Court File Nos.: 38663 and 38781

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

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c. 12, s. 186
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER THE *CONSTITUTIONAL QUESTIONS ACT*, 2012, SS 2012, c. C-29.01

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

Appellant

- and –

ATTORNEY GENERAL OF CANADA

Respondent

- and –

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF QUÉBEC

Interveners

(Title of Proceeding continued on next page)

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

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Interveners

AND BETWEEN:

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

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c. 12, s. 186
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL TO THE COURT OF APPEAL FOR ONTARIO UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C.43, s. 8

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Table of Contents

PART I – OVERVIEW

1. These matters come to this Honourable Court by way of Notice of Constitutional Question which essentially requires a determination as to whether the *Greenhouse Gas Pollution Pricing Act*[1] ("the *Act*") is constitutional in whole or in part.

2. It is the position of the Attorney General of New Brunswick ("AGNB") that the *Act* is unconstitutional as it infringes on matters of provincial competence.

3. The facts relevant to these appeals are well laid out in the Appellants' and Respondents' factums submitted to this Honourable Court, on which the AGNB intends to rely.

PART II – ISSUES

4. The AGNB submits that both majority decisions from the Saskatchewan Court of Appeal[2] and the Ontario Court of Appeal[3] ("majority decisions") erred in conflating the distinct steps of characterization and classification, which resulted in a flawed analysis and determination.

5. The AGNB respectfully submits that clear guidelines relative to the characterization and classification process ought to be established by this Honourable Court when analysing unenumerated matters within the division of powers.

6. The AGNB submits the newly crafted matter of national concern fails to respect the appropriate balancing of powers provided for in the Constitution.

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[1] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.
[2] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan Reference*].
[3] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario Reference*].

PART III – ARGUMENT

A. Characterization and Classification

7. There are many cases from this Court where the pith and substance test has been used to determine if legislation falls within the jurisdiction of the legislature that enacted it, but there are rather fewer cases where the pith and substance test has been used to determine if an act falls into the residual void.

8. The first task of consequence in division of powers inquiries is the characterization or pith and substance test, which is best seen as a stand-alone inquiry. A complete yet confined analysis to identify the true "matter" at issue in the challenged law is of paramount importance in respecting the division of powers in the Constitution. The Court should only embark on the classification stage following a distinct and separate characterization of the impugned act.

9. With respect to classification, the powers of Parliament as enumerated under s. 91 of the *Constitution Act, 1867*[4] are diverse. Some powers have seemingly tangible qualities, such as Beacons, Buoys, Lighthouses, and Sable Island,[5] the Establishment and Maintenance of Marine Hospitals,[6] or the Establishment, Maintenance, and Management of Penitentiaries.[7] Others appear less tangible and possibly more ubiquitous to the everyday lives of Canadians, such as Taxation,[8] Navigation and Shipping,[9] or Marriage and Divorce.[10]

10. When the task is to determine if an enactment of Parliament falls into one or more of the various powers, in some cases classification indicia have developed in the common law to facilitate the inclusion (or rejection) of a subject matter within the appropriate head(s) of power. For example, in matters of criminal law, an enactment may be classified as criminal law if, having

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[4] *Constitution Act*, 1867 (UK), 30 & 31 Victoria, c 3 (UK) [*Constitution Act*].
[5] *Constitution Act*, supra note 4, s 91(9).
[6] *Constitution Act*, *supra* note 4, s 91(11).
[7] *Constitution Act*, *supra* note 4, s 91(28).
[8] *Constitution Act*, *supra* note 4, s 91(3).
[9] *Constitution Act*, *supra* note 4, s 91(10).
[10] *Constitution Act*, *supra* note 4, s 91(26).

considered its subject matter, it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty.[11]

11. There are also classification indicia for subject matters seeking inclusion within the general federal power over the regulation of trade and commerce.[12] Most recently, in *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*,[13] this Court outlined eight non-exhaustive factors of varying weight encompassed in the integral connection test for classification purposes in matters of navigation and shipping, albeit in a non-statutory, maritime law context. In each of these cases and many others, it is typical that a subject matter is in the process of being *classified into* an enumerated head within the division of powers, and not classified into the new and unknown.

12. This is not to say that classification indicia do not exist for unenumerated matters. Attempts to classify the subject matter now before this Court has caused much ink to be spilled (1) over the nature of the subject matter, and (2) whether, howsoever framed, it is single and indivisible, or of a qualitative difference, or possessing a degree of unity, making it distinct and, perhaps most eloquently, of a "sufficient consistence to retain the bounds of form."[14] These are the qualities that a subject matter must possess to gain entry into this particular branch of the general Peace, Order and Good Government ["POGG"] power[15] to which Canada is entitled.

13. A great deal depends upon the approach used when contemplating the characterization of the enactment, and no less so than when classifying it. That is, there are normative tests found in Canadian law to be employed when distilling the character of an enactment, and there are diverse classification indicia to be employed cataloguing the matter (or rejecting it) within the division of powers.

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[11] *Reference re Firearms Act*, 2000 SCC 31 at para 27, [2000] SCR 783 [*Firearms Reference*].
[12] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 103, [2018] 3 SCR 189 [*Pan-Canadian Securities Reference]*.
[13] 2019 SCC 58 at para 56 [*Desgagnés*].
[14] Being the various descriptions of what may be classification indicia, as gathered together in Beetz, J's dissent in *Re Anti-Inflation Act*, [1976] 2 SCR 373 at para 150, 68 DLR (3d) 452 [*Re Anti-Inflation*]; and, as re-articulated in *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para 28, 72, 49 DLR (4th) 161 [*Crown Zellerbach*].
[15] *Constitution Act*, *supra* note 4, s 91.

14. Finding a marriage between subject matter and jurisdictional classification for the *Act* has been elusive. Before the Saskatchewan Court of Appeal, the Attorney General of Canada ("Canada") submitted that the pith and substance of the *Act* "is to incentivize the behavioural changes necessary to reduce Canada's GHG emissions by ensuring that GHG emissions pricing applies throughout Canada."[16] Regarding the matter of national concern within which the *Act* so characterized should find residency, Canada submitted that "GHG emissions – a discrete, distinct, and indivisible form of pollution – are a matter of national concern."[17]

15. At the Ontario Court of Appeal, Canada submitted that, "[t]he Act's purpose and effect show that its pith and substance relates to the cumulative dimensions of GHG emissions"[18] and that "the cumulative dimensions of GHG emissions is a matter of national concern."[19]

16. Canada's submissions on characterization and classification were rejected by both the Saskatchewan and Ontario Courts of Appeal.

17. The Saskatchewan majority opined that the pith and substance of the *Act* "is best seen as the establishment of minimum standards of price stringency for GHG emissions"[20] and then classified it under the national concern branch as "the establishment of minimum standards of price stringency for GHG emissions".[21] The Saskatchewan majority rejected Canada's submission that the matter of national concern was "GHG emissions", noting that the subject matter had been reformulated by Canada as "the cumulative dimensions of GHG emissions", before concluding that there is essentially no difference between the concepts.[22]

18. The Ontario majority characterized the subject matter as follows:

> The Act's purpose and effects demonstrate that the pith and substance of the Act can be distilled as: "establishing minimum

[16] Canada's Factum, *Saskatchewan Reference* at para 83.
[17] Canada's Factum, *Saskatchewan Reference* at para 88.
[18] Canada's Factum, *Ontario Reference* at para 54.
[19] Canada's Factum, *Ontario Reference* at para 58.
[20] *Saskatchewan Reference, supra* note 2 at para 125.
[21] *Saskatchewan Reference, supra* note 2 at para 163.
[22] *Saskatchewan Reference, supra* note 2 at paras 134, 137, 138.

> national standards to reduce greenhouse gas emissions". The means chosen by the Act is a minimum national standard of stringency for the pricing of GHG emissions."[23]

19. Therefore, the Saskatchewan majority created an exact match as between characterization and classification, while the Ontario majority characterized the *Act* slightly more generally than Saskatchewan but opined that the policy means chosen by the *Act* is a degree more specific than its characterization.

20. *Ward v Canada (Attorney General)*[24] is discussed by both the majority and dissent in the *Ontario Reference*.[25] At para 25, the Court in *Ward* cautions that when determining the true character of an act, one must not blend the purpose and effect of the legislation with the means chosen to achieve it:

> Turning to the effects of the legislation, s. 27 affects the legal rights of its subjects by prohibiting the sale of whitecoats and bluebacks that have otherwise been legally harvested. Ward submits that the legal effect of s. 27 is to regulate the property and processing of a harvested seal product. The argument amounts to saying that because the legislative measure is a prohibition on sale, it must be in pith and substance concerned with the regulation of sale. This confuses the purpose of the legislation with the means used to carry out that purpose. Viewed in the context of the legislation as a whole and the legislative history, there is nothing to suggest that Parliament was trying to regulate the local market for trade of seals and seal products. Ward's argument that s. 27 is directed at regulating an already processed product because the seals are skinned and the meat preserved on the vessel similarly confuses the purpose of s. 27 with the means chosen to achieve it.

21. In hindsight, Canada appeared to be aiming for a conventional structure in Saskatchewan, characterizing the subject matter with a degree of refinement more specific than the national concern classification – that is, "behavioural change" within a "GHG emissions" matrix. Canada's interpretation of the *Act*'s pith and substance underwent significant alteration in

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[23] *Ontario Reference, supra* note 3 at para 77.
[24] 2002 SCC 17 [*Ward*].
[25] *Ontario Reference, supra* note 3 at paras 178, 207.

Ontario, where characterization and classification were exact equals: "the cumulative dimensions of GHG emissions".

22. The rejection by both Courts of Appeal is instructive. The AGNB submits that either version of the national concern was too broad and invasive of provincial competence to survive as a federal plenary power. As stated in the *Saskatchewan Reference* majority opinion:

> Where does this lead? All things considered, it is not possible to conclude "GHG emissions" or, as Canada puts it in oral argument, "the cumulative dimensions of GHG emissions" fall within federal jurisdiction by virtue of the national concern doctrine. Even assuming a matter framed in this way has the sort of singleness, distinctiveness and indivisibility demanded by the *Crown Zellerbach* test, the fundamental distribution of legislative power under the *Constitution Act, 1867* would be upset if it were allocated to Parliament. As a result, this approach to federal jurisdiction in respect of GHG emissions does not survive the second part of the test prescribed by *Crown Zellerbach*. It follows that the POGG argument advanced by Canada cannot succeed.[26]

23. Instead of opining that the *Act* was unconstitutional based on Canada's interpretation of its own legislation, both Courts of Appeal substituted a characterization and classification for that of Canada's. Prompted by the able submissions of the Attorney General of British Columbia,[27] and seen as a way of capturing the illusive "singleness, distinctiveness and indivisibility" requirement,[28] the "GHG emissions", cumulative or otherwise, were narrowed to comply with the classification indicia found in the jurisprudence.

24. The AGNB submits that the analyses undertaken by the majorities in the *Saskatchewan* and *Ontario References* conflate the purpose of the *Act* with the proper subject matter of national concern, rather than truly contemplating the *Act*'s pith and substance. In so doing, the analyses undertaken led to a pre-determined, self-fulfilling, singular national concern that should not be classified as a plenary power.

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[26] *Saskatchewan Reference, supra* note 2 at para 138.
[27] *Ontario Reference, supra* note 3 at para 113; *Saskatchewan Reference, supra* note 2 at para 139.
[28] *Crown Zellerbach, supra* note 14 at para 33.

B. The fixation on outcomes

25. The AGNB submits that a true characterization and classification analysis was not conducted, a process that should be ordered and bifurcated. Specifically, the characterization analysis should be undertaken without fixation on outcomes, to avoid bias or the influence of factors potentially distracting from the purpose and effects of the legislation.

26. This is evident in Canada's perpetually evolving characterization, where in their present argument they are now certain the *Act*'s pith and substance is establishing "minimum national standards integral to reducing nationwide GHG emissions."[29] It is as though Parliament's perceived purpose of the *Act* has morphed into a matter that is palatable to an outcome that was intended to be achieved.

27. The rules that should apply to the immediate circumstances are admittedly uncertain, as there are no head(s) of legislative competence to consider subsequent to the pith and substance assessment. The AGNB submits the *Act* is not "falling within" anything other than a conflation of the *Act*'s characterization and classification. The Saskatchewan majority made a revealing comment that may go to the root of this issue:

> […] The challenge in the application of the national concern doctrine is to delimit its reach. […][30]

28. The AGNB respectfully submits that the Saskatchewan majority erred by framing the task at hand in the manner that it did. The challenge is not to delimit the reach of the enactment. The *Act* is what it is. Eligibility criteria for entry into that which is single, distinct and indivisible, or of a qualitative difference, or possessing a degree of unity, cannot be governed by an act of *delimiting its reach*.

29. While the refinement of a matter's scope or boundaries may appear as the best means of avoiding superficial and over-generalized characterizations, the AGNB would urge this Honourable Court to address the wisdom of doing so for a division of powers analysis where the

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[29] Canada's Factum at paras 60-61.
[30] *Saskatchewan Reference, supra* note 2 at para 143.

target power is unknown. If an unbiased and bifurcated analysis is to be presumed in circumstances where a new and plenary jurisdiction stands to be the outcome, then the mere act of equating pith and substance with the power once established is suspect. In *Chatterjee v Ontario* (*Attorney General*):

> […] In principle this assessment should be made without regard to the head(s) of legislative competence, which are to be looked at only once the "pith and substance" of the impugned law is determined. Unless the two steps are kept distinct there is a danger that the whole exercise will become blurred and overly oriented towards results. [31]

30. When both the framer of the legislation and the trier of fact are aware that the exercise is to determine if an uncertain subject matter has the potential to be slotted into an arguable constitutional residuary, it would take a willing suspension of disbelief to conclude that the latter would not influence the former.

31. Huscroft JA's dissenting opinion in the *Ontario Reference* acknowledged the hazards of fixation on outcomes, framed as the conflation of characterization and classification in the pith and substance analysis,[32] leading to this blunt assessment:

> […] Hence, it is a category error to describe the specific means adopted in legislation to address a problem, rather than the subject matter of the problem itself, as a matter of national concern.[33]

32. The AGNB submits that "precision" is key. Where the constitutional power is yet to be formed, and where law decrees that characterization must precede and not be influenced by classification, any approach without strict criteria creates the means to poach local jurisdiction. Although the widespread evisceration of provincial authority may not occur in any one case – as the isolated or constrained result may only allow the removal of a thin slice from a larger sphere

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[31] 2009 SCC 19 at para 16, [2009] 1 SCR 624.
[32] *Ontario Reference, supra* note 3 at para 224.
[33] *Ontario Reference, supra* note 3 at para 225.

of local competence – it cannot be denied that the repeated use of knives so forged will lead to the classic death of a thousand tiny cuts of the division of powers.[34]

33. Huscroft JA, when discussing the classification of the *Act* in his dissenting opinion, described the reach of the *Act* in the following terms:

> Plainly, the Act imposes charges on manufacturing, farming, mining, agriculture, and other intraprovincial economic endeavours too numerous to mention, in addition to imposing costs on consumers, both directly and indirectly, as businesses can be expected to pass on increased costs, to a greater or lesser extent – all matters that would be classified as falling under provincial lawmaking authority over property and civil rights (s. 92(13)) or matters of a local or private nature (s. 92(16)). […][35]

34. With respect to both majority opinions, it is submitted that the reason for the *Act* may well be to establish minimum standards, but that is not its subject matter. The subject matter, the true pith and substance, is the regulation of GHG emissions, a matter of provincial competence. This description of the problem echoes Beetz J in *Re Anti-Inflation*:

> […] I am prepared to accept that inflation was the occasion or the reason for its enactment. But I do not agree that inflation is the subject matter of the Act. […][36]

35. The AGNB submits that both Courts of Appeal erred in their respective characterizations by finding that the *Act* creates minimum standards (with or without the addition of price stringency) for GHG emissions. Rather, the *Act* provides Parliament with the means to force provincial regulators to conform to its preferred stringency standard under threat of its backstop. That alone creates a regulatory environment invasive of provincial constitutional competence, with resulting direct and indirect charges on a multitude of consumer and industrial initiatives – all of which infiltrate to the roots of local works and undertakings,[37] property and civil rights[38] and local

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[34] *Saskatchewan Reference*, *supra* note 2 at para 435.
[35] *Ontario Reference*, *supra* note 3 at para 215.
[36] *Re Anti-Inflation*, *supra* note 14 at para 138.
[37] *Constitution Act*, *supra* note 4, s 92(10).
[38] *Constitution Act*, *supra* note 4, s 92(13).

matters.[39] Additionally, despite the evidence of the efficacy of carbon pricing, the infiltration is no more than the imposition of Canada's preferred means of addressing climate change in a sphere which should be left to the provinces.

36. The Saskatchewan minority stated: "at its core, setting "minimum national standards of stringency for pricing GHG emissions" is just a nice way of saying the matter is actually "the regulation of Provincial GHG emissions pricing."[40] The Ontario minority stated: "[i]n my view, the *Act* should be characterized more simply: it regulates GHG emissions."[41]

37. The AGNB submits that the majority decisions blend the two distinct analytical processes of characterization and classification. As such, an objective and bifurcated line of inquiry became a singular inquiry fueling and pre-determining the outcome, such that the *Act* was characterized with the classification in mind and the classification was drawn from the pith and substance.

38. In order to respect the division of powers and principles of federalism, when analysing matters not falling under an enumerated head, clear guidelines relative to the characterization and classification process ought to be established by this Court.

39. The AGNB submits that the majority opinions have led to uncertainty regarding the sweep and direction of the pith and substance analysis.

40. In most cases, the pith and substance test looks outward, beyond the reason for the enactment, peering well into what the legislation accomplishes in terms of its socio-economic reach and impact, or its effect.

41. In *Desgagnés*, this Court noted that the traditional "pith and substance" analysis has never been applied in the context of non-statutory maritime law[42] and that "a slightly different approach

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[39] *Constitution Act*, *supra* note 4, s 92(16).
[40] *Saskatchewan Reference, supra* note 2 at para 437.
[41] *Ontario Reference, supra* note 3 at para 213.
[42] *Desgagnés, supra* note 13 at para 32.

to the pith and substance analysis is required".[43] The chosen approach required a highly particularized subject matter: this Court was faced with the marriage of particular facts to the non-statutory body of maritime law, for the purpose of ascertaining whether the "matter" could be classified within the federal power over navigation and shipping.

42. In *Desgagnés*, this Court stated that a broad subject matter would defy specific classification and defeat the exercise; the Court made it abundantly clear that the entire purpose of the exercise is to identify the subject matter "more narrowly so as to make it possible to determine, at the classification stage, whether the matter comes within the federal power over navigation and shipping."[44]

43. This begs the question: what is the appropriate methodology when what is at stake is the wholesale creation of a new federal power under the national concern branch of the POGG power, with all the privileges of plenary jurisdiction over the matter once classified? Should the process be a struggle to isolate a thing – to "characterize with precision" or "delimit the reach" of the subject matter with the endgame in mind? Alternatively, should the process doggedly avoid any contemplation of the endgame so as to not blur the exercise with results-based considerations?

44. The AGNB submits that the process under review should in fact be the most extreme example of distinct steps possible to identify the true pith and substance of the *Act*. Here, the result is nothing less than a new head of power, writ large as aeronautics or marine pollution. The AGNB submits that any power freshly minted under the national concern branch of POGG must be degrees of precision apart from the legislation under review. In other words, the legislation should be more specific than the power so conceived. The majorities in both cases created exactly matching characterizations and classifications. Canada's current proposed matter of national concern "establishing minimum national standards integral to reducing nationwide GHG emissions"[45] once again mirrors its characterization of the *Act*.[46] The *Act* fulfils the total essence

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[43] *Desgagnés*, *supra* note 13 at para 33.
[44] *Desgagnés*, *supra* note 13 at para 37.
[45] Canada's Factum at para 72.
[46] Canada's Factum at para 60.

of the newly-minted power and thus we have embarked on a new frontier of constitutional principle.

45. Any fully plenary authority should possess relatively similar potential. A singular enactment should not be deemed to inhabit that plenary space so completely that pragmatic response to changing circumstances would require yet another enactment and national concern. In *Crown Zellerbach*, one subsection of an enactment, which prohibited the dumping of any substance at sea with a few exceptions, was found to be within the national concern of "marine pollution". [47] It is respectfully submitted that the analysis and logic employed getting there is a far cry from the analysis and logic employed thus far regarding the *Act*.

46. Indeed, the establishment of minimum standards of price stringency, or establishing minimum standards to reduce greenhouse gas emissions are, arguably, as isolated as the minimum containment standards for geologic sequestration of anthropogenic carbon dioxide. Were carbon sequestration as *de rigueur* as carbon pricing, an analysis of subject matter and classification with practically identical legal plot points could well be before this Court, whittled down to an analogous standards-setting characterization, seemingly as isolated from provincial competence as is the actual issue under consideration.

47. Whether the subject matter involves actual carbon pricing or the imagined sequestration, or any other operational concept, practically any generalized subject matter of unlimited jurisdictional reach can be distilled down to a narrow and isolated thing. The ease with which that reductionist process occurs may have much in common with the degree of regard for the essential qualitative difference implied by the oft-referenced phrase: "single, distinct and indivisible". In the end, the process should have a critical landing point that is reconcilable with the fundamental distribution of legislative power under the Constitution.

[47] *Crown Zellerbach, supra* note 14 at para 40.

C. The Principles of Federalism, or "to the Constitution what sap is to a tree"[48]

48. In *Quebec (Attorney General)*, this Court spoke of federalism as follows:

> As this Court explained in *Reference re Secession of Quebec*, federalism "was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today", and "political leaders [had] told their respective communities that the Canadian union would be able to reconcile diversity with unity": para. 43. The principle of federalism requires that the constitutional division of powers be respected and that a balance be maintained between federal and provincial powers. One "power may not be used in a manner that effectively eviscerates another": *Reference re Securities Act*, at para. 7; *Reference re Secession of Quebec*, at paras. 57-58. [49]

49. The above-noted case involved the ending of the federal long-gun registry and whether licensing data collected for the purposes of the registry could be legitimately destroyed as ancillary to the valid criminal law enactment. In circumstances where the analysis is "in relation to" an existing power, and in accordance with principles of federalism, it is important "to be able to reconcile diversity with unity" as between the provinces and the federal government.

50. In circumstances where there is no existing power to consider, requiring a leap into the unknown, it would be logical to expect the need for reconciliation of the constitutional powers to be even more zealously guarded. As such, the default position would reside more in favour of provinces, possessing a keen appreciation of ostensible purposes and colourability in all its forms.

51. This is particularly so where the new power was originally subject to provincial jurisdiction, and not one that did not exist at Confederation. The Ontario majority noted that ""environmental" concerns certainly existed at Confederation", and the framers likely "anticipated

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[48] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 144, [2015] 1 SCR 693 [*Quebec (Attorney General)]*

[49] *Quebec (Attorney General)*, *supra* note 48 at para 145.

that legislation pertaining to these matters would come within s. 92(16), which gives the provinces jurisdiction over "all Matters of a merely local or private Nature in the Province."[50]

52. Courts have repeatedly recognized that there is a shared responsibility for the development of regulatory schemes and structures to preserve and protect our provinces/territories, country and planet.[51] However, as the dissent noted in *Hydro-Quebec:* "Environmental protection must be achieved in accordance with the Constitution, not in spite of it."[52]

53. Additionally, consider the matter of health. Health is not amongst the listed heads of power identified in sections 91 and 92 of the *Constitution Act*, and thus, is not specifically allocated to one level of government. Despite its absence from the listed matters, there is strong academic support that health is a matter of provincial competence.[53] The dominance of provincial jurisdiction in this area has prevailed even in the face of constitutional challenges respecting, for example, narcotic drug use, which typically depends upon the federal criminal law and trade and commerce powers.[54]

54. In contrast, matters previously classified as national concerns under POGG, like atomic energy, have not permitted provincial labour laws to apply to nuclear power plants.[55] Thus, the AGNB submits courts have made a clear distinction between matters that, although unlisted, remain firmly of provincial jurisdiction, and those that despite their historic provincial competence, are reclassified as national concerns of federal jurisdiction. The former permits concurrent jurisdictional enactments while the latter imports exclusive legislative competence to the federal government.

55. In the present matter, both Canada and the Courts of Appeal appear to distort established constitutional principles respecting new matters of national concern. Granting authority to both

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[50] *Ontario Reference, supra* note 3 at para 79.
[51] *Friends of the Oldman River v Canada (Minister of Transport*), [1992] 1 SCR 3; *Crown Zellerbach, supra* note 14; and *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*].
[52] *Hydro-Québec, supra* note 51 at para 62.
[53] Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy" (Summer 2002), 52 U Toronto LJ 163 at 188.
[54] *Schneider v British Columbia*, [1982] 2 SCR 112, 139 DLR (3d) 417.
[55] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457.

levels of government to legislate GHG emissions regulation belies the very propositions articulated to establish a matter as a national concern. In *Crown Zellerbach*, the Court emphasized that federalizing what was provincial jurisdiction was necessary "because of the inter-relatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment."[56]

56. It is the AGNB's position that despite this reasoning, this is exactly what the Courts of Appeal have done – upset the balance of power in our constitutional democracy.

57. We must be aware of the history of the phrase "Property and Civil Rights", when identifying a matter as a national concern, thereby stripping the province of its constitutional competence. Professor W.R. Lederman has described the origins of the phrase as follows:

> To illustrate what I mean, I wish to take up a neglected historical point. I refer to the historically established meaning of the phrase "Property and Civil Rights" in central British North America from 1774 to 1867. The phrase comes from the Quebec Act of 1774 of the Imperial Parliament, which provided that French law and custom were to obtain respecting property and civil rights in the royal colony of Quebec. This covered all the law except English criminal law, and except the English public law that came to Quebec as necessary context for English colonial governmental institutions. In her recent book on the subject, Dr. Hilda Neatby, a distinguished Canadian historian, has demonstrated from the official documents of the time that the phrase property and civil rights in the Quebec Act had and was intended to have this very broad significance. Moreover, these words retained this very broad significance in Upper and Lower Canada between 1791 and 1841, and in the United Province of Canada, 1841-1867. The Fathers of Confederation knew all about this – they lived with it every day – and naturally they took the broad scope of the phrase for granted. Accordingly they realized that, in setting up a central Parliament in their new federal system, a considerable list of particular central powers would have to be specified in some detail as subtractions from the historically established meaning of the phrase property and civil rights. Otherwise, the use of that phrase in the provincial list would leave very little for the new central Parliament. [57]

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[56] *Crown Zellerbach, supra* note 14 at para 35.

[57] WR Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation", (1975) LIII Canadian Bar Review 597 at 601.

58. The point to be made is that s. 92(13) of the *Constitution Act* is not to be trifled with; it has a long history of being no less than a residuary of its own. The AGNB submits that a province's authority over property and civil rights should be seen on equal terms with the federal residuary. Although cooperative federalism is not to the fore of the instant debate, neither it nor any other pragmatic interpretive tool should be drawn that diminishes the terms under which Confederation happened.

59. We submit that in the present case, it would have been possible for federal powers and provincial powers to co-exist and be regulated cooperatively had Canada chosen to respect the division of powers. That was the case in the *Pan-Canadian Securities Reference* where provinces agreed to regulate a certain portion of the subject matter of securities while Canada tackled the capital markets systemic risks aspect.[58]

60. The AGNB submits it is possible to achieve a model of GHG regulation that is based on cooperative federalism; a model that reflects a modern and constantly evolving world, that respects the basic division of powers that is so fundamental to the Constitution, and that recognizes and respects each jurisdiction's sovereignty. Here, Canada's approach in relying on the national concern doctrine renders that impossible.

61. The AGNB submits the *Act* purports to be a wholesale takeover of the regulation of provincial GHG emissions pursuant to the national concern doctrine under the POGG power. While the AGNB recognizes that certain aspects of GHG emissions have broad characteristics and impacts, in the spirit of cooperative federalism, it is necessary to respect historical constitutional principles and develop a more creative path that will account for compromise.

62. A cooperative approach that permits a scheme that recognizes the essentially provincial nature of GHG emissions while allowing Parliament to deal with genuinely national concerns would remain available if the *Act* was declared unconstitutional.

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[58] *Pan-Canadian Securities Reference, supra* note 12 at para 2.

63. In another essay, Professor Lederman draws a distinction between *necessity* and *convenience* for the purposes of the use of the federal general power:

> In other words, if a federal statute is challenged and the federal general power is invoked to support it, in competition with the usual provincial powers, then, if the challenged statute proposes to do something that needs to be done at the nation-wide level if it is to be done effectively, or done at all, then this element of necessity causes the statute to fall within the federal general power. It is not enough if one shows that there is some mere convenience or advantage to be obtained by federal legislative action of the type at issue. But, on the other hand, one no longer has to go beyond genuine necessity and establish emergency to invoke the federal general power. So a balanced definition results – some real necessity that is more than just convenience or advantage but less than outright emergency. [59]

64. As this Court has said in the case of *Canadian Western Bank v Alberta*:

> […] The fundamental objectives of federalism were, and still are, 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.[60]

65. What seems to be the driving force behind the *Act* is this idea that because GHG emissions have a broad impact, transcend provincial limits, and have a certain "national" dimension, or flavour, it is open to Canada to take over the subject-matter under the guise of the national doctrine. With respect, the AGNB submits Parliament cannot regulate GHG emissions as a whole simply because aspects of it have a national dimension[61], just as they cannot resolve "division of power issues on the basis of general claim to promote the common good".[62]

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[59] *WR Lederman, Continuing Canadian Constitutional Dilemmas*: *Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworths, 1981) at page 275.
[60] 2007 SCC 22 at para 22, [2007] 2 SCR 3.
[61] *Reference re Securities Act*, 2011 SCC 66 at para 7, [2011] 2 SCR 837 [*Securities Reference*].
[62] *Ward v Canada (Attorney General)*, [1999] 182 DLR (4th) 172 (NLCA) at para 20.

66. In consideration of the above, the AGNB submits that it is only in the clearest of cases, where the balance of powers is respected, that the national concern doctrine under the POGG power should be used. Per Lord Watson in *Ontario (AG) v Canada (AG)*:

> [...] 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. [63]

67. The *Act* does not provide single or uniform treatment. At best, it imposes subjective oversight by the federal government into provincial matters, and at worst, it expands federal authority so significantly as to eviscerate the province's authority over property and civil rights.

PART IV – COSTS

68. The AGNB does not seek costs on this intervention and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2020.

Rachelle Standing
Isabel Lavoie Daigle

Counsel for the Intervener,
The Attorney General of New Brunswick

[63] [1896] UKPC 20, [1896] AC 348 at 360-61.

PART VII – AUTHORITIES

Case Law		Cited at paragraphs
1	*Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3	64
2	*Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 SCR 624	29
3	*Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58	11, 41, 42
4	*Friends of the Oldman River v Canada (Minister of Transport)*,[1992] 1 SCR 3	52
5	*Ontario (AG) v Canada (AG)*, [1896] UKPC 20, [1896] AC 348	66
6	*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457	54
7	*Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693	48,
8	*R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401; 49 DLR (4th)	12, 23, 45, 55
9	*R v Hydro-Québec*, [1997] 3 SCR 213	52
10	*Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452	12, 34
11	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544	18, 20, 23, 31, 33, 36, 51
12	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40	17, 22, 23, 27, 32, 36
13	*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189	11, 59
14	*Reference re Securities Act*, 2011 SCC 66, [2011] 2 SCR 837	65
15	*Reference re Firearms Act (Can)*, 2000 SCC 31, [2001] SCR 783	10
16	*Schneider v British Columbia*, [1982] 2 SCR 112, 139 DLR (3d) 417	53
17	*Ward v Canada (Attorney General)*, [1999] 182 DLR (4th) 172 (NLCA)	65
18	*Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 SCR 569	20

Legislation			**Cited at paragraphs**
1	*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186	*Loi sur la tarification de la pollution causée par les gaz à effet de serre*, LC 2018, ch 12, art 186	1, 2, 14, 17, 19, 21, 23, 24, 26, 27, 28, 33, 34, 35, 36, 37, 44, 45, 61, 62, 65, 67
2	*Constitution Act, 1867* (UK) 30 & 31 Victoria, c 3	*Loi constitutionnelle de 1867*, 30 & 31 Victoria, c 3	9, 12, 35, 53, 58

Secondary Sources		**Cited at paragraphs**
1	Sujit Choudhry, "*Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy*" (Summer 2002), 52 U Toronto LJ 163	53
2	W.R Lederman, "*Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto : Butterworths, c. 1981)	63
3	W.R Lederman, "*Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation*", [1975] Canadian Bar Review [vol. LIII]	57