SCC Court File No. 38663
(and 38781 continued next page)

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

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c C-29.01

BETWEEN:

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APPELLANT
(Party Pursuant to Section 4 of *The Constitutional Questions Act*, 2012)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Party Pursuant to Section 5(4) of *The Constitutional Questions Act*, 2012)

- and -

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INTERVENERS

SCC File No: 38781

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(ON APPEAL FROM THE COURT OF APPEAL OF 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 GOVERNOR IN COUNCIL TO THE ONTARIO COURT OF APPEAL UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c C.34, s 8

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*(style of cause and cover continued on the next page #**38663 & 38781**)*

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PART I – OVERVIEW AND FACTS

1. International treaties are relevant to this appeal, but there is uncertainty about how. The Smart Prosperity Institute submits that the transboundary subject-matter of the *Paris Agreement*[1] and the nature of Canada's reciprocal commitments to the world support the *Act*'s[2] validity.

2. There is no treaty implementing power outside of sections 91 and 92 of the *Constitution*.[3] Lord Atkin was right about that in *Labour Conventions*.[4] The ability to fulfil obligations under certain treaties is, however, crucial "for the Peace, Order, and good Government of Canada".

3. POGG does not give Parliament *carte blanche* to perform any and all treaty obligations. That would unduly encroach into provincial jurisdiction and could risk an end-run around the division of powers. Under POGG, Parliament can fulfil agreements with reciprocal commitments between Canada and other nations to solve true transboundary problems. Parliament's POGG power cannot be used to merely harmonize provincial standards with rules abroad. Conventions harmonizing standards for local working hours, weekly rest, and wages are perfect examples of treaties Parliament cannot implement for POGG. In contrast, a global agreement exchanging pledges amongst nations to combat an indisputable, existential, transboundary threat to humanity and the planet is a perfect example of one Parliament can fulfil.

4. Recognizing the POGG power to address matters of true transnational concern fills a constitutional gap that has existed for almost 85 years. Section 132 of the *Constitution* explicitly empowers Parliament to perform its own or provincial obligations between the British empire and foreign countries. It was unforeseen in 1867 that Canada would ever have authority over its own international affairs. When in 1926 Canada acquired autonomy to negotiate, sign, and ratify treaties, the power to implement treaties became, literally, a gap.

5. Canada is the only former colony in the Commonwealth facing this problem, and if the *Act* is not upheld, would seem to be the only country on earth that cannot constitutionally implement its *Paris* obligations. But if this Court recognizes a limited treaty implementation power by relying on its own existing precedents, informed by ideas from leading constitutional scholars and our

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[1] *Paris Agreement*, 16 February 2016 (entered into force 4 November 2016).
[2] The "*Act*" at issue is the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.
[3] *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.
[4] *Canada (A-G) v Ontario (A-G)*, [1937] AC 326 ["*Labour Conventions*"].

Commonwealth counterparts, the watertight compartments of *Labour Conventions* need not sink Canada's ship in foreign waters.

6. Alternatively, fulfilling agreements with reciprocal commitments to solve indisputably transboundary problems is, by definition, a national concern. Think of it as a *trans*national concern. The concern is not implementing a treaty per se, nor just the topic of the particular treaty at issue. The transnational concern arises from an inextricable combination of the transboundary subject-matter and Canada's pledge to the world. A true transnational concern is inherently distinguishable from a provincial concern because the effect of any provincial failure is a national inability to fulfil Canada's commitments on the world stage. A true transnational concern is inherently proportionate in its scale of impact on provincial jurisdiction given the global nature of the problem.

7. These appeals—about this specific *Act* to fulfil this reciprocal *Agreement* addressing this transnational crisis—are the Court's best chance in decades to balance federalism and effective foreign affairs. The transnational dimensions of this matter are inextricably intertwined. Without *Paris*, there are no commitments to meet. Without the *Act*, commitments cannot be met. The pith and substance of the *Act*, therefore, includes its explicit purpose of achieving Canada's treaty commitments to the world. And that is valid legislation under Parliament's POGG power.

8. Fully integrating the *Act*'s transnational dimensions into both the statutory characterization and constitutional classification differentiates Smart Prosperity's submissions from the parties' and other interveners' arguments. But if nothing else, Smart Prosperity agrees with the AG Canada and the lower courts that *Paris* is at least evidence of a national concern in relation to minimum national standards integral to reducing nationwide GHG emissions. Smart Prosperity accepts the facts as framed by the AG Canada.

PART II – POSITION ON THE APPELLANTS' QUESTIONS

9. A central question in these appeals is whether the *Act* constitutes a valid exercise of Parliament's POGG power. Smart Prosperity submits it does. Smart Prosperity would also agree that the *Act* is valid in relation to Parliament's Trade and Commerce and Criminal Law powers and imposes valid regulatory charges or taxation. But to avoid duplication and best assist the Court, this factum addresses only the treaty issue.

PART III – STATEMENT OF ARGUMENT

10. Both the Saskatchewan and Ontario Courts of Appeal considered the links among treaties and the division of powers. But the judges did so differently. The Saskatchewan majority conflated most treaty-related arguments in a segregated discussion of section 132 of the *Constitution* and *Labour Conventions*.[5] The Saskatchewan dissent considered international aspects of climate change only in respect of the distinctiveness part of the POGG analysis.[6] The Ontario majority likewise focussed on international issues mainly under the national concern branch of POGG.[7] The Ontario dissent barely touched on the international dimensions to this matter.[8]

11. Nobody in these appeals argues in favour of a free-standing treaty implementation power of the sort considered and rejected in *Labour Conventions* and by the Saskatchewan majority. The issue is whether and, if so, how the international treaty framework is relevant to Parliament's section 91 powers, including in relation to POGG or specific Classes of Subjects. The proper analytical approach is integrating not segregating the treaty issues in these appeals.

12. Smart Prosperity makes three submissions. **(A)** On characterization: the pith and substance of the *Act* is at least partly if not primarily determined by its purpose to achieve Canada's nationally determined contribution under the *Paris Agreement*. **(B)** On classification: the *Act* fits into Parliament's POGG power to fill a treaty implementation gap or, **(C)** alternatively, the *Act* fits into Parliament's POGG power to address a transnational concern.

A. The *Act's* pith and substance includes its purpose to pursue Canada's *Paris* targets.

13. The *Act*'s pith and substance depends on its purpose and effects.[9] Its dominant purpose and effects are not to regulate GHGs locally or in the abstract. The *Act* regulates only a particular aspect of GHGs for a particular purpose. An essential purpose is to pursue Canada's *Paris* targets.

14. The particular aspect of GHGs the *Act* regulates can be narrowed in numerous further ways, any of which support the *Act*'s constitutionality. The AG Canada emphasizes the particular aspect of minimum national standards. The AG British Columbia emphasizes pricing. Canada's Ecofiscal

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[5] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 174-177.
[6] *Ibid* at paras 426-430.
[7] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras 106, 116, 134-36.
[8] *Ibid* at para 222.
[9] See for example *Reference re Securities Act*, 2011 SCC 66 at paras 63-64.

Commission focusses on transboundary aspects. Smart Prosperity submits these are all accurate and precise ways to describe the *Act*'s essential character.

15. Smart Prosperity adds that these dominant characteristics of the *Act* become even clearer in light of the *Paris Agreement*. At the heart of *Paris* are "nationally determined contributions" to achieve a long-term global average temperature goal.[10] Parties—which besides the supranational European Union are all nation states—are to undertake and communicate ambitious efforts to achieve the global goal.[11] Canada and all other Parties "shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."[12]

16. But for *Paris*, there would probably be no *Act*. Canada could not and would not address climate change alone. However, we need not speculate about counterfactuals because we have clear evidence: helping to fulfil Canada's *Paris* commitments is a reason, if not *the* reason, for the *Act*.

17. Intrinsically, the *Act*'s Preamble cites Canada's ratification of the *United Nations Framework Convention on Climate Change* (*UNFCCC*),[13] under which the *Paris Agreement* was created. The Preamble also cites the *Paris Agreement* specifically. Even more specifically the Preamble explains that "the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the *Paris Agreement*".[14] Also, the essence of the *Act*'s operative provisions is minimal impairment; to defer as much as possible to provinces. The backstop approach is aimed at achieving only Canada's nationwide commitments.

18. Extrinsically, evidence of the *Act*'s purpose to achieve Canada's *Paris* commitments includes the history of policymaking leading up to the *Act*. The *Paris Agreement* was on policymakers' minds from the Vancouver Declaration, to the Final Report of the Working Group on Carbon Pricing Mechanisms, to the Pan-Canadian Approach to Pricing Carbon Pollution document, to the First Ministers' Pan-Canadian Framework on Clean Growth and Climate

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[10] *Paris Agreement*, *supra* note 1 at Arts 2, 3, 4.
[11] *Ibid* at Art 3.
[12] *Ibid* at Art 4(2) [emphasis added].
[13] *United Nations Framework Convention on Climate Change*, 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).
[14] *Act*, *supra* note 2 at Preamble.

Change.[15] The sponsoring Minister said about the *Act*: "pricing carbon pollution is making a major contribution to helping Canada meet its climate targets under the *Paris Agreement*."[16] The *Comprehensive Economic and Trade Agreement* between Canada and the European Union also reaffirms the commitment to implement multilateral agreements including the *Paris Agreement*.[17]

19. The AG British Columbia's characterization of the *Act*'s pith and substances captures its *Paris*-related purpose by reference to "Canada's overall targets". Those targets are, more specifically, Canada's "nationally determined contribution" undertaken, communicated and pursued under Article 4 of the *Paris Agreement*. The AG Canada captures the same purpose less explicitly by reference to "nationwide" emissions. Nationwide emissions are all that really matter because that is what Canada has committed under the *Paris Agreement* to reduce. So, the Attorneys General of both British Columbia and Canada acknowledge the relevance of the *Paris Agreement* in characterizing the *Act*'s pith and substance. Smart Prosperity is just more direct about it.

20. None of this means the pith and substance of the *Act* and the *Paris Agreement* are the same. They are not. The *Act* is more precise than *Paris*. It addresses only one particular aspect of transboundary GHG emissions—minimum price stringency standards—integral to achieve Canada's nationwide targets. And this aspect pertains to only one part of the *Paris Agreement*: the matter of nationally determined contributions. The *Act* does not address other parts of *Paris*, for example the international emissions trading scheme under Article 6. Moreover, the *Act* is only one part of the broader strategy to achieve Canada's national commitments. The *Act* is necessary but not sufficient. As the AG Canada notes, there are numerous enacted or planned complementary measures, investments and programs.[18]

21. And anyways, the *Act*'s constitutionality depends on its own pith and substance, not characterization of the *Paris Agreement*. *Paris* provides the context, but this Court must more

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[15] Affidavit of John Moffet, Vol I of AG Canada Record before ONCA at paras 27, 32, 36, 37, 41, 46-47, 56-59, 61, 65, 67, 72-74, 85.
[16] *House of Commons Debates*, 42-1, No 289 (1 May 2018) at 18958 (Hon. Catherine McKenna). See also Factum of the Respondent at p 12, footnote 34.
[17] *Canada-European Union Comprehensive Economic and Trade Agreement*, September 21, 2017 at Art 24.2. See also Affidavit of André Francois Giroux, Vol IV of AG Canada Record before ONCA at paras 7, 13, 16-17, 20.
[18] Factum of the Respondent at para 50.

precisely characterize the *Act*. The pith and substance of the *Act* is establishing minimum national pricing standards integral to Canada's treaty commitment to reduce nationwide GHG emissions.

B. The *Act* fits into Parliament's POGG power to fill a treaty implementation gap.

22. The constitutional gap that exists in relation to treaty implementation is well known. Section 132 of the *Constitution Act, 1867* explicitly gives Parliament and the federal government all powers necessary or proper for performing obligations of Canada or any Province under Empire treaties, *i.e.* treaties signed on Canada's behalf between the British Empire and foreign countries. This treaty implementing power went dormant in 1926 when the British stopped making treaties for Canada and Canada started making treaties for itself.[19]

23. In the Privy Council's *Radio Reference* decision, Viscount Dunedin soon recognized the root of the problem: "This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought-of in 1867."[20] Canada's evolution from colony to fully independent nation state created, quite literally, a constitutional gap. In 1932, *Radio Reference* established that the POGG power can fill the gap for some kinds of treaties.

24. A quite different argument—that section 132 itself could be stretched to cover Canada's independent treaty obligations—was rejected in the 1937 *Labour Conventions* decision. Lord Atkin said instead that that the power to implement treaties no longer rested with the federal government but with whichever level of government had jurisdiction over the subject-matter at issue.[21] *Labour Conventions* is the also case where Lord Atkin wrote that Canada's "ship of state now sails on larger ventures and into foreign waters" but retains "watertight compartments".[22]

25. Hogg concludes that *Labour Conventions* "has impaired Canada's capacity to play a full role in international affairs".[23] Reviewing the constitutional literature, Elgie writes: "On the whole, almost all scholars agree that *Labour Conventions* was badly decided, and the large majority

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[19] P Hogg, *Constitutional Law of Canada* (Scarborough, ON: Thompson Carswell, 2007) (loose-leaf revision, 5th ed supplement, vol 1) ch 11 at 12.
[20] *Quebec (A-G) v Canada (A-G)*, [1932] AC 304 ["*Radio Reference*"] at 3.
[21] *Labour Conventions*, *supra* note 4 at paras 14-15.
[22] *Ibid* at para 15.
[23] Hogg, *supra* note 19 ch 11 at 16.

support departure from its precedent—although not all suggest going so far as to allocate treaty-implementing power to the federal government alone."[24]

26. Chief Justice Laskin has made the most explicit call at the Supreme Court of Canada to reconsider *Labour Conventions*. In *MacDonald v Vapor* he cited Chief Justice Kerwin who, writing for himself and future Chief Justices Taschereau and Fauteux, questioned *Labour Conventions*, and he mentioned Justice Rand's contradiction of the case.[25] The treaty issue was ultimately moot in *MacDonald Vapor* because the *Trade Marks Act* did not mention the purpose of implementing an international treaty. In Chief Justice Laskin's opinion, "assuming Parliament has power to pass legislation implementing a treaty which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference."[26] The *Act* at issue in these appeals has that missing ingredient from *MacDonald v Vapor*—the manifest purpose and effect of implementing the *Paris Agreement*.

27. It is not necessary to overrule *Labour Conventions* in order to uphold the *Act* as being, at least partly in relation to Canada's commitments under the *Paris Agreement*. But if that case were interpreted strictly, Canada would seem to be the only country in the world whose federal government is constitutionally unable to fulfil its international climate commitments.[27] Interpreted pragmatically, *Labour Conventions* leaves room for Parliament to fulfill certain treaty obligations under POGG. Smart Prosperity supports pragmatism. *Labour Conventions* need only be nuanced.

28. "Recent dicta by the Supreme Court of Canada suggest", explains Hogg, "that the reasoning in the *Radio Reference* could be returning to judicial favour."[28] Régimbald and Newman agree that several Supreme Court cases "seem to confirm that Parliament has the jurisdiction to … implement international treaties that are not squarely within areas of provincial jurisdiction."[29]

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[24] S Elgie, "Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)" (2008) 13:1 *Rev of Const Studies* 67 at 93.
[25] *MacDonald v Vapor Canada Ltd*, [1977] 2 SCR 134 at 169.
[26] *Ibid* at 171.
[27] T Strom & P Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules", (1993) 25 *Ottawa L Rev* 39 at 60; J Trone, *Federal Constitutions and International Relations*" (St Lucia: U of Queensland Press, 2001) at 85-86, 114.
[28] Hogg, *supra* note 19 ch 17 at 6.
[29] G Régimbald & DG Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017) at 229 n 13.

29. Insight into the kind of treaty obligations Parliament has the power to fulfil can be gleaned by comparing *Radio Reference* and *Labour Conventions*. Hogg argues that *Labour Conventions* can be read narrowly, and reconciled with *Radio Reference*, by confining its reasoning to treaties about "harmonization of domestic law", leaving Parliament with power to implement treaties "under which states undertake reciprocal obligations to each other".[30] The real differences between the cases are indeed the topics of the treaties and the nature of Canada's obligations. *Radio Reference* was about wireless communications that transcend boundaries. *Labour Conventions* was about local working conditions. The subject-matter of the treaties in *Radio Reference* was mentioned nowhere in sections 91 or 92. The subject-matter of the treaties in *Labour Conventions* was squarely within 92(13) Property & Civil Rights. The obligations in *Radio Reference* were reciprocal commitments between Canada and other countries to address transboundary issues. The obligations in *Labour Conventions* were merely to harmonize local standards domestically.

30. Treaty implementation also supported the validity of Parliament's legislation addressing aeronautics. In *Johannesson*, this Court held that two international treaties on civil aviation (one a 1919 Empire treaty signed by the Britain for Canada; the other signed in 1944 by Canada itself) supported the proposition that aeronautics is inherently not a provincial but a national concern.[31]

31. Looking across the case law on treaty implementation, it is clear that hours of work, weekly rest, and wages are squarely provincial, not inherently transboundary. Broadcasting, aeronautics, and GHG emissions are inherently transboundary, not squarely provincial. These appeals involving the *Act*'s fulfillment of *Paris* commitments are like *Radio Reference* and *Johannesson* not *Labour Conventions*. That alone is enough to uphold the validity of this particular *Act*.

32. The line between the international commitments Parliament can fulfil alone and those it cannot is more generally illustrated by a series of cases from the High Court of Australia culminating in the *Tasmania Dam Case*. Although Australia's federalist constitution does not allocate a specific power to implement treaties, the Court held that Australia's federal Parliament may do so within Australia's "external affairs" power. The judges' reasons differed on whether the federal power allowed implementation of all treaties or only treaties addressing a sufficient

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[30] Hogg, *supra* note 19 ch 11 at 17; see also WR Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 358.

[31] *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292.

‘‘international concern” that if not implemented “threatens serious disruption to its international relations”.[32] The Parliament of Canada’s power is, Smart Prosperity submits, more like the latter position. Parliament’s treaty related POGG power does not allow it implement treaties involving domestic matters (like the treaties in *Labour Conventions*) but does allow it to fulfil reciprocal national obligations to solve indisputably transboundary problems.

33. While line-drawing is not easy in all cases, it is in these appeals. The *Act* at issue—the purpose and effect of which is to pursue Canada’s nationally determined contributions under the *Paris Agreement*—is the quintessential example of treaty implementing legislation that Parliament has the POGG power to enact. This kind of treaty implementation fills a constitutional gap.

C. The *Act* fits into Parliament’s POGG power to address a transnational concern.

34. Alternatively, once an *Act* has been characterized as fulfilling reciprocal obligations to solve indisputably transboundary problems it can be classified as, by definition, a transnational concern. True transnational concerns are inherently distinguishable from provincial concerns because any one province’s inability to address the issue has national and global repercussions. And true transnational concerns are inherently proportionate in their scale of impact on provincial jurisdiction compared to Canada’s need to engage other countries in important global affairs.

35. Where a treaty deals with a transnational concern, the international treaty and Parliament’s domestic measures combine to establish the singleness, distinctiveness, and indivisibility of the matter. The international convention to prevent marine pollution considered in *Crown Zellerbach* is a good example of a treaty as evidence supporting an indivisible national concern.[33] The *Paris Agreement* could be similarly considered as evidence in these appeals.

36. But Smart Prosperity’s submission goes further. The *Paris Agreement* is not just evidence of a national concern. Fulfilling Canada’s *Paris* commitments is itself a national concern. The transnational concern is about both the agreement and its subject matter simultaneously.

37. The most important thing distinguishing a true transnational concern from a squarely provincial concern is the question of inability, not indivisibility. In *Crown Zellerbach* this Court

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[32] *Commonwealth v Tasmania*, [1983] HCA 21, at paras 33 and 41 of the respective judgments of Wilson and Dawson JJ.
[33] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 38.

held "it is relevant to consider" provincial inability in assessing indivisibility. That is an understatement. When considering the constitutional validity of a matter of transnational concern under POGG, inability is at the heart of the analysis.

38. Obviously one province is unable to cause another province to contribute to fulfilling Canada's commitments under the *Paris Agreement*. But the analysis is not only about *provincial* inability to address the matter of transnational concern. It is also about the *national* inability caused by a provincial failure to deal effectively with intra-provincial aspects of the matter. Here, any one province's failure to contribute its minimum share to Canada's overall *Paris* targets creates a national inability to fulfil Canada's commitments to the rest of the world.

39. The *extra*-provincial effects of a provincial failure are not just inter-provincial. The provincial failure has national and global repercussions. If Ontario fails to limit working hours or set minimum wages, Saskatchewan is not affected at all. But if Alberta fails to reduce GHG emissions, Australia is catastrophically affected. That is the essence of a transnational concern, and the reason Parliament has the POGG power to fulfil reciprocal commitments to solve indisputably transboundary problems.

40. Looking at this matter through the lens of a transnational concern also puts the scale of impact on provincial jurisdiction in perspective. The *Act* is reconcilable with the fundamental distribution of legislative power in Canada in proportion to the scale of the problem the *Act* addresses. Proportionality is established by the indisputable, existential, transboundary threat facing humanity as well as the need for Canada as a nation to fulfil reciprocal commitments to the rest of the world addressing that threat. Both the problem itself and the need for Canada as a nation to respond are relevant to the scale of impact analysis. Federal regulation is only needed if a province's failure creates a national inability to achieve Canada's overall commitments undertaken and communicated to the world. Proportionate to the scale of the problem, the *Act* minimally impairs provincial jurisdiction.

41. Upholding this *Act* would not create a new threat to Canadian federalism. Invaliding this *Act* would, however, exacerbate a threat to humanity, the planet, and Canada's place in the world.

PART IV – SUBMISSIONS ON COSTS

42. Smart Prosperity does not seek costs and asks that it not be liable for costs to any party.

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

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PART VII – TABLE OF AUTHORITIES

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