) and the management of prisons. Simply put, the *gravity* of the extra-provincial consequences should not and (until now) has not dictated the outcome of the provincial inability test.

[448] For my part, rather than dilute *Crown Zellerbach* so as to assure the *Act*’s constitutionality, I consider myself bound by its understanding of provincial inability.

The reason why is illustrated by this Court's decision in *Anti-Inflation*. While controlling inflation could undoubtedly meet aspects of the provincial inability test — in the sense that part of the matter is beyond the scope of provincial legislative authority to address — this Court held that controlling inflation does not qualify as a matter of national concern, because it is *divisible* (“an aggregate of several subjects”, at p. 458). In other words, it is possible for a matter to be characterized by provincial inability, while still failing to satisfy the requirement of singleness, distinctiveness and indivisibility. This surely means that, where extra-provincial effects are such that all or part of a matter is beyond provincial legislative power to address, this is an *indicator* — but no more — that the matter *may* be distinct from provincial jurisdiction and have extra-provincial aspects that are indivisible from its local and private aspects. In other words, the insight of *Crown Zellerbach* obtains: consistent with the residual nature of POGG, federal usurpation of what was formerly within provincial jurisdiction is possible only where a matter has become distinct from what the provinces can do, and yet cannot be separated from what the provinces can do. In such a case, resort to POGG, and in particular its national concern branch, is necessary to preserve the exhaustiveness of the division of powers.

C. *Scale of Impact*

[449] The final step in the majority's diluted reformulation of the test for national concern requires the reviewing court to determine “whether the matter's scale of impact on provincial jurisdiction is acceptable having regard to the impact on the interests that

will be affected if Parliament is unable to constitutionally address the matter at a national level” (para. 196). The “impact on provincial jurisdiction” is considered, then weighed against other “interests”, which requires the court to “balance competing interests” (para. 160). This is yet another departure from *Crown Zellerbach*, in which this Court said that a matter of national concern must have “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (p. 432). Curiously, while the majority cites to this passage, it then abandons it, seeking to reconcile the impact on provincial jurisdiction *not* with *the division of powers*, but with *the importance* that the reviewing judge ascribes to other “interests” (para. 206).

[450] The judicial role in federalism disputes is properly confined to identifying the boundaries set by the Constitution that separate federal from provincial jurisdiction. In the context of considering the “scale of impact”, this entails looking to the scope of provincial powers affected and the impact on the relative autonomy of Parliament *and* provinces. It also requires carefully considering the contours of the matter said to be of national concern, as it is only where the matter has “ascertainable and reasonable limits” that it can be said to have “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power” (*Crown Zellerbach*, at pp. 432 and 438). Determining the contours of jurisdiction and the effects of legislation is what courts do. The role of the judiciary, properly understood, does *not* extend to evaluating the importance of other interests that could be affected if the provinces are not supervised in the exercise of their jurisdiction. That is the stuff of policy-making,

not adjudication. This distinction, which appears to elude the majority, was once thought uncontroversial at this Court (see *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136).

[451] But the real problem with my colleagues' scale of impact analysis is their significant understatement of the intrusion into provincial jurisdiction effected by the *Act*. It will be recalled that the majority finds that the impact on provincial jurisdiction is limited, in part because the "impact on the provinces' freedom to legislate is minimal" and "strictly limited", since provinces "are free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency" (paras. 199-200 (emphasis added)). As I have noted, this ignores the detailed industrial regulations authorized by Part 2 of the *Act*. But it also ignores that the federal benchmark is *not static*, and can be set to an increasingly stringent level so as to correspondingly narrow provincial jurisdiction in the field. It is only by ignoring such things that the majority is able to claim that the federal power that it recognizes here is "significantly less intrusive than [that recognized] in *Crown Zellerbach*" (para. 201).

[452] More fundamentally, and even if federalism *were* a thing whose terms were not constitutionally enshrined but could instead be judicially balanced, the majority's overall approach is not one of balance. Rather, the majority puts its thumb heavily on the federal side of the scale — by legitimating as a national concern the device of "minimum national standards" on matters of importance that otherwise fall within

provincial jurisdiction, and by insisting that doing so still preserves provincial autonomy (*as long as* it is exercised in accordance with federal priorities). Parliament now knows how to ensure that the balance will always tip its way, whenever provinces choose to exercise their legislative authority in a way that impedes the federal agenda.

[453] Even the Attorney General of Canada was not so bold as to ask for a weighted scale, much less a redefined framework that accounts for other interests that should have no bearing on the division of powers. And yet, the majority has given him just that.

VI. Conclusion

[454] The *Act*'s subject matter falls squarely within provincial jurisdiction. It cannot be supported by any source of federal legislative authority, and it is therefore *ultra vires* Parliament. This Court, a self-proclaimed “guardian of the constitution” should condemn, not endorse, the Attorney General of Canada’s leveraging of the importance of climate change — and the relative popularity of Parliament’s chosen policy response — to fundamentally alter the division of powers analysis under ss. 91 and 92 of the *Constitution Act, 1867* and, ultimately, the division of powers itself (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155).

[455] The majority’s reasons for judgment are momentous, and their implications should be fully and soberly comprehended. This Court once maintained that the Constitution, underpinned as it is by the principle of federalism, “demands respect for

the constitutional division of powers” (2011 *Securities Reference*, at para. 61; see also *Reference re Secession of Quebec*, at paras. 56 and 58). But in its unfortunate judgment, the majority discards that constitutionally faithful principle for a new, distinctly hierarchical and supervisory model of Canadian federalism, with two defining characteristics: (1) the subjection of provincial legislative authority to Parliament’s overriding authority to establish “national standards” of how such authority may be exercised; and (2) the replacement of the constitutionally mandated *division* of powers with a judicially struck *balance* of power, which balance must account for other “interests”.

[456] No province, and not even Parliament itself, ever agreed to — or even contemplated — either of these features. This is a model of federalism that rejects our Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*, opening the door to federal intrusion — by way of the imposition of national standards — into *all* areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways. I dissent.

The following are the reasons delivered by

ROWE J. —

[457] The national concern doctrine is a residual power of last resort. I have come to this view through a close reading of *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and the cases that preceded it. Faithful adherence to the doctrine leads inexorably to the conclusion that the national concern branch of the “Peace, Order, and good Government” (“POGG”) power cannot be the basis for the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (“Act”).

[458] My focus is mainly doctrinal. To attain the objectives sought by the federal structure, and for courts to be accountable to the public in how they exercise their power as umpires in federalism disputes, doctrinal coherence, clarity and predictability regarding the division of powers are essential (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 23; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at para. 3).

[459] First, I discuss the principle of federalism and the division of powers: the starting point for a complete understanding of the national concern doctrine. Second, I discuss the residual and circumscribed nature of the POGG power, rooted in s. 91 of the *Constitution Act, 1867*. While some commentators refer to the existence of three branches of POGG — gap, national concern, and emergency — in my view, the case law does not support a distinction between “gap” and “national concern”, nor is such a distinction useful. Rather, what commentators refer to as “gap” and “national concern” is better understood as one manifestation of the cumulatively exhaustive nature of the division of powers, and the residual nature of POGG. Third, I apply this understanding

to the national concern test set out in *Crown Zellerbach*, and interpret the concepts of “singleness, distinctiveness and indivisibility”, “provincial inability” and “scale of impact on provincial jurisdiction” accordingly (p. 432). The national concern doctrine applies only to matters that are distinct from those falling under provincial jurisdiction and that cannot be distributed between the existing powers of both orders of government. In addition, their recognition under POGG cannot upset the federal balance. Fourth, I compare this approach to the approach urged on us by the Attorney General of Canada. Finally, I address an entirely distinct matter: the methodology for reviewing regulations for compliance with the division of powers and how it may apply to regulations made under the *Act*. In the result, for these reasons and those of Justice Brown, which I adopt, the legislation is *ultra vires* in whole.

I. Federalism and the Division of Powers

[460] This case requires a careful consideration of one of the fundamental underlying principles animating the Canadian Constitution: federalism (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 32). The “primary textual expression” of the principle of federalism can be found in the division of powers effected mainly by ss. 91 and 92 of the *Constitution Act, 1867* (*Secession Reference*, at para. 47; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 (“*Reference re GND*”), at para. 20).

[461] An essential characteristic of the distribution of powers is its exhaustiveness, which precludes legislative voids (*Reference re Same-Sex Marriage*,

2004 SCC 79, [2004] 3 S.C.R. 698, at para. 34; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 44). Exhaustiveness reconciles parliamentary sovereignty and federalism: it ensures that there is no subject matter which cannot be legislated upon and that Canada, as a whole, is fully sovereign.

[462] The principle of federalism pursues some well-known objectives: “to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good” (*Canadian Western Bank*, at para. 22). The distribution of powers, in turn, was not random; rather, it was designed to achieve these objectives. It accommodates diversity between provinces — by allocating considerable powers to provincial legislatures to allow them pursue their own interests — and their desire for unity — by granting powers to Parliament when they share a common interest (*Secession Reference*, at paras. 58-59; *Reference re GND*, at para. 21). The federal structure protects the separate identities of the provinces from being subsumed under a unitary state.

[463] The federal structure was an essential condition for Confederation. Many provinces would not have supported the project of Confederation without the adoption of a federal form (*Secession Reference*, at para. 37; see also *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.) (“*Labour Conventions*”), at pp. 351-53). In other words, “[w]ithout federalism, Canada could not have formed or endured” (*Newfoundland and Labrador (Attorney General) v.*

Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4, at para. 240, per Brown and Rowe JJ., dissenting). Consequently, courts interpreting the division of powers must be careful not “to dim or to whittle down” the provisions of the *Constitution Act, 1867*, and its underlying values, or “impose a new and different contract upon the federating bodies” through an exercise of interpretation (*In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.) (“*Aeronautics Reference*”), at p. 70).

[464] The Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination between equal partners, not subordination (*Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (“*Securities Reference*”), at para. 71; see also *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 442-43). The guarantee of provincial autonomy to facilitate the pursuit of collective goals has particular salience for a province like Quebec, “where the majority of the population is French-speaking, and which possesses a distinct culture” (*Secession Reference*, at para. 59; see also *Labour Conventions*, at pp. 351-52).

[465] Autonomy, rather than subordination, entails that provinces have the right to “legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific” (*Labour Conventions*, at p. 352). As Professor Pigeon (as he then was) explained:

The true concept of autonomy is thus like the true concept of freedom. It implies limitations, but it also implies free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. It should therefore be realized that autonomy means the right of being different, of acting differently. This is what freedom means for the individual; it is also what it must mean for provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies. [Emphasis added.]

(“The Meaning of Provincial Autonomy” (1951), 29 *Can. Bar Rev.* 1126, at pp. 1132-33)

[466] Thus, federalism recognizes that “there may be different and equally legitimate majorities in different provinces and territories and at the federal level” (*Secession Reference*, at para. 66).

[467] Embracing differences between the provinces also has instrumental value. Allocating powers to the provinces may produce policies tailored to local realities, since provinces are “closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3; see also D. Newman, “Federalism, Subsidiarity, and Carbon Taxes” (2019), 82 *Sask. L. Rev.* 187, at pp. 192-93). In addition, provinces can serve as “social laborator[ies]” when they enact innovative legislative policies that can be “tested” at the local level (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)),

vol. 1, at s. 5.2, referring to *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), at p. 311, per Brandeis J.).

[468] The judiciary is charged with delimiting the sovereignties of both orders of government, guided by the “lodestar” of the principle of federalism (*Secession Reference*, at para. 56; *Securities Reference*, at para. 55). More specifically, in *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, this Court explained that “[t]he tension between the centre and the regions is regulated by the concept of jurisdictional balance” (para. 78 (emphasis added)).

[469] Division of powers disputes must be resolved in a way that reconciles unity and diversity. This cannot be achieved by merely determining which order of government “is thought to be best placed to legislate regarding the matter in question” (*Securities Reference*, at para. 90). Functional effectiveness is often erroneously equated with centralization and uniformity and eclipses the value of regional diversity (see, e.g., J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003), 28 *Queen’s L.J.* 411). As Professor Beetz (as he then was) explained:

[TRANSLATION] As a result, Quebec jurists can only be suspicious of the argument that, for example, legislative authority must be commensurate with the problem to be resolved. They find, first of all, that this is not a legal argument, but a political and functional reason to amend the constitution if necessary. Next, they find, from a political standpoint, that it is a permanent argument, one that is favorable to a concentration of powers in the federal government, since the problems to be resolved will obviously not stop increasing in intensity, in complexity and in their ramifications. [Emphasis added; footnote omitted.]

(“Les Attitudes changeantes du Québec à l’endroit de la Constitution de 1867”, in P.-A. Crépeau and C. B. Macpherson, eds., *The Future of Canadian Federalism* (1965), 113, at p. 120)

[470] Rather than the functional approach, Professor Beetz argued for [TRANSLATION] “further development and clarification of concepts, [and for] analytical jurisprudence” (p. 120). This is consistent with the view that at every step of the analysis, courts must assess “constitutional compliance, not policy desirability” (*Comeau*, at para. 83).

[471] In recent years, this Court has adopted a flexible, cooperative conception of the division of powers. This approach accommodates overlap between valid exercises of federal and provincial authority and encourages intergovernmental cooperation (*Reference re GNDA*, at para. 22; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18).

[472] Cooperative federalism, however, cannot override the division of powers or “make *ultra vires* legislation *intra vires*” (*Reference re Pan-Canadian Securities Regulation*, at para. 18; see also *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 39). Moreover, while it encourages cooperation between orders of government, it does not impose it (J.-F. Gaudreault-DesBiens and J. Poirier, “From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian*

Constitution (2017), 391, at p. 391; *Securities Reference*, at paras. 132-33). Finally, precise and stable definitions of the powers of the two orders of government are an essential precondition to cooperative federalism. Without them, the “respective bargaining positions of the two levels of government will be too uncertain for federal-provincial agreements to be reached” (W. R. Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975), 53 *Can. Bar Rev.* 597, at p. 616).

[473] Respect for the principle of federalism is essential in deciding these appeals. This Court is called to determine, primarily, if the *Act* can be upheld as an exercise of Parliament’s authority to enact laws under the national concern doctrine. This involves consideration of the purposes sought by the choice of a federal structure, the logic of the distribution of powers, and a careful examination of the jurisdictional balance between both orders of government.

II. POGG Is Residual and Circumscribed

[474] The Attorney General of Canada seeks to uphold the *Act* as a valid exercise of Parliament’s jurisdiction under the national concern doctrine of its “Peace, Order, and good Government” power. The exhaustive nature of the division of powers, discussed above, means that matters that do not come within the enumerated classes must fit somewhere. This is dealt with by two residual clauses: one federal, and one provincial.

[475] The federal residual clause, which I refer to as the “Peace, Order, and good Government” or “POGG” power, comes from the opening words of s. 91 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

[476] The provincial residual clause is s. 92(16) of the *Constitution Act, 1867*:

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,

. . .

16. Generally all Matters of a merely local or private Nature in the Province.

[477] Collectively, the federal and provincial residual clauses ensure that the division of powers is exhaustive. The role of POGG is thus limited to instances where the matter does not fall under any enumerated heads and cannot be distributed among existing heads of powers. Notably, by the operation of s. 92(16), POGG does not apply to matters of a “merely local or private Nature”. This residual and circumscribed

understanding of the POGG power informs my understanding of the national concern test. I justify this understanding of POGG first, through a close reading of the text of ss. 91 and 92, and second, through a close reading of the case law.

[478] In the analysis that follows, there are two points which could be seen as unorthodox. The first relates to residual authority in the division of powers. It is commonly accepted that POGG is a grant of residual authority to Parliament. What is less widely accepted is that s. 92(16) is a residual grant of authority to provincial legislatures. My view is that both provisions confer residual authority, as I will explain below. The second point is that, properly read, the jurisprudence supports a view of POGG as having two branches, “national concern” and “emergency”. The (third) “gap” branch constitutes part of “national concern”, which is Parliament’s general residual power. I would underline that my analysis of the *Crown Zellerbach* framework would be the same even if there is only one residual authority (POGG) and even if there are three branches to POGG (“national concern”, “gap” and “emergency”). Thus, my conclusions are in no way dependent on these two points. Nor do these two points affect my critique of the augmentation and extension of “national concern” urged on this Court by the Attorney General of Canada.

A. *A Close Reading of Sections 91 and 92*

[479] While the statement of the heads of power set out in 1867 could not contemplate the changes in technology and society that would follow, that statement was exhaustive. The heads of power must be given meaning in a changing world; a

living tree capable of growth and development but grounded in natural and fixed limits (*Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at pp. 135-37; see also *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 45). This is accomplished through a flexible, progressive interpretation of the division of powers, but one that begins with and is constrained by the “natural limits of the text” (*Marcotte v. Fédération des caisses Desjardins du Québec*, 2014 SCC 57, [2014] 2 S.C.R. 805, at para. 20, quoting *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 94; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, at paras. 8-13).

(1) POGG Is Residual to Section 92

[480] The wording of s. 91 provides textual support for the view that the POGG power is residual to s. 92. Section 91 confers the power to legislate for peace, order and good government “in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”. As Professor Lysyk points out, it does *not* confer a power to legislate “in relation to peace, order and good government” (“Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority” (1979), 57 *Can. Bar Rev.* 531, at p. 541 (emphasis in original deleted)). Rather, the power is to legislate “in relation to matters” that do not fall under any provincial, enumerated head of power (p. 541 (emphasis added; emphasis in original deleted)):

In other words, Parliament is not authorized to legislate in relation to a matter caught by the provincial categories simply because it might in some sense be thought to qualify as contributing toward the “peace, order and good government of Canada”. [p. 542]

[481] Further, as Professor Gibson explains, every conferral of provincial legislative jurisdiction is qualified by words such as “in the Province”, including s. 92(16). The result is that the POGG power is limited to only those matters that are *not* of a provincial nature; in other words, it confers Parliament jurisdiction over matters with a “national dimension” (“Measuring ‘National Dimensions’” (1976), 7 *Man. L.J.* 15, at p. 18).

[482] Thus, focusing on “peace, order, and good government” is “unproductive”, because it provides little assistance in drawing the line between provincial and federal areas of competence. In addition, it “tends to draw attention away from the central question pointed to by the introductory clause, namely, whether the matter to which an enactment relates is one ‘not coming within’ the classes of subjects assigned exclusively to provincial legislatures” (Lysyk, at p. 534; see also J. Leclair, “The Elusive Quest for the Quintessential ‘National Interest’” (2005), 38 *U.B.C. L. Rev.* 353, at pp. 358-59).

[483] A general power to legislate “in relation to peace, order and good government” would also be incompatible with the intention to create a robust sphere of provincial jurisdiction to protect the autonomy of the provinces. Section 92(13), in particular, grants the provinces jurisdiction over “Property and Civil Rights in the

Province”, which was understood as “descriptive of the full range of civil law, as opposed to criminal law” (Lysyk, at p. 544). In *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), Sir Montague Smith similarly observed that the words of s. 92(13) were “sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract” (p. 110). He held that there is no reason for holding that these words are not used in their “largest sense” in s. 92(13) (p. 111).

[484] As a result, the general POGG power does not confer authority to Parliament to enact laws of a local or private nature, or related to “property and civil rights” under the guise of “peace, order, and good government”. As Lord Watson observed in *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 (P.C.) (“*Local Prohibition*”), at pp. 360-61:

... the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships’ opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures. [Emphasis added.]

(2) POGG Should Be Understood as Residual to the Enumerated Heads of Section 91

[485] While case law has consistently held that POGG is residual to the *provincial* enumerated heads, this Court's approach to whether it is residual to the *federal* enumerated heads is not so clear.

[486] Some early cases treat the POGG power as residual to both the provincial and federal enumerated heads of power. For example, in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396 (P.C.), Viscount Haldane said that courts should first ask whether the subject matter falls within s. 92. If it does, the court asks whether it also falls under s. 91. Only if the subject “falls within neither of the sets of enumerated heads” would POGG be considered (p. 406 (emphasis added)).

[487] However, some commentators have claimed that POGG is not residual to the enumerated federal heads of power because the enumerated federal heads are only illustrative of “peace, order, and good government” (see, e.g., B. Laskin, “‘Peace, Order and Good Government’ Re-Examined” (1947), 25 *Can. Bar Rev.* 1054, at p. 1057).

[488] Moreover, in some cases this Court has held that a matter may fall within the POGG power *or* another enumerated federal head of power (see, e.g., *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, which concluded that nuclear power fell *either* under the declaratory undertaking power (s. 92(10)(c)) *or* national concern; *In re Regulation and Control of Radio Communication in Canada*,

[1932] A.C. 304 (P.C.) (“*Radio Reference*”), which concluded that the matter could fall under the POGG power or the interprovincial undertakings power (s. 92(10)(a)); and *Aeronautics Reference*, which appeared to conclude that the matter fell under both s. 132 and the POGG power). While there is nothing wrong with making alternative findings, these cases could be read as indicating that it is possible for a matter to fall *both* within the POGG power *and* within a federal enumerated head of power at the same time.

[489] In my view, this approach is wrong. I agree with Professor Hogg that the POGG power is residual to the enumerated provincial *and* federal heads of power, and that “matters which come within enumerated federal or provincial heads of power should be located in those enumerated heads, and the office of the p.o.g.g. power is to accommodate the matters which do not come within any of the enumerated federal or provincial heads” (s. 17.1). Contrary to Professor Laskin’s view (as he then was), I do not understand a number of the enumerated heads of power assigned to Parliament, such as its power over copyrights (s. 91(23)), to be merely examples of a broad power to legislate for peace, order, and good government. Rather, many had to be specifically enumerated to avoid falling under the large scope of provincial jurisdiction over “property and civil rights” (s. 92(13)) (Leclair (2005), at pp. 355-57; Hogg, at s. 17.1; Lysyk, at p. 539).

[490] There is no reason to hold that a matter falls under POGG when it comes within an enumerated head of jurisdiction. As Professor Hogg explains, the normal

process of constitutional interpretation, like the interpretation of any statute or contract, is to rely first on a more specific provision before resorting to a more general one (s. 17.1). Resort to the general over the specific improperly treats the specific as redundant. Moreover, as Professor Abel argues, the more specific will usually be more defined and less contentious, and courts should not waste time arguing about the outer limits of the more general and diffuse when it is not necessary. In doing so, they would avoid the difficult question of whether a matter is of a “merely local or private” nature or if it has reached a national dimension so as to fall under POGG (“The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487, at pp. 510-12).

[491] When we are classifying the subject matter of an enactment, we are therefore *first* trying to classify it among the exclusive heads of power assigned to the federal and provincial legislatures. If the matter cannot fit within any enumerated head, *only then* may resort be had to the federal residual clause. This methodology helps ensure that the federal residual power cannot be used as a tool to upset the balance of federalism by stripping away provincial powers.

(3) The Parallel Structure of the Provincial and Federal Residual Clauses Supports a Narrow Understanding of POGG

[492] The federal residual clause has typically been seen as the sole residual power, such that all matters “not coming within” those assigned to the federal and provincial legislatures come within federal power (Hogg, at s. 17.1). However, there is a strong case for viewing the opening words of s. 91 and s. 92(16) as setting out a

“parallel structure of complementary federal and provincial residua” (Leclair (2005), at p. 355 (emphasis added)).

[493] There is much to be said for the theory that the two sections “complement and modify each other”, with the federal residuum dealing with matters “of a general character” and the provincial residuum encompassing matters “of a merely local or private nature” (Lysyk, at pp. 534 and 536-38). Indeed, the two sections have been said to strike a “careful balance . . . with matters potentially regulated at the federal level already within the enumerated provincial powers or ultimately covered within this last clause on matters of local concern” (Newman, at p. 192). Professors Hogg and Wright similarly say:

. . . there is a plausible argument that the *Constitution Act, 1867* includes not one, but two complementary residuary powers. This argument, in turn, strengthens the view that the *Act*, as drafted, was intended to form the foundation for a federal system that is less centralized than many English-Canadian commentators have supposed. [Footnote omitted.]

(“Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism” (2005), 38 *U.B.C. L. Rev.* 329, at p. 338)

[494] As the Attorney General of Quebec argues in this case, the scope of s. 92(16) must be interpreted as a counterbalance to the introductory paragraph of s. 91 to reflect the constitutional principle that both Parliament and provincial legislatures must be seen as equals. Accordingly, when determining if a matter falls under POGG, it is relevant to consider if it is of a “merely local and private nature” such that it would

fall under s. 92(16) (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at pp. 599-600).

[495] There is also support for this understanding of the relationship between the POGG power and s. 92(16) in the case law. In *Local Prohibition*, at p. 365, Lord Watson explains:

In s. 92, No. 16 appears to [their Lordships] to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated. [Emphasis added.]

(See also *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 700.)

[496] In *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, this Court also addressed the residual nature of s. 92(16), and explained that “[h]ead 16 contains what may be called the residuary power of the Province . . . and it is within that residue that the autonomy of the Province in local matters, so far as it might be affected by trade regulation, is to be preserved” (p. 212). More recently in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, McLachlin C.J. stated that s. 92(16) along with s. 92(13) are “often seen as sources of residual jurisdiction”, and LeBel and Deschamps JJ. stated that s. 92(16) “can also be regarded as a partial residual jurisdiction” (paras. 134 and 264; see also *R. v. Hauser*, [1979] 1 S.C.R. 984; and *Schneider v. The Queen*, [1982] 2 S.C.R. 112).

[497] The parallel structure of the residual clauses contributes to the balance of powers within the Confederation and ensures that, as society changes, more and more matters are not enveloped exclusively within federal competence (Lysyk, at p. 534; Newman, at p. 192). Accordingly, the residual scope of the POGG power is narrowed by s. 92(16), which applies to matters that are of a local and private nature even if they do not come within any other enumerated head of power.

[498] For clarity, this understanding of the relationship between s. 92(16) and POGG differs from the understanding of the Court of Appeal of Alberta majority. In my view, POGG is residual to all enumerated provincial heads of power, including s. 92(16). Matters that formerly fell under *any* enumerated provincial head of power can come to extend beyond provincial competence and, where the *Crown Zellerbach* test is met, come within POGG.

B. *A Close Reading of the Case Law*

[499] A review of POGG case law reveals that courts have long struggled to define its contours in a way that preserves the division of powers. The result has been doctrinal confusion and categories that lack clarity. Many commentators speak of three separate POGG branches: emergency, national concern and gap. Professor Hogg explains that matters falling under the “gap” branch are not just “new” in the sense that they do not come within any enumerated head of power, but rather “depend upon a lacuna or gap in the text of the Constitution”, where “the Constitution recognizes certain topics as being classes of subjects for distribution-of-power purposes, but fails

to deal completely with each topic” (s. 17.2). Though the terminology between commentators differs, the schema is similar (see, e.g., G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at c. 6; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at p. 264; Brun, Tremblay and Brouillet, at p. 584).

[500] In my view, the POGG jurisprudence should be read as signaling the existence of just two branches: a general residual power and the emergency power. What some commentators have named “gap” and “national concern” are simply manifestations of the exhaustive nature of the division of powers, and the residual nature of the POGG power. Matters that do not come within any enumerated head of power or cannot be distributed among multiple heads of power must fit somewhere, and they belong under POGG when they pass the *Crown Zellerbach* test. A close reading of *Crown Zellerbach* reveals that the test set out in that case applies to both “national concern” and “gap” cases, and this affinity between “gap” and “national concern” informs my understanding of that test.

(1) The Early Development of the POGG Power

[501] From the beginning, courts have treated the POGG power as *residual*, only relevant where a matter does not come within the enumerated classes of subjects. The early cases reveal no distinction between “gap” and “national concern”, but rather a distinction between a general residual power and the emergency power. In either instance, the courts emphasize that POGG is a category of last resort, and the

importance of keeping the doctrine circumscribed and narrow, so as to properly preserve the sphere of provincial jurisdiction.

[502] The earliest cases of *Parsons* and *Russell* treated s. 91 and POGG essentially as one: if a matter did not come within a s. 92 head of power, it fell somewhere within s. 91 (*Parsons*, at p. 109; *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), at pp. 836-37). In *Russell*, Sir Montague Smith upheld the *Canada Temperance Act*, noting that temperance was a subject “of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it” (p. 841 (emphasis added)).

[503] In *Local Prohibition*, Lord Watson upheld a provincial local-option temperance scheme quite similar to the federal one in *Russell*, under s. 92(13) or (16). While noting that there may be matters not coming within the enumerated heads of s. 91 or 92 that fell under federal power, Lord Watson cautioned that such non-enumerated matters “ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance” and should not trench upon provincial subjects at the risk of destroying provincial autonomy (p. 360). He then made the frequently cited statement:

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. [Emphasis added; p. 361.]

[504] Following *Local Prohibition*, the Privy Council, per Viscount Haldane, ignored this passage and the national concern idea for many years. Instead, POGG was seen as encompassing only emergencies (Hogg, at s. 17.4(a); *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 (P.C.), at pp. 703-6; *Snider*, at pp. 405-6 and 412). These cases represent the first scaling back of national concern. At the same time, they illustrate that the courts have long been concerned with ensuring provincial legislatures did not lose their powers.

[505] In 1931, national concern seemed to resurface in the *Aeronautics Reference*, which reiterated that matters can attain “such dimensions as to affect the body politic of the Dominion” (p. 72). Ultimately, the Privy Council held that aeronautics fell within federal jurisdiction, essentially under s. 132 of the *British North America Act, 1867* (the treaty power). In the *Radio Reference*, Viscount Dunedin held that Parliament had jurisdiction to regulate radio communication based on both the interprovincial undertaking power and POGG. He noted that the *British North America Act, 1867*, was silent on the ability of Canada (as opposed to the “British Empire” in s. 132) to enter treaties and thus did not authorize treaty-implementing legislation. POGG therefore filled what appeared to be a gap.

[506] Next, a series of “new deal” cases in 1937 reverted to the idea that POGG applied only to emergencies (see Hogg, at s. 17.4(a)). Among these was the *Labour*

Conventions case, in which Lord Atkin held that neither the *Aeronautics Reference* nor the *Radio Reference* stood for the proposition that legislation to perform a treaty was an exclusively federal power. For division of powers purposes, there was “no such thing as treaty legislation as such” (p. 351); rather, provinces could legislate over aspects of treaties falling under s. 92 and Parliament over aspects falling under s. 91.

[507] National concern re-emerged in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.). Viscount Simon held that *Russell* was not based on the emergency branch and that POGG was *not* confined to emergencies and could encompass matters of “concern of the Dominion as a whole” (p. 205).

[508] As the foregoing discussion demonstrates, early POGG cases suffered from a series of twists and turns, with various “national concern” statements infusing them at various points. As I read the above cases, the common theme is this: courts rely on POGG to give effect to the exhaustive nature of the division of powers, but courts have always been cautious to guard provincial jurisdiction and ensure POGG does not become a vehicle for federal overreach. With this backdrop, I turn to *Crown Zellerbach* and its survey of the modern case law on POGG.

(2) The Modern Development of the POGG Power and the “National Concern” Test from *Crown Zellerbach*

[509] In *Crown Zellerbach*, Le Dain J. set out the modern “national concern” test. A close reading of *Crown Zellerbach* and the cases on which Le Dain J. relies reveals

that his test applies both to what commentators refer to as “national concern” cases and “gap” cases: both are manifestations of the exhaustive nature of the division of powers and the residual nature of the POGG power. Both types of cases must have the requisite “singleness, distinctiveness and indivisibility” and must have a “scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (p. 432).

[510] In *Crown Zellerbach*, Le Dain J. surveys a number of POGG cases. The first one of note for our purposes is *Canada Temperance Federation*, where Viscount Simon set out the following formulation of the test:

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 (as, for example, in the *Aeronautics* case and the *Radio* case), 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 on matters specially reserved to the provincial legislatures. [Emphasis added; footnotes omitted.]

(*Canada Temperance Federation*, at p. 205, as cited in *Crown Zellerbach*, at pp. 423-24.)

Here, we have the *Aeronautics Reference* and the *Radio Reference* being cited as examples of “national concern” cases.

[511] Applying *Canada Temperance Federation*, this Court held that aeronautics fell under POGG apart from any question of a treaty power (as in *Aeronautics*

Reference) and that legislation establishing the National Capital Commission could be upheld under POGG (*Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Munro v. National Capital Commission*, [1966] S.C.R. 663).

[512] Le Dain J. then reviews *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, a case which provided important statements on both the emergency branch and the national concern branch. In *Anti-Inflation*, Laskin C.J., writing for a majority on this point, upheld the federal *Anti-Inflation Act* under the emergency branch of POGG. Although he wrote in dissent on the emergency power, Beetz J.'s reasons on national concern attracted a majority (p. 437).

[513] Beetz J. noted that national concern leads to exclusive, permanent federal competence and expressed serious concerns about a fundamental shift in the division of powers arising from recognizing inflation as a matter of national concern, as various provincial matters could be transferred to Parliament. In his view, if inflation were recognized as a matter of national concern, "a fundamental feature of the Constitution, its federal nature, the distribution of powers between Parliament and the Provincial Legislatures, would disappear not gradually but rapidly" (p. 445; see also p. 444).

[514] In *Anti-Inflation*, at p. 457, Beetz J. appears to have grouped what some commentators would call "gap" and "national concern" cases together, and understood them to be motivated by the same underlying logic:

In my view, 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 s. 92 and which, by nature, are of national concern. [Emphasis added.]

[515] This statement groups together the incorporation of federal companies and radio (referring to *Parsons* and *Radio Reference*, cases commentators typically characterize as “gap” cases) with “conservation and improvement of the National Capital Region” and aeronautics (referring to *Munro* and *Johannesson*, cases commentators typically characterize as “national concern” cases) (Régimbald and Newman, at paras. 6.5 and 6.21; Hogg, at ss. 17.2 and 17.3).

[516] Beetz J. understood each of these subject matters as not falling within any enumerated head *and* as being “of national concern” (p. 457). Beetz J. goes on to explain, at p. 458, that such matters must not be

an aggregate but ha[ve] a degree of unity that [makes them] indivisible, an identity which [makes them] distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enable[s] Parliament to touch on provincial matters ha[s] also to be taken into consideration before they [are] recognized as federal matters [Emphasis added.]

[517] These constraints apply *both* to “national concern” cases *and* to the cases some commentators understand to be “gap” cases. They allow courts to ascertain whether the matter is of a truly national dimension (rather than local) and whether it

has sufficient unity to be recognized as a matter under POGG rather than subdivided among existing heads of jurisdiction. I note that Beetz J. expressed that he was “much indebted” (p. 452) to an article by Professor Le Dain (as he then was) for his doctrinal statement on POGG (see G. Le Dain, “Sir Lyman Duff and the Constitution” (1974), 12 *Osgoode Hall L.J.* 261).

[518] Later in *Crown Zellerbach*, Le Dain J. refers to *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, where Estey J. illustrated the range of federal jurisdiction under POGG, characterizing the POGG doctrine as falling into three categories:

... (a) the cases “basing the federal competence on the existence of a national emergency”; (b) the cases in which “federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature”, of which aeronautics and radio were cited as examples; and (c) the cases in which “the subject matter ‘goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole’”, citing *Canada Temperance Federation*.
[Emphasis added.]

(*Crown Zellerbach*, at p. 428, citing *Labatt*, at pp. 944-45.)

[519] Here, Estey J. (at p. 944) has characterized aeronautics and radio as examples of matters which “did not exist at the time of Confederation” and “cannot be put into the class of matters of merely local or private nature” (category “b” above), unlike Viscount Simon in *Canada Temperance Federation*, who saw these cases as examples of national concern in the traditional sense (category “c” above). This is

indicative of a relationship or overlap between both categories, which Le Dain J. later reconciles.

[520] Le Dain J. then cites Dickson J.'s dissenting reasons in *R. v. Wetmore*, [1983] 2 S.C.R. 284, who read *Anti-Inflation* and *Labatt* as establishing *two* branches: an emergency branch and a general residual branch, the second of which could be sub-divided into categories "b" and "c" from *Labatt*:

In the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, Beetz J., whose judgment on this point commanded majority support, reviewed the extensive jurisprudence on the subject and concluded that the peace, order and good government power should be confined to justifying (i) temporary legislation dealing with a national emergency (p. 459) and (ii) legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern" (p. 457). In the *Labatt* case, *supra*, at pp. 944-45, Estey J. divided this second heading into (i) areas in which the federal competence arises because the subject matter did not exist at the time of Confederation and cannot be classified as of a merely local and private nature and (ii) areas where the subject matter "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole". This last category is the one enunciated by Viscount Simon in *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193, at p. 205. The one preceding it formed the basis of the majority decision in *Hauser* that the *Narcotic Control Act*, R.S.C. 1970, c. N-1, came under the peace, order and good government power as dealing with "a genuinely new problem which did not exist at the time of Confederation". [Emphasis added.]

(*Wetmore*, at pp. 294-95, cited in *Crown Zellerbach*, at p. 430.)

[521] Le Dain J. did not draw a distinction between "gap" and "national concern" cases. Rather, he appeared to understand the two non-emergency POGG categories set

out in *Labatt* as falling under a general, residual branch of the POGG power, to which the following national concern test applies:

From this survey of the opinion expressed in this Court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

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. [Emphasis added.]

(*Crown Zellerbach*, at pp. 431-32)

[522] On my reading, Le Dain J. subsumed all non-emergency POGG cases into one test, which is “separate and distinct from the national emergency doctrine” but 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”. The requirements of singleness, distinctiveness and indivisibility and an assessment of the scale of impact on provincial jurisdiction apply for a matter to qualify as a matter of national concern “in either sense”.

[523] Therefore, while some commentary speaks of “emergency”, “gap” and “national concern” as three separate branches, in my view it is more accurate having regard to the case law to say there are two branches: emergency and a general residual power, to which the national concern test applies.

[524] This is consistent with Beetz J.’s approach in *Anti-Inflation* and the view Le Dain J. expressed when he wrote on POGG as a professor. Indeed, he seemed to view all non-emergency POGG cases as subsumed under the “general power”, which was decidedly residual:

... the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92.

(Le Dain, at p. 293; see also Lederman, at p. 606.)

[525] Le Dain J.’s view as a professor and Beetz J.’s reasons in *Anti-Inflation* should inform the interpretation of the test set out in *Crown Zellerbach*, as subsuming “gap” and “national concern”. This reading of *Crown Zellerbach* is also shared by some commentators. Dwight Newman says that POGG “applies only in the context of what

would otherwise be a gap in the structure” and “the case law does not support the three-branch description of [POGG]” (pp. 200-201).

[526] If “national concern” and “gap” are understood as separate, it is easy to mistakenly understand “gap” as the sole residual power, and to fail to appreciate the residual nature of “national concern”. Rather, what some commentators call “gap” and “national concern” have the same underlying logic. They are both manifestations of the exhaustive nature of the division of powers, and the residual nature of POGG. This close affinity between “gap” and “national concern” is crucial to a proper understanding of the *Crown Zellerbach* test: all matters of national concern must fill a kind of “gap” in the sense that they do not fit under the enumerated heads, and, conversely, all matters that do not fit under the enumerated heads must still pass the national concern test to be within federal jurisdiction. Historical newness is irrelevant in ascertaining the existence of a constitutional “gap”. Le Dain J. is clear in *Crown Zellerbach* that the test he sets out applies to historically new matters *and* matters that have come to extend beyond provincial competence and “become” matters of national concern. When I say that the matter must fill a kind of “gap”, I simply mean that the matter does not fall under any enumerated head of power, and cannot be divided between multiple enumerated powers.

[527] As I explain below, “singleness, distinctiveness and indivisibility”, “provincial inability”, and “scale of impact” should be understood so as to give effect to the residual nature of the POGG power, and filter out any matter that could fall under

an enumerated head of power, including matters that are of a “merely local or private Nature” falling under s. 92(16), and matters that could be distributed among multiple heads.

[528] I pause here to note that the emergency branch, too, can and should be understood as residual to the enumerated heads of power. Viscount Haldane, the architect of the emergency doctrine, “employed expressions which suggest a temporary transcending of the confines of the provincial heads of power” (Lysyk, at p. 549). Cases invoking the emergency branch indicate that in an emergency, a new aspect of government business arises that extends beyond provincial competency (*Fort Frances*, at p. 705; *Snider*, at p. 412; see also Lysyk, at pp. 548-51). For clarity, the fact that the emergency branch should also be understood as residual does not mean matters classified as emergencies need to pass the “national concern” test set out in *Crown Zellerbach*. Indeed, Le Dain J. specifically clarified that “[t]he national concern doctrine is separate and distinct from the national emergency doctrine” (p. 431).

(3) Going Forward

[529] The arc of the POGG jurisprudence has been an effort to navigate such that the division of powers is collectively exhaustive, in a way that respects provincial jurisdiction. The national concern doctrine, when properly applied, plays an essential role in achieving this. Matters that do not come within one of the enumerated heads of jurisdiction and that cannot be separated and shared between the enumerated heads of jurisdiction of both orders of government, do not fit comfortably within the division of

powers. In order to maintain exhaustiveness, such matters fall under the general residual power of Parliament by virtue of their “distinctiveness” from matters under provincial jurisdiction and their “indivisibility” between various heads of jurisdiction. But when the doctrine is improperly applied, POGG ceases to be residual in nature. When that is so, it can become an instrument to enhance federal and correspondingly decrease provincial authority.

[530] The POGG case law reviewed above is at times amorphous and difficult to organize, but one common denominator runs throughout: courts must be careful in recognizing matters of national concern and heed the consistent warnings from the case law, because the national concern branch has great potential to upset the division of powers (*Local Prohibition*, at p. 361; *Canada Temperance Federation*, at pp. 205-6; see also *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at paras. 67, 110 and 115).

[531] Once a matter is qualified as “of national concern”, Parliament has exclusive jurisdiction over the matter, including its intra-provincial aspects (*Crown Zellerbach*, at p. 433). Thus, as the Attorney General of Quebec argued, an expansive interpretation of the doctrine can threaten the fundamental structure of federalism and unduly restrain provincial legislature’s law-making authority. It would allow Parliament to acquire exclusive jurisdiction over matters that fall squarely within provincial jurisdiction and flatten regional differences, including Quebec’s ability to retain exclusive control over [TRANSLATION] “all powers deemed essential to the

survival and flourishing of its distinct cultural identity” (E. Brouillet, *La négation de la nation: L’identité culturelle québécoise et le fédéralisme canadien* (2005), at p. 299).

[532] Courts should never *start* a division of powers analysis by looking to the federal residual power (Gibson (1976), at p. 18). This approach helps guard against an unwarranted and artificial expansion of federal jurisdiction. While the national concern doctrine allows courts to recognize Parliament’s jurisdiction over matters that used to fall under provincial jurisdiction, there is no corresponding transfer of matters that are no longer of national interest to the provinces (Brun, Tremblay and Brouillet, at pp. 589-91). Rather, recognizing a matter of national concern has the effect of “adding by judicial process new matters or new classes of matters to the federal list of powers”, which “would belong to Parliament permanently” (*Anti-Inflation*, at pp. 444 and 458). Therefore, to preserve the federal balance, courts should treat POGG as a power of last resort.

[533] Some more recent case law from this Court recognizes this. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, this Court declined to uphold federal legislation under the POGG power and stated that “the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867*” (p. 65 (emphasis added); see also *Hydro-Québec*, at paras. 109-10).

[534] My view of the national concern test gives effect to this truly residual understanding of POGG. The scope of the national concern doctrine must be limited to

matters that cannot fall under other heads of jurisdiction and that cannot be distributed among multiple heads, thus filling a constitutional gap. Accordingly, the doctrine only applies to matters which are truly of “national concern”, as opposed to matters of a “merely local or private nature” that fall under s. 92(16).

III. The National Concern Doctrine

A. *Singleness, Distinctiveness, Indivisibility*

[535] In *Crown Zellerbach*, Le Dain J. explained that “[f]or a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern” (p. 432). A close reading of Le Dain J.’s reasons in *Crown Zellerbach* and of Beetz J.’s influential reasons in *Anti-Inflation* reveal that “singleness, distinctiveness and indivisibility” should be understood purposively, as a way to identify matters that are beyond the powers of the provinces, and cannot be divided between both orders of government, which must fall under the general federal residual power in order to fill a constitutional gap.

[536] Beetz J.’s reasons in *Anti-Inflation* are an essential starting point to understand how matters can qualify as of “national concern”. Beetz J. explained that matters of national concern have only been recognized “in cases where a new matter was not an aggregate but had 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” (p. 458 (emphasis added)). The matter at issue in *Anti-Inflation*, the “containment and reduction of inflation”, did not meet such requirements:

It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial powers nugatory. [p. 458]

[537] In *Crown Zellerbach*, Le Dain J. noted that the majority of the Court in *Anti-Inflation* “held that the national concern doctrine applied, in the absence of national emergency, to single, indivisible matters which did not fall within any of the specified heads of provincial or federal legislative jurisdiction” and referred to Beetz J.’s reasons extensively (pp. 426-27). Thus, it appears that Le Dain J. understood *Anti-Inflation* as standing for the proposition that the national concern doctrine applies when two conditions are met: first, the matter does not fall within (i.e. it is distinct from) the enumerated heads of jurisdiction and, second, it is single and indivisible.

[538] The issue in *Crown Zellerbach* was whether “marine pollution” could qualify as a matter of national concern. More specifically, the question was whether “the control of pollution by the dumping of substances in marine waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters” (p. 436 (emphasis added)). Le Dain J. proceeded in two steps, in line with *Anti-Inflation*. First, he determined that marine pollution was sufficiently distinct from the pollution of other provincial waters because of the distinction between salt and fresh water. Second, he

determined that the distinction was sufficient to conclude that marine pollution was a single and indivisible matter.

[539] These cases demonstrate that the requirements of “singleness, distinctiveness and indivisibility” serve the purpose of identifying matters that are truly residual in two ways. That is, the matter must be “distinct” from provincial matters *and* must be incapable of division between both orders of government such that it must be entrusted solely to Parliament. These requirements give effect to the general residual power of Parliament under POGG and ensure that there is no jurisdictional gap in the division of powers. They apply to both “new matters” and to matters which, although originally falling under provincial jurisdiction, have come to extend beyond the powers of the province and, due to indivisibility, must be entrusted exclusively to Parliament.

(1) Importance Is Irrelevant

[540] Given the residual nature of POGG, the importance of a matter has nothing to do with whether it is a matter of national concern. In the *Insurance Reference* case, the Supreme Court and the Judicial Committee of the Privy Council made plain that the importance of a subject did not mean that it had attained a national dimension so as to transfer matters from provincial to federal authority (*In re “Insurance Act, 1910”* (1913), 48 S.C.R. 260, at p. 304, *aff’d Attorney-General for Canada v. Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.), at p. 597, cited in Le Dain, at pp. 276-78; see also *Anti-Inflation*, at pp. 446-50). The role of the general residual power is to maintain the exhaustiveness of the division of powers, not to centralize “important”

matters that can be legislated upon by the provinces or by both orders of government. This would severely undermine the principle of federalism (Gibson (1976), at p. 31; see also Hogg, at s. 17.3(b)). For instance, provinces have jurisdiction to legislate in relation to education and the national concern doctrine cannot displace such authority simply because of the importance of the matter.

(2) Distinctiveness

[541] First, the impugned matter must be distinct from matters falling under the enumerated heads of s. 92 (*Anti-Inflation*, at p. 457). This will be met when the matter is beyond provincial reach, including because of the limitation of provincial jurisdiction to matters “in the Province” (see Gibson (1976), at p. 18). This inquiry includes consideration of the provincial residuum: if the matter is of a “merely local or private Nature”, it would fall under s. 92(16).

[542] For example, federal legislation regulating the insurance business could not be sustained under POGG because it was not distinct from provincial matters. Provincial legislatures could have enacted legislation “substantially identical” under their authority to make laws in relation to civil rights and matters of local interest, under ss. 92(13) and 92(16) (*In re “Insurance Act, 1910”*, at pp. 302-3, per Duff J.). Similarly, “[t]he brewing and labelling of beer and light beer” did not transcend the provincial authorities’ powers so as to give rise to a matter of national concern. On the contrary, Estey J. noted that there had been “legislative action duly taken in this field by the provinces” (*Labatt*, at p. 945).

[543] By contrast, marine pollution was found to be sufficiently distinct from pollution in other provincial waters, which fall under provincial jurisdiction (*Crown Zellerbach*, at pp. 436-38). Likewise, the subject of aeronautics was found to “transcen[d] provincial legislative boundaries” (*Johannesson*, at p. 309, per Kerwin J.).

[544] I would add that the matter must also be distinct from matters falling under federal jurisdiction, as POGG is purely residual. Of course, since division of powers disputes typically pertain to the boundaries between provincial and federal jurisdiction, in practice, distinctiveness is mainly considered with respect to provincial powers.

(3) Singleness and Indivisibility

[545] Second, as the Attorney General of Quebec correctly argued, even if the matter does not come within an enumerated head of power, it must be single and indivisible to fall under POGG rather than an aggregate that can be broken down and distributed to enumerated heads of jurisdiction (Lederman, at pp. 604-5). In other words, the fact that provinces are unable to deal with a matter is insufficient to conclude that it falls under POGG. The nature of the matter must be such that it cannot be shared between both orders of government and that it must be entrusted to Parliament, exclusively, to avoid a jurisdictional vacuum. This will be the case when the matter has a degree of unity and specificity that makes it indivisible or where the intra-provincial and extra-provincial aspects of the matter are inextricably interrelated (*Anti-Inflation*, at p. 458; *Crown Zellerbach*, at p. 434).

[546] For instance, diffuse matters such as “inflation”, “labour relations” and “the environment” are distinct from matters falling under s. 92; they are not of a “merely local or private Nature” (s. 92(16)) and cannot be fully regulated by the province. However, they cannot be assigned to Parliament exclusively since they are divisible aggregates of several subjects cutting across provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; *Oldman River*, at pp. 63-64). They do not have a singleness such that they must be regulated exclusively by Parliament to avoid a jurisdictional gap.

[547] Such general categories should be viewed as “outside the system . . . [and] subdivided into appropriate parts so that necessary legislative action can be taken by some combination of both federal and provincial statutes” (Lederman, at p. 616; see also D. Gibson, “Constitutional Jurisdiction over Environmental Management in Canada” (1973), 23 *U.T.L.J.* 54, at p. 85, cited in *Oldman River*, at p. 63). This is not a flaw of federalism, since we ought to reject the view that “there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem” (*Crown Zellerbach*, at p. 434). Rather, these matters are properly dealt with through federal-provincial agreements, what Professor Lederman calls “[t]he essence of co-operative federalism” (p. 616). Accordingly, resort to the general federal residual power is not necessary to preserve the exhaustiveness of the division of powers.

[548] This Court has found that certain matters have the requisite singleness and indivisibility to fall under the general federal residual power rather than be distributed

between federal and provincial heads of powers. For instance, the conservation of the National Capital Region was, by nature, a specific matter with a degree of unity that made it indivisible (*Anti-Inflation*, at pp. 457-58; *Munro*, at pp. 671-72). In *Crown Zellerbach*, the majority of this Court found that marine pollution was a single and indivisible matter in part because “the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions” (p. 437). The interrelatedness of the intra-provincial and extra-provincial aspects of the matter was such that marine pollution could not be shared between both orders of government if it were to be regulated. On this view, if it did not fall under the general federal residual power, neither Parliament nor provincial legislatures could have effectively legislated upon marine pollution, which would be inconsistent with the exhaustive division of powers.

[549] Singleness and indivisibility are thus means to determine whether the matter truly lies outside the enumerated heads or if it is merely a “new nam[e]” applied to “old legislative purposes” that can be distributed among existing heads of jurisdiction (Le Dain, at p. 293).

B. *Provincial Inability*

[550] In *Crown Zellerbach*, Le Dain J. held that in evaluating whether the matter has a singleness, distinctiveness and indivisibility, “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” (p. 432). This factor is known as the “provincial inability” test.

[551] Once again, it is essential to look at the genesis of the provincial inability inquiry to understand what it sought to accomplish and its role in the national concern doctrine. The provincial inability inquiry has been designed to control the centralization of powers and to limit the extension of the national concern doctrine to matters that are “beyond the power of the provinces to deal with” and that must be legislated upon by Parliament, exclusively (Gibson (1976), at pp. 33-34 (emphasis deleted); see also Leclair (2005), at p. 361; *Crown Zellerbach*, at pp. 432-33).

[552] In *Labatt*, this Court held that matters would meet this “test” when interprovincial cooperation is realistically impossible because “the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces” (p. 945, citing P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 261). In such cases, the matter is effectively beyond the power of the provinces to deal with it.

[553] This background sheds light on the purpose of the concept of provincial inability: to help identify potential jurisdictional voids or gaps, which may indicate that a matter has a national dimension so as to fall under POGG to ensure the division of powers is exhaustive. The underlying purpose of the provincial inability inquiry is essential to understanding its iteration in *Crown Zellerbach*.

(1) Extra-Provincial Effects Are Relevant to, But Not Determinative of, Provincial Inability

[554] First, “extra-provincial effects”, on their own, are insufficient to satisfy the “provincial inability” test. Rather, the extra-provincial effects must be such that the matter, or part of the matter, is beyond the powers of the provinces to deal with on their own or in tandem.

[555] I acknowledge that this is not the only way to read *Crown Zellerbach*. Read in isolation, Le Dain J.’s reasons could suggest that provincial inability is met whenever there are considerable effects on extra-provincial interests of a provincial failure to deal effectively with the intra-provincial aspects of the matter. In my view, this understanding cannot be correct. Understood this way, provinces would be “unable” to legislate with respect to many matters that were expressly entrusted to them. For example, if a province did not deal effectively with the administration of justice in the province (s. 92(14)), this may have grave consequences for residents of other provinces — the absence of any criminal prosecutions in an entire province would surely have spillover effects for neighbouring provinces. However, I would not say that this mere possibility makes all provinces “unable” to administer justice in the province.

[556] Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction (Brun, Tremblay and Brouillet, at pp. 592-93; Hogg, at s. 13.3(c)). If the pith and substance of

provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at paras. 23, 24 and 38; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 28). Given the potential displacement of provincial authority, courts should have a “strong empirical base” for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem (K. Swinton, “Federalism under Fire: The Role of the Supreme Court of Canada” (1992), 55 *Law & Contemp. Probs.* 121, at p. 136; Leclair (2005), at p. 370).

[557] Evidence that provinces are not cooperating, even combined with the presence of extra-provincial effects, is also insufficient to make out provincial inability. Provinces are sovereign within their sphere of jurisdiction and can legitimately choose different policies than other provinces. The sovereign and democratic will of provincial legislatures entitles them to agree or disagree that uniformity of laws is a desirable goal, and to change their mind in the future (*Reference re Pan-Canadian Securities Regulation*, at para. 69; Hogg, at s. 17.3(b)). Moreover, since the possibility of one or more provinces not cooperating is always hypothetically present, such lax criteria would be ineffective protection for provincial jurisdiction (E. Brouillet, “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” (2011), 54 *S.C.L.R.* (2d) 601, at pp. 620-21). It is worth repeating that striking a balance between diversity and uniformity is precisely why the Canadian constitution has a

federal structure. In certain fields, the *Constitution Act, 1867*, places diversity and the right to provincial difference above uniformity. This is not a defect of our Constitution, it is a strength.

(2) Provincial Inability Is Relevant to, But Not Determinative of, “Singleness, Distinctiveness and Indivisibility”

[558] Second, the residual role of the national concern doctrine explains why Le Dain J. in *Crown Zellerbach* indicated that the “provincial inability” test is only a “factor” to evaluate whether a subject matter has the required singleness, distinctiveness and indivisibility.

[559] Many matters are “beyond the power of the provinces to deal with” but do not meet the requirements of singleness, distinctiveness and indivisibility, and are therefore not matters of national concern. Obviously, matters that fall squarely within federal jurisdiction are one example (i.e. currency and coinage, the postal service, etc.). This is also the case when matters are mere divisible aggregates that span provincial and federal jurisdiction (*Anti-Inflation*, at p. 458; Brouillet (2011), at p. 619). For instance, there is no denying that the containment of inflation is “beyond the power of the provinces to deal with”, since it involves measures that fall squarely under federal jurisdiction, such as central banking measures relating to the rate of interest (*Anti-Inflation*, at p. 452). This does not mean that the containment of inflation has the required singleness and indivisibility to qualify as a matter of national concern since it can be divided and distributed to both orders of government. Since there is no

constitutional gap, there is no need for the national concern doctrine to be applied such that the entire matter comes under federal jurisdiction.

[560] Provincial inability is no more than Le Dain J. says it is in *Crown Zellerbach*: an indicium of “singleness, distinctiveness and indivisibility”. Extra-provincial effects resulting in provincial inability may indicate that the matter is not of a local or private nature (i.e. “distinct” from provincial matters), or is not separable from the local and private aspects of the matter (i.e. “indivisible” or “single”). This will be the case where the extra- and intra-provincial aspects of a matter are interrelated and inseparable (*Crown Zellerbach*, at p. 434). This makes sense. In line with the residual role of POGG, federal authority over what was formerly within provincial competence is only justified where a matter has become distinct from what the provinces can do, and cannot be shared between orders of government because of its indivisibility. In such a case, reliance on POGG is the only way to maintain the exhaustiveness of the division of powers. Otherwise, there would be a jurisdictional void — if the federal Parliament did not have jurisdiction over such a matter, no one would.

C. *Scale of Impact*

[561] When determining if a matter can pass muster as a subject matter falling under POGG, the final step is to consider whether it has “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (*Crown Zellerbach*, at p. 432). If the “singleness, distinctiveness

and indivisibility” inquiry has been carried out correctly such that reliance on POGG is necessary to avoid a jurisdictional vacuum, then the scale of impact will necessarily be reconcilable with the division of powers. This stage of the test should therefore be understood as a “check” or “litmus test”, rather than as an independent requirement. The evaluation of the scale of impact on the federal balance illustrates the need for caution when determining whether a new permanent head of exclusive power should, in effect, be added to the federal list of powers (*Anti-Inflation*, at p. 444).

[562] This prong of the test requires courts to determine whether recognizing the proposed new federal power would be compatible with the federal structure. It does *not* ask whether the importance of the proposed new federal power *outweighs* the infringement on provincial jurisdiction. Importance is irrelevant because it does not indicate whether there is a jurisdictional gap that must be filled with the general residual power. Important matters can and should be dealt with by the provinces. Further, assessing importance requires courts to assess the desirability of certain policies, something which is not their role.

[563] Rather, the notion of scale of impact on the fundamental distribution of powers is a manifestation of the principle of federalism. As this Court held in *Comeau*, this principle “requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests” (para. 78). Professor Brouillet explains that the idea of preserving a “federal balance” ought to be a principled exercise, animated by the values underlying federalism:

The search for a federal balance aims at keeping an equilibrium between the values of unity and diversity, whose first legal expression is laid down in the distribution of powers between the levels of government. The value of unity will be essentially preserved if the autonomy of the central government is protected, as the value of diversity will be maintained if the federated units are free from interference from the central government in the exercise of their exclusive legislative powers. [Emphasis added.]

(“The Federal Principle and the 2005 Balance of Powers in Canada” (2006), 34 S.C.L.R. (2d) 307, at pp. 311-12)

[564] If ubiquitous, all-pervasive matters, such as “the containment and reduction of inflation”, fell under POGG, they would authorize federal action that would have a radical effect on the federal balance as they would “render most provincial powers nugatory” (*Anti-Inflation*, at p. 458). Rather, the matter must be of a sufficiently narrow and specific nature to be consistent with the value of diversity and the autonomy of provincial governments to set their own priorities and come up with policies tailored to their unique needs (*Securities Reference*, at para. 73).

[565] Moreover, the fact that some matters were not assigned exclusively to either Parliament or the provincial legislatures, and instead are shared between both orders of government, must be given effect. This must not be disturbed through constitutional interpretation. In *Hydro-Québec*, at para. 59, Lamer C.J. and Iacobucci J., dissenting, but not on this point, made this clear in relation to the “environment” as a subject matter:

A decision by the framers of the Constitution not to give one level of government exclusive control over a subject matter should, in our opinion, act as a signal that the two levels of government are meant to operate in tandem with regard to that subject matter. One level should not be allowed

to take over the field so as to completely dwarf the presence of the other. This does not mean that no regulation will be permissible, but wholesale regulatory authority of the type envisaged by the Act is, in our view, inconsistent with the shared nature of jurisdiction over the environment. As La Forest J. noted in his dissenting reasons in *Crown Zellerbach*, at p. 455, “environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man’s relationship with his environment, waste is unavoidable.” [Underlining in original; italics added.]

[566] Although the modern conception of federalism is flexible and accommodates overlapping jurisdiction, courts must be careful not to let the double aspect doctrine undermine the scale of impact inquiry by suggesting that provinces retain ample means to regulate the matter. The double aspect doctrine recognizes that the same fact situation or “matter” may possess both federal and provincial aspects, which means that both orders of government can legislate from their respective perspective (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 84; *Canadian Western Bank*, at para. 30). For example, the prohibition of driving while intoxicated can be enacted by Parliament under its power over criminal law, while provinces can legislate regarding the suspension of driving licenses for highway safety reasons, likely under their power over “property and civil rights” (*O’Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238).

[567] The role of the double aspect doctrine is simply to explain how similar rules in otherwise valid provincial and federal laws can apply simultaneously, “when the contrast between the relative importance of the two features is not so sharp” (*Rogers Communications*, at para. 50, citing W. R. Lederman, “Classification of Laws and the

British North America Act”, in *The Courts and the Canadian Constitution* (1964), 177, at p. 193; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 182). Thus, while this doctrine “allows for the *concurrent application* of both federal and provincial legislation, . . . it does not create *concurrent jurisdiction* over a matter” (*Securities Reference*, at para. 66 (emphasis in original)).

[568] As its name indicates, the doctrine only applies when a subject matter has multiple aspects, some that may be regulated under provincial jurisdiction, and some under federal jurisdiction. It is “neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction” and does not allow Parliament and provincial legislatures to legislate on the “*same aspect*” of the matter (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 766, per Beetz J. (emphasis in original)). As Professors Brouillet and Ryder write, “an unbridled application of the doctrine would undermine the principle of exclusiveness that forms the foundation of the distribution of powers in Canada” (“Key Doctrines in Canadian Legal Federalism”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 415, at p. 423).

[569] Moreover, the double aspect doctrine must be applied carefully, since increasing overlap between provincial and federal competence can severely disrupt the federal balance. Under the paramountcy doctrine, “where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency” (*Saskatchewan*

(Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 15; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11). The combined operation of the doctrines of double aspect and federal paramountcy can have profound implications for the federal structure and for provincial autonomy. I note that Quebec scholars have warned about the particular effects of an unrestrained application of the double aspect doctrine on the province's exclusive jurisdiction. To quote Professor Patenaude:

[TRANSLATION] It is because of section 92, subsection 13, that Quebecers are governed by a distinct private law system adapted to the specificity of their culture. Any weakening of the rule of [provincial] exclusiveness signifies a possibility for the federal Parliament, in which Francophones are in the minority, to legislate, pre-eminently, in fields the framers had entrusted exclusively to the Parliament of Quebecers. . . . Quebecers cannot accept that fields of jurisdiction over which they have exclusive control can, under the guise of the aspect doctrine, pass into the sphere in which federal jurisdiction has priority of application. [Emphasis added.]

(“L'érosion graduelle de la règle de l'étanchéité: une nouvelle menace à l'autonomie du Québec” (1979), 20 *C. de D.* 229, at p. 234; see also G. Rémillard, “Souveraineté et fédéralisme” (1979), 20 *C. de D.* 237, at p. 242.)

[570] As Professor Hogg explained, “[i]f in a nation paramount central power completely overlapped regional power, then that nation would not be federal It is only where overlapping of power is incomplete, or the scope of central control is limited, that we have a federal system” (s. 5.1(a); see also *Bell Canada*, at p. 766). When Professor Hogg wrote that the “nation would not be federal”, he did not mean that provinces would cease to exist. Rather, he meant that where provinces become

subordinate units, the nation is no longer federal in its nature. In other words, supervisory federalism isn't federalism at all.

[571] In para. 139, the Chief Justice says that my description of national concern (referred to as “two-step”) is not reflective of the jurisprudence, noting *Munro* and *Crown Zellerbach*. He concludes by saying: “In those cases, this Court did not proceed by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern.” In reply, first, I would say that aside from a few shining beacons of clarity and coherence, notably Beetz J. in *Anti-Inflation*, the jurisprudence on national concern has been unclear, even obscure. Second, I do not agree that my description of national concern is not consistent with the jurisprudence while that of the Chief Justice is so. Neither he nor I simply apply precedent. Rather, each of us in different ways makes sense of what was written before. The two-step approach I adopt reflects the methodology Le Dain J. set out and applied in *Crown Zellerbach*, as I have indicated throughout. Third, the difference is not how faithfully we each adhere to a tortuous case law, but rather how we each conceive of the purpose of the national concern doctrine. For me, it is to give effect to federal residual authority over matters not otherwise assigned under the enumerated heads of power and that cannot be divided between both orders of government. For the Chief Justice it is akin to a debenture, with POGG being a general federal authority that floats over that of the provinces, and crystalizes into exclusive federal jurisdiction when a matter of “inherent national concern” is recognized. These views are fundamentally different, but neither follows directly from the case law.

[572] The Chief Justice also takes issue with my account of the national concern test. I agree that our understandings of POGG are fundamentally different. Mine is that POGG confers residual authority, by which I mean authority to legislate in relation to only those matters which would otherwise fall into a jurisdictional vacuum. As such, it can only be the basis of jurisdiction for matters that do not come within heads of power listed in ss. 91 and 92, and *cannot be divided between them*. Such residual authority is necessary to ensure that the division of powers is exhaustive. To put it in the simplest terms, the matters falling under the competence conferred on Parliament by s. 91 and that conferred on the legislatures of the provinces by s. 92, or any combination of the two, by definition, cannot come within a residual authority.

[573] Therein lies the conceptual difference that the Chief Justice highlights. In his framework, POGG is a primary source of authority conferred on Parliament in relation to “matters of inherent national concern” (para. 139). Moreover, it is a source of authority that can be used to deal with federal “aspects” of matters under enumerated powers within the exclusive jurisdiction of provincial legislatures. Thus, he states at para. 130: “. . . where Canada is empowered to impose a minimum national standard, a double aspect situation arises: federal and provincial laws apply concurrently, but the federal law is paramount.”

[574] By means of “minimum national standards”, a federal aspect is *generated*, and this federal aspect can be used as a basis to supervise provinces in the exercise of their authority. This is not residual authority. It is the antithesis of residual authority,

as it would operate to encroach on jurisdiction conferred on the provinces. Most respectfully, I disagree.

D. *Conclusion*

[575] The national concern doctrine must be applied with caution in light of its residual role and its potential to upset the division of powers. If the doctrine is not strictly applied so as to limit it to ensuring that the division of powers is exhaustive, the federal nature of the Constitution would “disappear not gradually but rapidly” (*Anti-Inflation*, at p. 445).

IV. The Attorney General of Canada’s Expansive Approach Lacks Caution

[576] Repeated warnings about the misuse of the “national concern” power, notably by Beetz J. in *Anti-Inflation*, were all but ignored by the Attorney General of Canada in his submissions before this Court. The Attorney General of Canada did not seek to rely on the federal enumerated powers, notably taxation or trade and commerce, as the basis for the constitutionality of the *Act*. He did not set forth national concern as an alternative basis. Nor did he rely on the emergency branch, which confers Parliament temporary, rather than permanent, authority. (In a “throw-away” submission, the Attorney General of Canada made passing reference to these potential grounds and referred the Court to the submissions of certain interveners.) This was audacious as national concern has been recognized repeatedly as being a threat to the distribution of powers that is at the heart of the Confederation bargain. Further, the Attorney General

of Canada's proposed national concern test would considerably extend the doctrine, despite this Court's call for caution when considering a doctrine that "inevitably raises profound issues respecting the federal structure of our Constitution" (*Hydro-Québec*, at para. 110). I would reject this doctrinal expansion of national concern. I do so for two reasons. First, it departs in a marked and unjustified way from the jurisprudence of this Court. And, second, if adopted, it will provide a broad and open pathway for further incursions into what has been exclusive provincial jurisdiction.

A. *Becoming a Matter of National Concern*

[577] The Attorney General of Canada argues in his factum (at para. 2) that the pith and substance of the *Act* of "establishing minimum national standards integral to reducing nationwide [greenhouse gas] emissions" has attained national dimensions because of its importance and the existential threat that climate change poses. This reasoning misstates what it means to attain national dimensions. A matter has attained national dimensions when it has the requisite singleness, distinctiveness and indivisibility such that it cannot fit under any enumerated head or be divided among multiple enumerated heads, and a scale of impact on provincial jurisdiction that is reconcilable with the division of powers, as explained above. How important a matter is does not determine which order of government has jurisdiction. While the seriousness or the immediacy of the threat that climate change poses may be relevant to an argument under the emergency branch, it has no place in the national concern

analysis, which is “separate and distinct from the national emergency doctrine” (*Crown Zellerbach*, at p. 431; see also *Anti-Inflation*, at p. 425).

[578] Similarly, the Attorney General of Canada also says that the presence of international agreements indicates that the matter is of national concern. This argument is not only inconsistent with the residual nature of POGG, it also undermines almost nine decades of jurisprudence beginning with the *Labour Conventions* case, which held that the federal government does not gain legislative competence by virtue of entering into international agreements. Rather, the federal government and the provinces must cooperate to implement international agreements that relate to matters within provincial jurisdiction. What is urged on us by the Attorney General of Canada is a means — indirect, but no less significant thereby — for the federal Cabinet to expand the competence of Parliament by the exercise of its authority in respect of foreign relations.

B. *Singleness, Distinctiveness and Indivisibility*

[579] The treatment of “singleness, distinctiveness and indivisibility” by the Attorney General of Canada conflates key elements of the test, skipping over — I would go so far as to say denying the existence of — what should be important limits on federal jurisdiction. Interpreting such limits out of existence will have profound implications for the future on issues having nothing to do with climate change.

[580] On distinctiveness, the Attorney General of Canada argues in his factum that “the subject matter and the *Act* target a distinct type of pollutant with indisputable

persistence, atmospheric diffusion, harmful effects and interprovincial aspects” (para. 88). While the distinctiveness of greenhouse gases (“GHGs”) from other types of gases may be relevant to the distinctiveness inquiry, it is only relevant insofar as the regulation of GHGs is outside of or “distinct from” provincial competence, which the Attorney General of Canada fails to adequately explain. The distinctiveness requirement is inherently incompatible with the backstop nature of the *Act*, which contemplates that some or all provinces could implement GHG pricing schemes that accord with standards set (from time to time) by the federal Cabinet, thereby avoiding the triggering of federal intervention. Lamer C.J. and Iacobucci J. make a similar point in their dissenting reasons in *Hydro-Québec*, at paras. 57 and 77. In that case, “equivalency provisions” which allowed the Governor in Council to exempt a province from the scheme if the province had equivalent regulations in force led them to reject the argument that the provinces were unable to regulate toxic substances.

[581] The Attorney General of Canada glosses over the problems with its distinctiveness argument through a proposed “modernized” national concern test that draws on the trade and commerce power jurisprudence and focuses on its version of provincial inability. This new test urged on us by the Attorney General of Canada does away with many of the requirements of “singleness, distinctiveness and indivisibility”, and simply asks is the matter “distinctly national” (para. 69). The Attorney General of Canada says this should be assessed using the provincial inability test. He says it is “more than an indicium of distinctiveness, it is the test for distinctiveness” (para. 70). In effect, the Attorney General of Canada’s proposition collapses “singleness,

distinctiveness and indivisibility” into “provincial inability” — despite Le Dain J.’s caution that “provincial inability” should be only *one* indicium in determining whether a matter meets the singleness, distinctiveness and indivisibility requirements (*Crown Zellerbach*, at p. 434).

[582] This approach fails to give effect to the residual nature of the POGG power. It ignores Beetz J.’s caution that an aggregate of provincial and federal matters is not sufficiently distinctive and too pervasive to justify the creation of (what amounts to) a new head of power under national concern (*Anti-Inflation*, at p. 458). This is exacerbated by the Attorney General of Canada’s reliance on the trade and commerce power jurisprudence to understand the “provincial inability” test. There is no reason why the national concern test should be informed by tests for enumerated heads of power, because the national concern test is directed towards matters that would not pass those tests. If a matter comes with “trade and commerce” or another enumerated power, then it cannot also be a matter of “national concern” if POGG is a residual power.

[583] The result is that something like the “containment and reduction of inflation”, which Beetz J., with majority support on this point, held did not pass muster in *Anti-Inflation*, may pass the Attorney General of Canada’s proposed “modernized” test. This is so because, even though such a matter could be divided between provincial and federal enumerated heads of power rendering it “divisible”, the provinces, on their own or in tandem, would be unable to fully deal with it, and the failure of one province to act would endanger the interests of other provinces. This example illustrates how the

Attorney General of Canada's proposal increases — I would go so far as to say transforms — the scope of the “national concern” branch under POGG.

[584] The device of “minimum national standards” makes wider still the pathway for enhancement of federal jurisdiction. The Attorney General of Canada argues that the provincial inability test is met, in part, because “no single province or territory can constitutionally legislate minimum national standards” (para. 101). But “by means of minimum national standards” could be applied to *any* matter, the same way “by means of the federal government” could be applied to any matter. If it could be applied to any matter, then it adds nothing meaningful to the description of a matter and has no place. Including “minimum national standards” in the matter of national concern short-circuits the analysis and opens the door to federal “minimum standards” with respect to other areas of provincial jurisdiction, artificially expanding federal capacity to legislate in what have been until now matters coming within provincial jurisdiction. This device undermines federalism by replacing provincial autonomy in the exercise of its jurisdiction with the exercise of such jurisdiction made permanently subject to federal supervision.

[585] Further, the Attorney General of Canada fails to identify extra-provincial effects that would be relevant to provincial inability. The Attorney General of Canada points to carbon leakage (interprovincial competition resulting from businesses relocating from jurisdictions with more strict climate policies to jurisdictions with less strict climate policies), but this is not the kind of extra-provincial effects that make the

provinces unable to deal with the matter, on their own or in tandem. An imaginative lawyer can almost always find some effects of provincial measures outside the province (Swinton, at p. 126). This is not enough to put all or part of a matter beyond the power of the provinces to deal with. If it were, the provinces would be “unable” to legislate in many areas of provincial jurisdiction.

[586] The Attorney General of Canada departs from this Court’s jurisprudence in treating “provincial inability” and extra-provincial effects as more than an indicator, and losing sight of what it is supposed to be indicating: singleness, distinctiveness and indivisibility, which give effect to the residual nature of POGG. Extra-provincial effects leading to provincial inability to deal with all or part of a matter can constitute *one step* towards singleness, distinctiveness and indivisibility. In treating provincial inability as determinative, the Attorney General of Canada reframes the national concern test so as to expand the scope of POGG beyond its proper residual nature.

[587] In effect, the Attorney General of Canada’s “modernized” test does away with “singleness, distinctiveness and indivisibility” by understanding these concepts in terms of (his version of) “provincial inability”. It then renders “provincial inability” meaningless by defining the matter in terms “minimum national standards”, something no province can do. By this logical sleight of hand, “provincial inability” exists whenever Parliament provides for “minimum national standards”.

C. *Scale of Impact*

[588] The Attorney General of Canada suggests that the scale of impact on provincial jurisdiction of the *Act* is reconcilable with the distribution of powers, in part because of the backstop mechanism. He argues in his factum that the *Act* respects provincial jurisdiction because it provides provinces with the “flexibility” to implement their own GHG pricing systems and “fills in gaps” where the provincial pricing systems do not meet the “minimum national standards” (para. 6). This is presented as “cooperative” federalism.

[589] These conclusions are based on a highly centralized understanding of federalism. The *Act* leaves room for provincial jurisdiction only insofar as the decision of the province conforms to the will of Parliament and the federal Cabinet. Indeed, this is the whole point. It would not be a minimum national standard if it were possible to drop below that standard or ask to be measured by a different yardstick. Given the number of activities and industries that produce GHG emissions, the *Act*’s scale of impact on provincial jurisdiction would be “so pervasive that it knows no bounds” (*Anti-Inflation*, at p. 458).

[590] While provincial authority would remain nominally intact, in reality it would become subject to oversight by the federal Cabinet through the exercise of its ability to invoke “minimum national standards” that would override provincial measures. But provinces are not “simple agents for implementing national policies but rather . . . veritable laboratories for the development of solutions adapted to local realities” (A. Bélanger, “Canadian Federalism in the Context of Combatting Climate

Change” (2011), 20 *Const. Forum* 21, at p. 27). The *Act* is not an exercise in cooperative federalism. Rather, it is the means to enforce supervisory federalism.

[591] As the Attorney General of Quebec points out, even provincial schemes that, at a given time, meet the federal benchmark would never be secure from federal displacement; as a result, the continued application and consistent operation of provincial schemes would be less predictable. This is especially the case considering that minimum national standards could be elevated to a level that completely subsumes provincial schemes. The *Act* effectively undermines the predictability, stability and integrity of provincial regulatory schemes. Exercise of provincial authority would be permanently contingent on the federal Cabinet’s discretion.

[592] The reasoning of the Attorney General of Canada turns provincial autonomy on its head. It also suggests that Parliament could enact “minimum national standards” for a panoply of areas within provincial jurisdiction, and thereby create a federal “aspect” of multiple provincial matters. This has implications far beyond this legislation; these implications permanently alter the Confederation bargain.

[593] The double aspect doctrine does not cure this problem. The double aspect doctrine allows the same fact situation to “be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power” (*Desgagnés Transport*, at para. 84). The problem here is that the federal matter has been defined in terms of the extent to which it can limit the provinces’ discretion to legislate: the backstop mechanism. This is not two aspects of the same fact situation. It is one aspect,

and it gives the federal government the upper hand and the final say. But, that is what “minimum national standards” are intended to do.

[594] In conclusion, I would reject the Attorney General of Canada’s proposed expansion of the national concern doctrine and, for the reasons of my colleague Brown J., conclude that Parliament did not have jurisdiction to enact the *Act* under its general residual power. However, given that the majority has concluded that Parliament has the power to enact the *Act*, I want to emphasize that this conclusion does not extend to the regulations made under the *Act*.

V. The Constitutionality of Regulations Made Under the *Act* Are a Matter for Another Day

[595] The *Act* confers exceptionally broad authority on the Governor in Council to create policy in the regulations, particularly under Part 2. Although the majority has decided to uphold the *Act*, the *regulations* are not before this Court, and may well be challenged in future cases. I take this opportunity to clarify the appropriate methodology for reviewing regulations facially enacted pursuant to a constitutional statute for compliance with the division of powers, and how this methodology may apply to regulations made under the *Act*. In short, the federal power when applied in the regulations must be limited to the matter of national concern in which the *Act* is grounded: establishing minimum national standards of price stringency to reduce GHG emissions. To establish “minimum national standards”, any differences in treatment between industries or provinces in the regulations must be justified with respect to

“price stringency to reduce GHG emissions” (Chief Justice’s reasons, at para. 207). Regulations that have the effect of favouring or imposing unequal burdens on certain provinces and industries in a manner that cannot be so justified would be *ultra vires* the division of powers.

A. *Regulations Purportedly Enacted Under a Constitutional Act Can Be Unconstitutional*

[596] It is possible for a statute to be *intra vires*, and yet for regulations facially enacted under that statute to be *ultra vires* on division of powers grounds. One way to see this is that such regulations are not properly *intra vires* the Act, insofar as they are not consistent with the purpose for which the Act was upheld (even if facially they are within the Act’s wording). In *Reference re Assisted Human Reproduction Act*, McLachlin C.J. assessed whether an Act was valid under the federal criminal law power, and explained that “[a]ny regulations passed under the enabling statute will be valid only insofar as they further valid criminal law goals, and they will be subject to challenge to the extent that they do not” (para. 84). As long as the regulations made under an Act reflect and further the purposes for which the Act was held to be constitutional, such regulatory schemes remain “securely anchored” in the Act and *intra vires* (para. 85).

[597] Certain regulation-making powers are more likely to give rise to regulations that may overstep the bounds of the division of powers than others. For example, the power to make regulations that define the mere details of a valid scheme

are unlikely to affect the division of powers. Broader regulatory powers are cause for greater concern. In such cases, [TRANSLATION] “[t]he regulatory authority, which must then itself consider the limits of the power so granted, is more likely to make regulations that will be found to be unconstitutional, whereas the enabling Act, owing to the generality of the language used and to the presumption of validity of laws, will avoid such a finding” (P. Garant, with P. Garant and J. Garant, *Droit administratif* (7th ed. 2017), at p. 290).

[598] In this case, the *Act* delegates substantial authority to the Governor in Council to make regulations. The *Act*, and especially Part 2, could be described as “framework” or “skeletal” legislation, in the sense that much of its content is given effect by means of the regulations. In the context of framework legislation, the risk of regulations using their powers in a manner that is beyond their constitutional competence is particularly high. While the validity of the regulations the Governor in Council has made, or will make in the future, is a matter for another day, I offer some guidance on the proper methodology for reviewing the constitutionality of such regulations.

[599] At para. 220 of his reasons, the Chief Justice writes: “My colleague Rowe J. has taken this opportunity to propose a methodology for assessing the constitutionality of regulations made under the *GGPPA*. . . . [H]is speculative concern that such regulations could be used to further industrial favouritism is neither necessary nor desirable.” This legislation is an instrument not only of environmental policy, but

also industrial policy. By design, regulations under Part 2 will have impacts that vary by enterprise, sector and region. These regulations will affect the viability, for example, of natural resource industries that need to generate power at remote locations or heavy industries that require intense heat, like making cement or smelting ore. By contrast, they will have little effect on industries that are either not power-intensive (like finance) or where production is electrified (like manufacturing). While the primary purpose of the legislation is environmental protection, Part 2 is premised on tailoring the impact of emissions reduction by reference, inter alia, to economic considerations (G. Bishop, *Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing* (2019), C.D. Howe Institute Commentary 559). Issues as to whether regulations veer too deeply into industrial policy, thus calling into question the regulations' constitutionality, will inevitably arise.

B. *Methodology for Evaluating the Constitutionality of Regulations*

[600] An administrative decision to enact regulations is, presumptively, reviewed solely for “reasonableness”, unless there is a reason to rebut that presumption. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, this Court made clear that there is no separate “jurisdictional questions” category of correctness review that would rebut the presumption, even for delegated legislation (paras. 65-66). *Vavilov* also adopted the view that “[w]here [the legislature] has established a clear line, the [administrative decision maker] cannot go beyond it; and where [the legislature] has established an ambiguous line, the [decision maker] can go no further

than the ambiguity will fairly allow” (para. 68, quoting *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 307).

[601] One way that the presumption of reasonableness can be rebutted, however, is when the constitutionality of a provision is in issue, including a challenge based on the division of powers (*Vavilov*, at para. 55). As *Vavilov* explained, at para. 56:

A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

Where the reason for which regulations are said to be *ultra vires* their enabling statute is *because* they are *ultra vires* the division of powers, this raises a constitutional question. As the standard of review may depend on the nature of the challenge and the relief sought, I will say no more about it here.

[602] As for methodology, the review of *regulation* for compliance with the division of powers follows the same structure as the review of *legislation* for compliance with the division of powers. In both cases, one must characterize the measure and then classify it. This Court explained the process for analyzing the constitutionality of subordinate legislation, specifically a municipal by-law, in *Rogers Communications*, at para. 36:

In analyzing the pith and substance of the notice of a reserve, the Court must consider both its purpose and its effects: *Goodwin*, at para. 21; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 63-64; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at paras. 20-22. The purpose of a municipal measure, like that of a law, is determined by examining both intrinsic evidence, such as the preamble or the general purposes stated in the resolution authorizing the measure, and extrinsic evidence, such as that of the circumstances in which the measure was adopted: *Lacombe*, at paras. 20-22; *COPA*, at para. 18; *Canadian Western Bank*, at para. 27. As for the effects of a municipal measure, they are determined by considering both the legal ramifications of the words used and the practical consequences of the application of the measure: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83.

[603] Analyzing the pith and substance of the municipal measure at issue above is done in the same way as it is for the pith and substance of a statute. Regulations are no different (D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at topic 13:3210; see also *Labatt*; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20, [2005] 1 S.C.R. 292; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, 398 D.L.R. (4th) 91; *Oldman River*). The underlying logic is the same: Parliament cannot via statute exercise power it does not have, and so it cannot delegate power that it does not have. Scrutiny for compliance with the division of powers can be no less, simply because Parliament has chosen to give effect to its authority through a delegate who is empowered to make regulations. A division of powers analysis begins with pith and substance, and pith and substance begins with purpose and effect.

[604] In considering purpose, courts can and should consider both intrinsic and extrinsic evidence (see, e.g., *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 20; see also *Rogers Communications*, at para. 36, per Wagner and Côté JJ., and at paras. 100-104, per Gascon J., concurring). However, certain empowering provisions are more likely than others to generate extrinsic evidence. Empowering provisions of cities, where bylaws are passed after public debate, almost always generate extrinsic evidence. *Rogers Communications* is an example. Similarly, empowering provisions that place a duty to give reasons on an administrative decision-maker can also be adequately reviewed for constitutionality. Regulations directed to an individual or specific site, as opposed to regulations of general application, may attract a duty of procedural fairness (Brown and Evans, at topic 7:2331).

[605] Where, however, there is no public debate and no duty to give reasons, there is no guarantee that extrinsic evidence will be created. Without such extrinsic evidence, a court's ability to effectively adjudicate the boundaries of federal and provincial powers may be made more difficult. This will generally arise with regulation-making powers.

[606] This problem is particularly pernicious where the Governor in Council is empowered to make regulations. As Cabinet deliberates in secret, submissions to it are protected from disclosure and it gives no reasons for its decisions. It is very nearly a total black box. Further, it has been said that it is not the function of a court to

investigate the “motives” of Cabinet (Brown and Evans, at topic 15:3262; *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106).

[607] It is clear that courts have the power to review the *vires* of subordinate legislation, even where it is promulgated by the Governor in Council, where the basis for the review is that the subordinate legislation is *ultra vires* on division of powers grounds. As noted, Parliament cannot delegate power that it does not have. This is fundamental. While there may be evidentiary hurdles to identify the purpose of the regulations, where a review of the validity of a regulation turns on whether or not it is *ultra vires* the division of powers, courts remain tasked with ascertaining the pith and substance. Courts may consider extrinsic evidence in assessing the *vires* of an Order in Council, and have found Orders in Council to be invalid on the basis of extrinsic evidence of purpose (see *Heppner v. Province of Alberta* (1977), 6 A.R. 154 (S.C. (App. Div.)), at paras. 27-43). Where available, documents such as a Regulatory Impact Analysis Statement may provide extrinsic evidence of the purpose of a regulation (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 156-57). Where there is no extrinsic evidence of purpose, courts must infer the purpose as best they can from the language of the regulation itself, and ascertain the pith and substance using that in conjunction with the effects of the regulation. The legal and practical effects of the regulations will thus likely be highly relevant to determine their pith and substance and their validity in light of federal jurisdiction over “establishing minimum national standards of GHG price stringency to reduce GHG emissions” (Chief Justice’s reasons, at para. 207).

C. *Empowering Provisions Under the Act*

[608] I discuss a few key regulation-empowering provisions in the *Act*, and how such regulations may interact with the methodology set out above. The overall scheme of the *Act* has been explained by my colleague Brown J., and I need not repeat it here. As regulations made under the *Act* are not before us, I make only general observations.

(1) Part 1

[609] In Part 1 of the *Act*, ss. 166-168 provide the regulation granting powers. Section 166(1)(a), in combination with other sections, empowers the Governor in Council to make regulations prescribing who pays the fuel charge (and under what conditions), who is exempt from the fuel charge (and under what conditions), and the amount of the fuel charge in certain conditions (see ss. 26, 27, 40(3), 41(2), 46(3) and 48). Section 166(1)(e) gives the Governor in Council the power to make regulations “distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things”. These provisions have clear potential for use that is within federal competence over establishing minimum national standards of price stringency to reduce GHG emissions. The Governor in Council could distinguish between provinces, industries, fuels, etc. if the distinction is justified in light of the goal of reducing greenhouse gas emissions, for example, by taking into account the risk of international carbon leakage and the relative effectiveness of the pricing standard on GHG emissions. Regulations that differentiate between industries on such bases may fall within the matter of national concern in which the *Act* is grounded.

However, the potential for “playing favourites” for reasons that have nothing to do with establishing minimum national standards of price stringency to reduce GHG emissions is obvious. Moreover, even if regulations are enacted without such favouritism, they could have the effect of unduly disadvantaging certain provinces or industries in a way that is incompatible with “establishing minimum national standards of GHG price stringency to reduce GHG emissions”. Such regulations would be unconstitutional, even though the provisions that facially empower them are valid.

[610] Sections 166(2) and 166(3) give the Governor in Council the power to amend the list of provinces and areas to which Part 1 of the *Act* applies taking into account the stringency of provincial pricing mechanisms for GHG emissions as the primary factor. Although the *Act* does not define “stringency”, the Governor in Council’s decision to list or not list a province is nonetheless constrained by the limits of “establishing minimum national standards of GHG price stringency to reduce GHG emissions”. Similar provisions exist in Part 2 as well.

[611] Section 166(4) gives the Governor in Council the power to change the fuel charge for an individual fuel, on a per-region basis. Section 168 allows the Governor in Council to make regulations in relation to the fuel charge system. Section 168(3) provides the power to modify “this Part” through regulations, and s. 168(4) allows regulations made under “this Part in respect of the fuel charge system” to prevail over “this Part” in case of conflict. This is the so-called “Henry VIII” clause. There is similar

potential for abuse or unconstitutional effects in the exercise of these empowering provisions as there is in those described above.

(2) Part 2

[612] Part 2 delegates even more of the details to the regulations, and contains even more potential for overstepping the bounds of the division of powers. Part 2 of the *Act* creates a per-facility emissions limit. This creates the potential for improper differential treatment of facilities through the regulations.

[613] Key to the operation of Part 2 is s. 192. This section gives the Governor in Council 17 explicit regulation-making powers, including the power to make regulations respecting covered facilities and when they cease to be covered facilities (s. 192(b)) and respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility (s. 192(i)). Section 192(g) is particularly important, as it allows the Governor in Council to make regulations “respecting greenhouse gas emissions limits”. Section 192(g) gives the Governor in Council power to create a scheme that defines the emissions limits: these are not otherwise defined in the statute. The only stated restriction on the Governor in Council here is that the regulations must be “for the purposes of this Division”. Although the Division does not have a stated purpose, it is titled “Pricing Mechanism for Greenhouse Gas Emissions”.

[614] This power to set per-facility emissions limits is at the heart of Part 2 of the *Act*, and it could support a wide variety of regulations. Given, however, that the *Act* is

a “per-facility” scheme, the statute contemplates that the Governor in Council will create regulations that do not treat all covered facilities identically. This gives rise to the possibility of differences in treatment between industries that have nothing to do with the effectiveness of GHG emissions pricing in those industries. This would be inconsistent with “establishing minimum national standards of GHG price stringency to reduce GHG emissions”. Regulations that impose different treatment of facilities and industries must be justified in light of federal jurisdiction over this matter, or they will exceed the powers Parliament could validly delegate to the Governor in Council.

[615] The regulations, no less than the legislation under which they are enacted, must constitute an exercise of authority that is within federal competence. If they are not, they will be *ultra vires* the division of powers and, thereby, void in law.

VI. Conclusion

[616] A patient and careful examination of the doctrine reveals that POGG should be, and was always intended to be, a residual and circumscribed power of last resort that preserves the exhaustiveness of the division of powers. It is only available where no enumerated head of power, or combination of enumerated heads of power, is available. The approach of the Attorney General of Canada reflects a troubling misinterpretation of and departure from *Crown Zellerbach* and the doctrine that preceded it. For these reasons, and those of Justice Brown which I adopt, the *Greenhouse Gas Pollution Pricing Act* is *ultra vires* in whole and the reference questions are answered in the affirmative. Accordingly, I would allow the appeals of

the Attorney General of Saskatchewan and the Attorney General of Ontario and I would dismiss the appeal of the Attorney General of British Columbia.

Appeals of the Attorney General of Saskatchewan and of the Attorney General of Ontario dismissed and appeal of the Attorney General of British Columbia allowed, CÔTÉ J. dissenting in part and BROWN and ROWE JJ. dissenting.

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