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Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern

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Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern

Josh Hunter*

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I. INTRODUCTION

In September 2020, the Supreme Court of Canada heard appeals from three provincial references concerning the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act*.¹ The Act imposes a “carbon tax” on fuels and industrial activities in “listed provinces” the federal Governor in Council has decided have not

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¹ S.C. 2018, c. 12, s. 186.

placed sufficiently stringent prices on greenhouse gas emissions.² Saskatchewan, Ontario and Alberta brought references to their Courts of Appeal seeking an opinion on the validity of the Act.³ The majorities in Saskatchewan and Ontario affirmed the validity of the Act under the national concern branch of the federal peace, order and good government (“POGG”) power. In the opinion of the majority in Alberta, most of the Act was *ultra vires* Parliament.⁴

The hearing this fall was the first time the Supreme Court has considered the proper scope of the national concern doctrine in 23 years.⁵ The federal government and its supporters argued the Act is necessary to reduce greenhouse gas emissions, meet Canada’s international commitments and combat climate change. The challenging provinces and their supporters argued that upholding the Act would open the door to broad federal regulation of almost every aspect of human activity. The Court’s decision will shape the balance of federal-provincial relations for decades to come.

This article will summarize the precedents that currently govern the test for determining when a matter is suitable for federal regulation under the national concern doctrine. It will then discuss how the national concern doctrine should be

² Despite being colloquially referred to as a “carbon tax”, the federal government was clear when the Act was before Parliament that the Act did not impose taxation; rather, it imposed regulatory charges intended to change consumer and industry behaviour. Canada, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 279 (April 16, 2018), at 18317. In addition to the federalism issues discussed in this paper, the Supreme Court will also be asked to determine whether the charges imposed by the Act are valid behavioural modification regulatory charges or unauthorized disguised taxation. Nor are the substances on whose use the Act imposes charges limited to carbon — some 33 different substances are listed as “greenhouse gases” in Schedule 3 of the Act.

³ A reference is a procedure whereby the federal or provincial Executive can ask the Supreme Court of Canada (for federal references) or the provincial Court of Appeal (for provincial references) to provide an advisory opinion on the questions set out in the reference. An appeal lies as of right from a provincial reference decision to the Supreme Court of Canada. See, e.g., *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 36 and 53; *Constitutional Questions Act, 2012*, S.S. 2012, c. C-29.01, ss. 2-11; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 8; *Judicature Act*, R.S.A. 2000, c. J-2, s. 26.

⁴ The Alberta majority was not asked to and did not find Part 3 (applying provincial carbon pricing schemes to works and undertakings whose operations fall within Parliament’s legislative authority, federal Crown land, Indigenous land, and the internal waters, territorial sea, exclusive economic zone, and continental shelf of Canada) or Part 4 (requiring the federal Minister of the Environment to report to Parliament on the Act’s administration) of the Act unconstitutional.

⁵ From when a minority of the Court considered the doctrine in *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.). Thirty-two years after the entire panel sitting gave it detailed consideration in *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23 [1988] 1 S.C.R. 401 (S.C.C.).

modernized to ensure Parliament cannot too easily acquire jurisdiction over broad swathes of human activity that have traditionally fallen under provincial jurisdiction without the need to seek a constitutional amendment with provincial support. Finally, this article will examine why the Supreme Court should find the Act is not supportable under the national concern doctrine: its pith and substance is the regulation of greenhouse gases, a matter that is not single, distinct and indivisible and that does not have a scale of impact on provincial jurisdiction that is reconcilable with the constitutional division of powers as required by the national concern jurisprudence.

II. THE GREENHOUSE GAS POLLUTION PRICING ACT

Parliament passed the Act in 2018. Despite recognizing that there were non-pricing-based policy options available, the Act was designed to ensure that every province put a price on carbon acceptable to the federal Cabinet or face a federal “backstop” charge. To do so, the Act imposes “charges” in “listed provinces” the federal Governor in Council decides have not put a sufficiently stringent price on greenhouse gas producing fuels (Part 1) or industrial greenhouse gas emissions (Part 2).⁶

1. Fuel Charges

Part 1 imposes “charges” on “fuel” and “combustible waste” in “listed provinces”. The Governor in Council can prescribe any substance, material or thing as a “fuel” or “combustible waste”. The Governor in Council has virtually unfettered discretion to impose other “charges” on “fuel” and “combustible waste”.⁷ The Minister of National Revenue must distribute all fuel “charges” collected in respect of a province to the province itself, prescribed persons, persons of a prescribed class, persons meeting prescribed conditions or a combination thereof.⁸

2. Industrial Greenhouse Gas Emissions

Part 2 imposes “charges” on industrial greenhouse gas emitters that meet criteria prescribed by the Governor in Council or are designated by the federal Minister of the Environment. The Governor in Council can also determine which gases are “greenhouse gases”.⁹

Covered facilities that emit more than their “emissions limit” must remit “compliance units” to the Minister or pay an “excess emissions charge” to Her Majesty in right of Canada. Covered facilities that emit less than their emissions

⁶ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 3, 166(2)-(3), 169, 172(1), 189(1)-(2), Sch. 1.

⁷ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 3, 17-27, 166, Sch. 2.

⁸ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, s. 165.

⁹ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 169, 172, 190, 192, Sch. 3; *Output-Based Pricing System Regulations*, SOR/2019-266.

limit are issued “surplus credits” that can be used as compliance units. The Governor in Council can create other means of acquiring, trading or recognizing compliance units.¹⁰

The Governor in Council may set emissions limits and increase the rate of excess emissions charges.¹¹ The Minister of National Revenue is required to distribute charges collected in respect of a province to the province itself, prescribed persons, persons of a prescribed class, persons meeting prescribed conditions or a combination thereof.¹²

The Act attempts to force all provinces to adopt the federal government’s preferred policy approach to combatting greenhouse gases — putting a price on greenhouse gas-producing fuels and industrial greenhouse gas emissions — or face having federal “backstop” charges imposed on their residents. Alternative approaches that do not involve carbon pricing are not sufficient to avoid application of the federal “backstop”, even if they meet or exceed the federal government’s own stated reduction targets.

The federal government is currently using most of its Part 1 revenues to pay “Climate Action Incentive” credits to individuals in listed provinces. Despite its name, the credit amount is not based on whether an individual has taken any action to mitigate climate change and need not be spent on such mitigation. The amount of the credit is based solely on an individual’s province of residence, number of dependants and whether the individual lives in an urban or rural area.¹³

The remainder of the revenues raised by Part 1 will be paid out to small and medium-sized businesses, municipalities, educational institutions, hospitals, non-profit organizations and Indigenous communities under yet-to-be-decided formulae. The federal government issued a discussion paper asking for suggestions on how to spend the revenues raised by Part 2 but has not yet decided how it will do so.¹⁴

The federal government has also announced its intention to introduce further legislative measures to “set legally-binding, five-year emissions-reductions milestones” that will exceed current 2030 targets and lead towards net-zero emissions by 2050.¹⁵

¹⁰ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 169, 171, 173-175.

¹¹ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 191, 192, Sch. 4.

¹² *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, s. 188.

¹³ *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, s. 13.

¹⁴ Canada, Department of Finance, “Backgrounder: Ensuring Transparency” (October 23, 2018); Canada, *Ontario and pollution pricing* (March 7, 2019); Canada, *Canada announces next steps to drive clean growth and climate action* (June 28, 2019); Canada, *Use of proceeds from the federal Output-Based Pricing System* (August 20, 2019).

¹⁵ Mandate Letter from the Office of the Prime Minister to the Minister of Environment and Climate Change (December 13, 2019); Canada, House of Commons, *Speech from the*

III. THE REFERENCES

In April 2018, Saskatchewan brought a reference asking whether the then-proposed Act was *intra vires* Parliament. In August 2018, Ontario brought a reference as well. The Saskatchewan reference was heard in February 2019 and the Ontario reference in April 2019.

The Saskatchewan Court of Appeal released its decision in May 2019.¹⁶ Chief Justice Richards (Jackson and Schwann JJ.A. concurring) found that establishing minimum national standards of price stringency for greenhouse gas emissions falls within federal jurisdiction as a matter of national concern and that the Act could be supported by that federal head of power. Justices Ottenbreit and Caldwell (dissenting) found the Act could not be supported under the national concern doctrine or any other head of federal power.

The Ontario Court of Appeal released its decision in June 2019.¹⁷ Chief Justice Strathy (MacPherson and Sharpe JJ.A. concurring) found that “establishing minimum national standards to reduce greenhouse gas emissions” was a new matter of national concern that could support the Act. Associate Chief Justice Hoy (concurring) identified a narrower matter, relating only to setting national minimum standards for greenhouse gas emission *pricing*. Justice Huscroft (dissenting) would have found that the Act could not be supported under the national concern doctrine.

Saskatchewan and Ontario both appealed to the Supreme Court of Canada. Shortly thereafter, in June 2019, a new government in Alberta launched its own reference to its Court of Appeal, which was heard in December 2019. The Alberta court released its decision in February 2020.¹⁸ Chief Justice Fraser, Watson and Hughes JJ.A. held that the national concern doctrine could only apply to matters that fell outside the specific enumerated provincial powers. As the provinces can regulate greenhouse gas emissions under their enumerated powers,¹⁹ there was no scope for the national concern doctrine to apply. In the alternative, they held that greenhouse gas emissions did not meet the test to be recognized as a new matter of national

Throne, 43rd Parl. (December 5, 2019). On November 19, 2020, the government introduced Bill C-12, the *Canadian Net-Zero Emissions Accountability Act* which, if passed, would legally bind the federal government to achieve net-zero emissions by 2050. It has not yet released details of how it intends to do so.

¹⁶ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] S.J. No. 156, 2019 SKCA 40 (Sask. C.A.).

¹⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544 (Ont. C.A.).

¹⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74 (Alta. C.A.).

¹⁹ Including their powers over natural resources and electricity generation (s. 92A), their own property (s. 109), property and civil rights including nuisance and trespass (s. 92(13)), local works and undertakings (s. 92(10)), and public lands (s. 92(5)).

concern. For somewhat different reasons, Wakeling J.A. came to much the same conclusion. Justice Feehan (dissenting) would have held that “effect[ing] 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” was a new matter of national concern that could support the Act.²⁰

The Saskatchewan and Ontario appeals were originally scheduled to be heard by the Supreme Court of Canada in March 2020 but were adjourned due to the COVID-19 pandemic. After they were adjourned, British Columbia appealed the Alberta court’s decision.²¹ All three appeals were heard together on September 22 and 23, 2020.

The Supreme Court hearing may not be the last word on this matter. Manitoba has brought a judicial review in Federal Court of the federal government’s decision to list it under the Act, relying on constitutional and administrative law grounds. Although the constitutional issues will likely be moot after the Supreme Court rules, the administrative law issues will still have to be decided if the Supreme Court finds the Act to be constitutional. Manitoba’s judicial review is scheduled to be heard December 7 to 9, 2020.²²

IV. THE NATIONAL CONCERN DOCTRINE

Although several interveners have raised other heads of power to support the Act, the federal government has only relied on the national concern doctrine,²³ as did all of the judges who upheld the Act.²⁴ Accordingly, this paper will focus on the national concern doctrine, rather than other federal heads of power. It also will not

²⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 943 (Alta. C.A.).

²¹ Alberta originally sought to appeal its win to ensure its court’s decision would be before the Supreme Court when the other appeals were heard. Once British Columbia appealed, however, the Court ordered that only British Columbia’s appeal was to proceed with Alberta as the respondent.

²² *Manitoba v. Canada (Governor in Council)*, Federal Court File No. T-685-19.

²³ In its Supreme Court factum, Canada in one paragraph purports to rely on any other head of power raised by an intervener but does not actively make any arguments about them itself. Factum of the Respondent, the Attorney General of Canada in *Saskatchewan (Attorney General) v. Canada (Attorney General)*; *Ontario (Attorney General) v. Canada (Attorney General)*, Supreme Court File Nos. 38663 and 38781, para. 168.

²⁴ The Saskatchewan and Alberta majorities expressly rejected the argument the Act could be supported by any other head of power. *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] S.J. No. 156, 2019 SKCA 40, at paras. 165-202 (Sask. C.A.), *per* Richards C.J.S.; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 257-261 (Alta. C.A.), *per* Fraser C.J.A. The Ontario majority did consider other heads of power after upholding the Act under the national concern doctrine. Justice Huscroft (dissenting) rejected supporting the Act under the emergency branch of

consider the issues the reference raises concerning unconstitutional taxation and the constitutional limits on regulatory charges.

At their heart, the federal government’s submissions take an Ottawa-centric position that presumes federal jurisdiction is necessary to combat climate change because the provinces cannot be trusted to do it themselves. In essence, the federal government’s position boils down to: (1) climate change is a threat of national and international importance; (2) greenhouse gas emissions produced by human activity are a significant driver of climate change; (3) to combat climate change, Canada must take action to reduce its greenhouse gas emissions; and (4) therefore, Parliament must have jurisdiction to combat this “existential threat”.²⁵

Steps (1) to (3) are all factual statements that none of the provinces dispute; step (4), however, does not logically follow from steps (1) to (3). On the contrary, the constitution assigns many of the most important aspects of modern society such as health care, education, social assistance, policing, local government, professional regulation, *etc.*, to the provinces who work cooperatively with each other and the federal government to achieve national goals.

In attempting to demonstrate that such cooperation is insufficient to combat climate change and that Parliament must have jurisdiction to impose the solution it deems best, the federal government overemphasizes the importance of the so-called provincial inability “test” and unduly minimizes the impact conferring jurisdiction over climate change on Parliament would have on Canada’s federal constitution. If adopted by the Supreme Court, the federal government’s interpretation of the national concern doctrine would allow Parliament to take jurisdiction over broad swathes of hitherto provincial matters and unbalance the constitutional division of powers without resort to a constitutional amendment supported by significant provincial consent (and which would allow dissenting provinces to opt out).

1. The Early History of the National Concern Doctrine

The national concern doctrine is based in the opening words of section 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

POGG. *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at para. 140 (*per* Strathy C.J.O.) and paras. 216-219 (*per* Huscroft J.A., dissenting) (Ont. C.A.).

²⁵ Factum of the Attorney General of Canada, paras. 3 and 97, Supreme Court File Nos. 38663 and 38781.

coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .²⁶

In addition to the enumerated matters set out in the remainder of section 91, Parliament therefore has jurisdiction to make laws in relation to matters that fall outside the provincial matters enumerated in sections 92 to 95. This jurisdiction is usually referred to as Parliament’s “Peace, Order and Good Government” or “POGG” power.

Parliament’s POGG power includes matters that did not exist at all at the time of Confederation (the “gap” branch) and the power to make laws to deal with temporary emergencies such as war or a pandemic (the “emergency” branch). But it also has been held to extend to granting Parliament permanent jurisdiction over matters that did fall within provincial jurisdiction at Confederation but have since been transformed into matters of “national concern”. As Lord Watson put it in the *Local Prohibition* case,

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.²⁷

After a lengthy period in which the Privy Council doubted the existence of a distinct national concern branch of POGG, Viscount Simon reaffirmed its existence in *Canada Temperance Foundation*.²⁸ Subsequently, the Supreme Court relied on the national concern doctrine to uphold federal jurisdiction over aeronautics²⁹ and the National Capital Region.³⁰

2. The Anti-Inflation Reference

The Supreme Court gave more considered attention to the scope of the national concern doctrine (as well as the emergency branch of POGG) in the *Anti-Inflation Reference*.³¹ Another “existential threat” troubled the federation in the 1970s: the growing scourge of double-digit inflation. In response, Parliament passed the

²⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

²⁷ *Ontario (Attorney General) v. Canada (Attorney General)*, [1896] J.C.J. No. 1, [1896] A.C. 348, at 361 (P.C.).

²⁸ [1946] J.C.J. No. 7, [1946] A.C. 193 (P.C.).

²⁹ *Johannesson v. West St. Paul (Rural Municipality)*, [1951] S.C.J. No. 50, [1952] 1 S.C.R. 292 (S.C.C.).

³⁰ *Munro v. Canada (National Capital Commission)*, [1966] S.C.J. No. 46, [1966] S.C.R. 663 (S.C.C.).

³¹ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 (S.C.C.).

Anti-Inflation Act.³² The Act's Preamble stated that "the Parliament of Canada recognizes that inflation in Canada at current levels is contrary to the interests of all Canadians and that the containment and reduction of inflation has become a matter of serious national concern".³³ The Act allowed the Governor in Council to set guidelines for the restraint of prices and profit margins and compensation.³⁴ It applied of its own force to the private sector and the federal public sector. By agreement between the federal government and a province, it could also apply to the provincial public sector.³⁵

Faced with growing criticism of the Act as it applied to provincially regulated industries, the federal government referred the question of the Act's validity to the Supreme Court. The Court, by a 7-2 majority, held that the Act could be upheld under the emergency branch of POGG as a temporary measure designed to combat a national emergency.³⁶ Chief Justice Laskin, writing for four judges, held that it was therefore unnecessary to consider the national concern doctrine.³⁷

Justice Beetz, writing for the majority of the Court on this issue, did consider the national concern doctrine. He concluded that, however important combatting inflation might be, giving Parliament exclusive jurisdiction over such an amorphous subject matter would sound the death knell of Canadian federalism:

Parliament could control all inventories in the largest as in the smallest undertakings, industries, and trades. Parliament could ration not only food but practically everything else in order to prevent hoarding and unfair profits. One could even go farther and argue that since inflation and productivity are greatly interdependent, Parliament could regulate productivity, establish quotas and impose the output of goods or services which corporations, industries, factories, groups, areas, villages, farmers, workers, should produce in any given period. Indeed, since practically any activity or lack of activity affects the gross national product, the value of the Canadian dollar and, therefore, inflation, it is difficult to see what would be beyond the reach of Parliament.³⁸

Inflation was not, in Beetz J.'s view, an appropriate matter for Parliament to

³² *Anti-Inflation Act*, S.C. 1974-75-76, c. 75.

³³ *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, Preamble.

³⁴ *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, s. 3.

³⁵ *Anti-Inflation Act*, S.C. 1974-75-76, c. 75, s. 4.

³⁶ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 391-426 (per Laskin C.J.C.) and 436-440 (per Ritchie J.) (S.C.C.). Justice Beetz, dissenting on this point, argued that Parliament's invocation of an emergency had to be explicit. *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 459-472 (S.C.C.), per Beetz J.

³⁷ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 419 (S.C.C.), per Laskin C.J.C.

³⁸ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 437 (per Ritchie J.) and 443-445 (per Beetz J.) (S.C.C.).

regulate under the national concern doctrine:

I fail to see how the authorities which so decide lend support to the first submission. They had the effect of adding by judicial process new matters or new classes of matters to the federal list of powers. However, this was done only in cases where a new matter was not an aggregate but had a degree of unity which made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form. The scale upon which these new matters enabled Parliament to touch on provincial matters had also to be taken into consideration before they were recognized as federal matters: if an enumerated federal power designated in broad terms such as the trade and commerce power had to be construed so as not to embrace and smother provincial powers (*Parson's case*) and destroy the equilibrium of the Constitution, the Courts must be all the more careful not to add hitherto unnamed powers of a diffuse nature to the list of federal powers.

The “containment and reduction of inflation” does not pass muster as a new subject matter. 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.³⁹

3. The Environmental Cases

In a trio of cases in the 1980s and '90s, the Supreme Court used the national concern doctrine to grant Parliament jurisdiction over one narrow aspect of environmental law (marine pollution) closely associated with its existing powers over ocean pollution.⁴⁰ It repeatedly denied, however, that the environment or pollution generally were matters of national concern.

In *R. v. Crown Zellerbach Canada Ltd.*,⁴¹ the Court split 4-3 on whether Parliament could regulate pollution in marine (*i.e.*, salt) waters within a province. Justice Le Dain for the majority set out the now classic four-part test for the use of the national concern doctrine:

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

³⁹ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 458 (S.C.C.), *per* Beetz J.

⁴⁰ Parliament can regulate ocean pollution not only under its powers over the public property (s. 91(1A)), navigation and shipping (s. 91(10)), fisheries (s. 91(12)), and the criminal law (s. 91(27)) but under its plenary power to make laws for any part of Canada not part of a province (*Constitution Act, 1871* (U.K.), 34 & 35 Vict., c. 28, s. 4) and the gap branch of POGG.

⁴¹ [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401 (S.C.C.).

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 aspect of the matter.⁴²

Justice Le Dain went on to find that marine pollution was indivisible from ocean pollution because of the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state, not just because of the possibility or likelihood of pollutants moving across that boundary. At the same time, the differences in composition and action of marine waters and fresh waters meant marine pollution had its own characteristics and scientific considerations that distinguished it from freshwater pollution. The impact of giving Parliament jurisdiction over marine pollution therefore had ascertainable and reasonable limits.⁴³

It is important to note that, contrary to the arguments put forward by the federal government and the interveners that support it, Le Dain J. did not find that the fact that an individual province might not wish to or even be unable to regulate a matter effectively on its own was sufficient to grant Parliament jurisdiction over it as a matter of national concern. The so-called “test” was only “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”.⁴⁴ As Le Dain J. warned, “the ‘provincial inability’ test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative

⁴² *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 431-432 (S.C.C.).

⁴³ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 436-438 (S.C.C.).

⁴⁴ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 434 (S.C.C.).

problem”.⁴⁵ Furthermore, even when provincial inability did help establish that a matter had the necessary singleness, distinctiveness and indivisibility, it remained necessary to consider the second step of the national concern test: did recognizing the matter as a matter of national concern have a “scale of impact on provincial jurisdiction that was reconcilable with the fundamental distribution of legislative power under the Constitution”?⁴⁶ In the event, Le Dain J. did not even consider whether the provinces could regulate “marine pollution” in deciding it should be recognized as a matter of national concern.⁴⁷

Justice La Forest, for the minority, warned of the danger of considering a number of separate areas of activity, some federal and some provincial, a single, indivisible matter of national concern: “By conceptualizing broad social, economic and political issues in that way, one can effectively invent new heads of federal power under the national dimensions doctrine.”⁴⁸ Matters such as the control of inflation or environmental protection “are all-pervasive, and if accepted as items falling within the general power of Parliament, would radically alter the division of legislative power in Canada”.⁴⁹ The concerns Beetz J. raised about recognizing inflation as a matter of national concern applied *a fortiori* to the environment:

All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject-matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction. . . . [E]nvironmental pollution alone is itself all-pervasive. It is a by-product of everything we do. . . .

To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. . . . I would add to the legislative subjects that would be substantially eviscerated the control of the public domain and municipal government. Indeed as Beetz J. in *Re: Anti-Inflation Act*, *supra*, at p. 458, stated of the proposed power over inflation, there would not be much left of the distribution of power if Parliament had exclusive jurisdiction over this subject.⁵⁰

⁴⁵ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 434 (S.C.C.).

⁴⁶ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 432 (S.C.C.).

⁴⁷ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 436-438 (S.C.C.).

⁴⁸ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 452 (S.C.C.).

⁴⁹ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 454 (S.C.C.).

⁵⁰ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 454-456 (S.C.C.).

Justice La Forest then went on to find that these same concerns applied to the narrower proposed matter of marine pollution which he found could not be separated from freshwater pollution.⁵¹

Four years later, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, La Forest J. made clear that the concerns he expressed about the potential dangers of recognizing the environment or pollution as matters of national concern were shared by the Court as a whole:

I earlier referred to the environment as a diffuse subject, echoing what I said in *R. v. Crown Zellerbach Canada Ltd.*, *supra*, to the effect that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the “national concern” doctrine as articulated by Beetz J. in *Reference re Anti-Inflation Act*, *supra*. Although I was writing for the minority in *Crown Zellerbach*, this opinion was not contested by the majority. The majority simply decided that marine pollution was a matter of national concern because it was predominantly extra-provincial and international in character and implications, and possessed significantly distinct and separate characteristics as to make it subject to Parliament’s residual power.⁵²

After all, as Professor Le Dain (as he then was) wrote in an article cited by Beetz J. in the *Anti-Inflation Reference*, “there is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, *environmental protection*, and preservation of national identity or independence are examples”.⁵³

Five years later, in *R. v. Hydro-Québec*, La Forest J. again noted that the national concern doctrine “inevitably raises profound issues respecting the federal structure of our Constitution”⁵⁴ and should be resorted to only with great caution:

In *Crown Zellerbach*, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada.

The minority position on this point (which was not addressed by the majority) was subsequently accepted by the whole Court in *Oldman River*, *supra*, at p. 64. The general thrust of that case is that the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution. This is hardly consistent with

⁵¹ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 456-460 (S.C.C.).

⁵² [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 64 (*per* La Forest J.) and 81 (*per* Stevenson J., dissenting on other grounds) (S.C.C.).

⁵³ Gerald Le Dain, Q.C., “Sir Lyman Duff and the Constitution” (1974) 12 Osgoode Hall L.J. 261, at 293, cited by *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 451 (S.C.C.), *per* Beetz J. [emphasis added].

⁵⁴ *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at para. 110 (S.C.C.).

an enthusiastic adoption of the “national dimensions” doctrine.⁵⁵

Chief Justice Lamer and Iacobucci J., dissenting on whether the impugned provisions of the *Canadian Environmental Protection Act*⁵⁶ could be supported under the criminal law power, went on to consider the national concern doctrine and made it clear that the *Crown Zellerbach* test had to be applied strictly to preserve the federal nature of Canada’s constitution:

The test for singleness, distinctiveness and indivisibility is a demanding one. Because of the high potential risk to the Constitution’s division of powers presented by the broad notion of “national concern”, it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise “national concern” could rapidly expand to absorb all areas of provincial jurisdiction.⁵⁷

They also made it clear that the constitutionality of the Act had to be determined based on the full scope of what it authorized the federal Executive to do, not just the more limited use the government had made of the powers granted at the time of the challenge:

However, the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.⁵⁸

V. THE JUDGES THAT SUPPORTED THE ACT UNDULY NARROWED ITS PITH AND SUBSTANCE

The majority of the Ontario and Saskatchewan courts and the dissent in Alberta found that the *Greenhouse Gas Pollution Pricing Act* was a valid exercise of Parliament’s national concern power. In doing so, they all rejected the federal government’s proposed definition of the Act’s pith and substance as merely the “cumulative dimensions of greenhouse gas emissions”,⁵⁹ but went on to adopt their

⁵⁵ *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at paras. 115-116 (S.C.C.).

⁵⁶ R.S.C. 1985 (4th Supp.), c. 16.

⁵⁷ *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at para. 67 (S.C.C.).

⁵⁸ *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at para. 73 (S.C.C.) [underlining in original].

⁵⁹ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 74 (*per* Strathy C.J.O.), paras. 165-166 (*per* Hoy A.C.J.O.) and paras. 209-210 and 227 (*per* Huscroft J.A., dissenting); *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] S.J. No. 156, 2019 SKCA 40, at paras. 127-138 (Sask. C.A.), *per* Richards C.J.S.; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 935-945 (Alta. C.A.), *per* Feehan J.A.

own artificially narrow definitions of the Act's pith and substance.

The majority in Ontario held the Act's pith and substance was "establishing minimum national standards to reduce greenhouse gas emissions", while the concurring judge held it was "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions".⁶⁰ The majority in Saskatchewan held it was "the establishment of minimum national standards of price stringency for GHG emissions".⁶¹ The dissenting judge in Alberta held that it was "effecting 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".⁶²

As Huscroft J.A. pointed out in dissent in Ontario, however, these definitions beg the question. The Ontario majority's definition left unanswered the key question for classification purposes — minimum standards of what? Parliament can of course set minimum standards for matters that fall within its jurisdiction but the very question at issue is *whether* the Act falls within federal jurisdiction, which in turn depends on *whether* the matter for which Parliament desires to set national standards falls within the scope of the national concern doctrine. Associate Chief Justice Hoy, on the other hand, like the Saskatchewan majority, conflated the *means* Parliament adopted to achieve its goal with the ultimate purpose Parliament was seeking to achieve.⁶³ Justice Feehan in dissent in Alberta did both — he conflated the means Parliament had adopted (stringent pricing) and its purpose (reducing greenhouse gas emissions) and left open the question of which minimum standards Parliament had jurisdiction to impose.

All of these definitions fail to take into account the breadth of the Act. The Act's Preamble sets out the breadth of its purpose — Parliament intended to take "*comprehensive* action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change".⁶⁴ The Act's proposed effects are similarly comprehensive. All "fuels" (*i.e.*, any "substance, material, or thing" prescribed by the Governor in Council) sold, consumed, produced or imported into Canada can be subject to the "charges"

⁶⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 77 (*per* Strathy C.J.O.) and paras. 166 and 187 (*per* Hoy A.C.J.O.) (Ont. C.A.).

⁶¹ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] S.J. No. 156, 2019 SKCA 40, at para. 125 (Sask. C.A.), *per* Richards C.J.S.

⁶² *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 944 (Alta. C.A.), *per* Feehan J.A.

⁶³ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 211-212 and paras. 224-226 (Ont. C.A.), *per* Huscroft J.A., dissenting.

⁶⁴ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, Preamble [emphasis added].

imposed by Part 1. Any facility that meets prescribed criteria can be required to participate in the emissions trading scheme imposed by Part 2, including having to purchase or acquire compliance certificates for any “greenhouse gases” it emits (*i.e.*, any gas prescribed by the Governor in Council), report regularly whatever information the Governor in Council prescribes to the federal Minister, and subject itself to detailed compliance requirements.⁶⁵

Parliament’s decision that provinces must regulate greenhouse gas emissions in the way Parliament thinks best (no matter how effective other, non-pricing-based mechanisms might be) or risk having the federal government impose charges on virtually every activity that takes place in those provinces belies attempts to narrow the Act’s pith and substance. The Act is not limited to setting minimum standards for greenhouse gas reductions. Nor does it only establish minimum pricing standards to the extent they are *necessary* to reduce greenhouse gas emissions. A province that, like Ontario, achieves significant greenhouse gas reductions through non-pricing-based mechanisms would not satisfy the Act’s requirements even if it achieved greater reductions than provinces that do adopt carbon pricing.⁶⁶ Rather, as the Alberta majority and Huscroft J.A. correctly found, the pith and the substance of the Act is the regulation of greenhouse gas emissions *simpliciter*.⁶⁷

VI. THE ACT CANNOT BE SUPPORTED UNDER THE NATIONAL CONCERN DOCTRINE

1. Should the National Concern Test Be Modified?

The Alberta majority argued that the national concern doctrine should only be available if a matter did not fall within the provinces’ specific enumerated powers. A matter could only be found to be a matter of national concern if, at Confederation, it did not exist or fell within the provinces’ section 92(16) residual power over “all Matters of a merely local or private Nature”.⁶⁸

The Alberta majority’s argument has support in the text of the Constitution. The opening words of section 91 make it clear that, unlike Parliament’s enumerated powers which apply “notwithstanding anything in this Act”, its POGG power only

⁶⁵ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, ss. 3, 166(1)(a), 169, 171-174, 190-192, 197-198, 203. *Output-Based Pricing System Regulations*, SOR/2019-266.

⁶⁶ Ontario achieved the single-largest reduction in greenhouse gases in Canadian history (up to 30 Mt annually — the equivalent of taking seven million vehicles off the road) by a non-pricing measure — requiring the closure of all coal-fired electricity plants in the province.

⁶⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 252-256 (Alta. C.A.), *per* Fraser C.J.A.; *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 204-213 (Ont. C.A.), *per* Huscroft J.A., dissenting.

⁶⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 160-189 (Alta. C.A.), *per* Fraser C.J.A.

applies “to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”. It also has support in the case law. Both Beetz J. in the *Anti-Inflation Reference* and Le Dain J. in *Crown Zellerbach* speak of matters of a local or private nature, not specifically enumerated provincial matters, being able to be transformed into matters of national concern.⁶⁹

Nevertheless, it is unlikely that the Supreme Court will so drastically limit the national concern doctrine. Too many of the national concern cases have concerned matters that fall within provincial enumerated powers over matters such as tavern licensing,⁷⁰ municipal institutions⁷¹ and electricity generation.⁷² Although there are good arguments that each of those cases involved new matters not anticipated at Confederation (aeronautics, the national capital and nuclear energy respectively), the Court is unlikely to want to permanently foreclose the possibility of a new matter of national concern being recognized even though that matter had historically been regulated by the provinces under their enumerated powers.

Even if the Supreme Court is unlikely to limit the scope of the national concern doctrine as severely as the Alberta majority did, there are still several aspects of the test that should be clarified. Drawing on the Court’s jurisprudence under the general trade and commerce power, the requirement that a new matter of national concern be distinct from provincial heads of power should mean *qualitative* difference, not just a difference in scale. As in the *Reference re Securities Act*⁷³ and the *Reference re Pan-Canadian Securities Regulation*,⁷⁴ it is only matters that the provinces truly are unable to regulate, either individually or collectively, that should fall within federal jurisdiction. The systemic risk the Court found the provinces were unable to regulate was not simply the sum of each individual province’s market risk (as Canada’s national greenhouse gas emissions are the sum of each individual province’s emissions). Rather, systemic risks are “risks that occasion a ‘domino effect’ whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic

⁶⁹ *Reference re Anti-Inflation Act*, [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373, at 445 and 457 (S.C.C.), *per* Beetz J.; *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 431-432 (S.C.C.), *per* Le Dain J.

⁷⁰ *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.) [also known as “*Local Prohibition*”]; *Ontario (Attorney General) v. Canada (Attorney General)*, [1898] A.C. 348 (P.C.); *Ontario (Attorney General) v. Canada Temperance Federation*, [1946] J.C.J. No. 7, [1946] A.C. 193 (P.C.).

⁷¹ *Johannesson v. West St. Paul (Rural Municipality)*, [1951] S.C.J. No. 50, [1952] 1 S.C.R. 292 (S.C.C.); *Munro v. Canada (National Capital Commission)*, [1966] S.C.J. No. 46, [1966] S.C.R. 663 (S.C.C.).

⁷² *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] S.C.J. No. 99, [1993] 3 S.C.R. 327 (S.C.C.).

⁷³ [2011] S.C.J. No. 66, 2011 SCC 66 (S.C.C.).

⁷⁴ [2018] S.C.J. No. 48, 2018 SCC 48 (S.C.C.).

consequences that pervade an entire financial system”.⁷⁵ Systemic risks are risks to the market itself, not just a sum of risks to individual market participants; addressing them therefore requires the ability to issue orders that can quickly take effect in multiple jurisdictions across Canada.⁷⁶

Similarly, to the degree provincial inability to act is considered in determining whether a matter is single, distinct and indivisible,⁷⁷ it is only *jurisdictional* inability to act that should be considered, not a provincial decision to take a different approach than the one Parliament prefers.⁷⁸ Allowing courts to enter into a functional analysis of whether the provinces are taking the “right” action oversteps their proper role as guardians of the division of powers. Parliament remains free to use its enumerated powers (if available) to set national standards if it wishes to do so. Given the residual nature of the national concern doctrine, however, Parliament should not be granted jurisdiction to regulate matters that the provinces are perfectly capable of regulating but, in the exercise of their co-equal sovereignty, have chosen not to (or chosen not to regulate in the manner Parliament prefers).

“Provincial inability” should also not allow Parliament to more easily regulate a matter under the residual national concern power than under the enumerated general trade and commerce power.⁷⁹ Regulatory variability and policy experimentation is a central feature of Canada’s constitution, not a flaw to be fixed by expanding federal jurisdiction. The fact that one province’s decision not to act could have an adverse impact on another province cannot be sufficient to give Parliament jurisdiction. In today’s modern, interconnected world, almost every provincial decision to act or not

⁷⁵ *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837, 2011 SCC 66, at para. 103 (S.C.C.); *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 107 (S.C.C.).

⁷⁶ Steven L. Schwarcz, “Systemic Risk” (2008) 97 *Geo. L.J.* 193, at 198-204 and 207; David Johnston, Kathleen Rockwell & Cristie Ford, “National and Coordinated Approaches to Securities Regulation” in David Johnston, Kathleen Rockwell & Cristie Ford, *Canadian Securities Regulation* (Markham, ON: LexisNexis Canada, 2014), at 681.

⁷⁷ As discussed above, Le Dain J. made it clear that provincial inability was only one factor to consider in establishing whether a matter is single, distinct and indivisible, not a stand-alone indicium of federal jurisdiction. *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 433-434 (S.C.C.).

⁷⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 302-308 (Alta. C.A.), *per* Fraser C.J.A.; *Canada (Attorney General) v. Canadian National Transportation Ltd.*, [1983] S.C.J. No. 73, [1983] 2 S.C.R. 206, at 267-268 (S.C.C.), *per* Dickson J.; *General Motors of Canada Ltd. v. City National Leasing*, [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641, at 661-663 (S.C.C.); *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837, 2011 SCC 66, at paras. 70-85 (S.C.C.); *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, [2018] 3 S.C.R. 189, 2018 SCC 48, at paras. 100-103 (S.C.C.).

⁷⁹ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 305 (Alta. C.A.), *per* Fraser C.J.A.

to act can have adverse impacts on other provinces. Instead of trying to assess the severity of potential adverse impacts of one province's policy decisions on other provinces (an inherently political exercise ill-suited to adjudication by the courts), the courts should instead focus, as the name "provincial inability" suggests, on whether the provinces individually or collectively are *capable* of addressing a problem without federal intervention. As will be discussed further below, there is no doubt the provinces are capable of reducing greenhouse gas emissions; indeed, the very "backstop" nature of the Act presumes it.

2. Greenhouse Gas Emissions Are Not a Single, Distinct and Indivisible Matter

Even without those clarifications, greenhouse gas emissions (however defined) are not a single, distinct and indivisible matter suitable for federal regulation as a matter of national concern. In assessing the singleness, distinctiveness and indivisibility of the proposed new matter, it is not sufficient to look only at the scope of the Act (which, as discussed above, is itself strikingly broad), much less the scope of the particular regulations that the federal government has chosen to enact at the present time.

A new matter of national concern, once recognized, is not limited to the particular Act at issue in the initial court challenge — it is a permanent new head of federal jurisdiction that can potentially allow for a wide range of legislation. Any future federal legislation that in pith and substance concerned the reduction of greenhouse gas emissions (which given the range of activities that produce greenhouse gas emissions is a broad range of legislation indeed) would now fall within federal jurisdiction. Witness, for example, the thousands of pages of federal legislation supported by the aeronautics and telecommunications powers that go far beyond the factual situations at issue in the *Radio Reference*⁸⁰ and the *Aeronautics Reference*.⁸¹ As the Alberta majority correctly found, a court cannot prelimit the scope of a new matter of national concern to the precise legislation before the Court — Parliament remains free to legislate in the future as it sees fit in relation to that head of power.⁸²

Unlike marine pollution, which "because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution",⁸³ greenhouse gas emissions from any source have the same impact on climate change. There is

⁸⁰ *Quebec (Attorney General) v. Canada (Attorney General)*, [1932] J.C.J. No. 1, [1932] A.C. 304 (P.C.).

⁸¹ *Canada (Attorney General) v. Ontario (Attorney General)*, [1931] J.C.J. No. 4, [1932] A.C. 54 (P.C.).

⁸² *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 202 (Alta. C.A.), per Fraser C.J.A.

⁸³ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 437 (S.C.C.), per Le Dain J.

thus no way to distinguish which greenhouse gas-producing activities should be federally regulated from those which should remain provincially regulated. In fact, the Act does not attempt to do so: it presumes that the same greenhouse gas-producing activities can be regulated by the provinces (if they choose to enact pricing mechanisms that are “sufficiently stringent” to meet with the federal government’s approval) or by the federal government (if they do not). Yet, as the Alberta majority recognized, with very few exceptions, concurrent jurisdiction is a foreign concept to Canada’s constitution which assigns most matters exclusively to either Parliament or the provincial legislatures.⁸⁴

As Huscroft J.A. and the Alberta majority recognized, defining a matter as imposing “national standards” provides no intelligible standard by which to limit the scope of the proposed matter. Minimum national standards could be established concerning home heating and cooling; land use zoning; public transit; road design and use; or any other matter that impacts greenhouse gas emissions. Minimum national standards could be set for the quality of insulation used in homes. Minimum national standards could be established for the fuel efficiency of cars for sale within the province.⁸⁵ The ubiquity of the activities that generate greenhouse gases means that granting Parliament jurisdiction under the national concern doctrine to set minimum national standards for greenhouse gas emissions would eviscerate provincial jurisdiction over local undertakings, property and civil rights, and matters of a local concern within the province. As the Alberta majority put it, “There is no separate head of federal power relating to minimal national standards of anything. Nor is backstopism a separate head of federal power.”⁸⁶

The narrower characterization of “minimum national *pricing* standards to regulate greenhouse gas emissions”, adopted by Hoy A.C.J.O. in Ontario and the Saskatchewan majority (and with more adjectives added by Feehan J.A. in Alberta), does not avoid this problem. It merely requires more creativity on the part of legislative drafters. Almost any regulatory goal can be achieved through a pricing mechanism. If Parliament were given jurisdiction to establish minimum national pricing standards for greenhouse gas emissions, it could put a price on energy-inefficient building materials; on air conditioners and home heating; on automobiles with higher emissions; or even on which days an automobile is used or the density of housing. This is precisely the concern Beetz J. raised in the *Anti-Inflation Reference*

⁸⁴ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 209 (Alta. C.A.), *per* Fraser C.J.A.; *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 92A(2)-(3), 93(4), 94A, 95.

⁸⁵ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 235-237 (Ont. C.A.), *per* Huscroft J.A., dissenting; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 333 (Alta. C.A.), *per* Fraser C.J.A.

⁸⁶ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 294 (Alta. C.A.), *per* Fraser C.J.A.

as a reason why the control of inflation should not be recognized as a matter of national concern. Greenhouse gases are a product of all we do. Giving Parliament jurisdiction to set minimum national standards (or pricing standards) to regulate greenhouse gases as a matter of national concern would expand federal jurisdiction beyond limit.⁸⁷

Nor are the provinces incapable of regulating greenhouse gas emissions on their own. In fact, the entire premise of the Act as a “backstop” is a recognition by Parliament that the provinces *can* effectively regulate greenhouse gas emissions, including by way of carbon pricing if they so choose. The federal government’s concern is not that the provinces are unable to combat climate change; it is to discourage provinces from adopting a different way of doing so than the one mechanism Parliament believes is best by the threat of imposing federal charges on their residents.⁸⁸

Ensuring provincial compliance with Parliament’s wishes is not a proper reason to give Parliament jurisdiction to regulate a matter under the national concern doctrine. Justice Le Dain in *Crown Zellerbach* rejected Professor Gibson’s suggestion that the federal government could be granted national concern jurisdiction to ensure provincial cooperation “where it would be possible to deal fully with the problem by cooperative action of two or more legislatures” but there was a risk those provincial legislatures might not cooperate. As Le Dain J. explained, such a role for the federal government “would contemplate a concurrent or overlapping federal jurisdiction which is in conflict with what was emphasized by Beetz J. in the *Anti-Inflation Act* reference – that 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”.⁸⁹ Yet that is exactly the “backstop” role Parliament now wishes the Act to play. That is federal overreach, not provincial inability.

⁸⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 230-231 (Alta. C.A.), *per* Huscroft J.A., dissenting; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 295-296 (Alta. C.A.), *per* Fraser C.J.A. The fact that Parliament may have the ability to set national standards under its other heads of power does not pose the same risk to the division of powers. Unlike defining “minimum standards” themselves as a matter of national concern, Parliament relying on its other powers would require compliance with those powers’ limitations: criminal laws must be in the form of a prohibition and a penalty, emergency laws must be temporary, *etc.*

⁸⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 229-231 (Ont. C.A.), *per* Huscroft J.A., dissenting; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 306-325 (Alta. C.A.), *per* Fraser C.J.A.

⁸⁹ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 432-433 (S.C.C.).

3. The Act Has Too Great an Impact on Provincial Jurisdiction

Even if minimum national standards for greenhouse gas emissions were a single, distinct and indivisible subject matter, granting Parliament jurisdiction to impose them under the national concern doctrine would not “have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution”.⁹⁰

Parliament can regulate many aspects of the environment under its enumerated powers. For example, the federal government could invest further in interprovincial railways, the greater use of which could significantly contribute to the reduction of greenhouse gases in Canada.⁹¹ It can use its criminal law powers to prohibit activities such as coal-fired electricity generation.⁹² Parliament can apply provincial greenhouse gas reduction schemes to federally regulated undertakings as it has done by Part 3 of the Act. It could potentially rely on the emergency branch of POGG to support *temporary* measures to combat climate change (which the Act with its long-term purposes of imposing a carbon price “that increases over time”, “holding the increase in the global average temperature to well below 2°C”, and “increasing [Canada’s *Paris Accord* contributions] over time” is not).⁹³ Finally, if it were willing to bear the political cost of doing so, the federal government could ask Parliament to impose a true “carbon tax” under its taxation power.⁹⁴

But Parliament should not be given a plenary power over all aspects of a matter so broad as regulating greenhouse gas emissions. Given the range of provincially regulated activities that generate greenhouse gases, granting Parliament such a power would dramatically and impermissibly alter the division of powers. So broad an impact on provincial jurisdiction would be irreconcilable with the Constitution’s intention to divide legislative power between Parliament and the provincial legislatures.⁹⁵ Echoing La Forest J.’s warning, put forward first for the minority in

⁹⁰ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 432 (S.C.C.), *per* Le Dain J.

⁹¹ Alexis Belanger, “Canadian Federalism in the Context of Combating Climate Change” (2011) 20:1 Const. Forum Const. 21, at 25.

⁹² *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulation*, SOR/2012-167.

⁹³ *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, Preamble. See also Schedules 2 and 4, which set out charge rates that apply indefinitely, with the Governor in Council able to increase the rates even further by regulation (ss. 166(4), 168(1), 168(2)(b) and (c), 168(3), 174(3)(b), 174(5), 178(2), 181(3), 191).

⁹⁴ When asked by the Opposition, however, the Parliamentary Secretary to the Minister of Finance expressly denied that the Act was intended to impose taxation. Canada, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 279 (April 16, 2018), at 18317.

⁹⁵ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] S.J. No. 156, 2019 SKCA 40, at paras. 456-461 (Sask. C.A.), *per* Ottenbreit and Caldwell JJ.A., dissenting; *Reference*

Crown Zellerbach and then for the whole court in *Oldman River*, about the risks of defining new matters of national concern too broadly, giving the federal government power over such a diffuse agglomeration of local matters as the activities that generate greenhouse gases “would effectively gut provincial legislative jurisdiction” because “all physical activities have some environmental [or greenhouse gas] impact”.⁹⁶

“National concern” should not be interpreted as granting Parliament the broad power over greenhouse gas emissions that would be required to uphold the Act, much less whatever future measures the federal government believes are necessary to combat climate change. Doing so would result in a massive transfer of regulatory power from the provincial to the federal level and is incompatible with the federal nature of Canada’s constitution.⁹⁷ If Parliament’s existing enumerated powers are insufficient, there is always the option, as was done for old age security and unemployment insurance in the past, of proposing a constitutional amendment.⁹⁸ Or Parliament could adopt the course it has wisely taken in other matters that are of concern to the nation: work with the provinces. The *Canada Health Act*,⁹⁹ the co-existence of the CPP and the QPP, and cooperative capital markets regulation are all further examples of how the diversity that is the heart of Canadian federalism need not impair the country’s ability to come together to accomplish national goals.

Climate change is no different. Every government in Canada agrees that urgent measures must be taken to reduce greenhouse gas emissions. They do not all agree that imposing a carbon price on consumers and large industry is the best means of accomplishing that shared goal. Finding that the Act cannot be supported under the national concern doctrine would deprive Parliament of the ability to order the provinces to adopt its preferred policy approach or risk the imposition of “backstop”

re Greenhouse Gas Pollution Pricing Act, [2019] O.J. No. 3403, 2019 ONCA 544, at paras. 233-337 (Ont. C.A.), *per* Huscroft J.A., dissenting; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 326-339 (Alta. C.A.), *per* Fraser C.J.A.

⁹⁶ *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401, at 447-448 and 453-456 (S.C.C.), *per* La Forest J.; *Friends of the Oldman River Society v. Canada*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3, at 63 (S.C.C.); *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213, at paras. 64-79 (*per* Lamer C.J.C. and Iacobucci J., dissenting) and paras. 115-116 (*per* La Forest J.) (S.C.C.).

⁹⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] O.J. No. 3403, 2019 ONCA 544, at para. 237 (Ont. C.A.), *per* Huscroft J.A.; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at paras. 328, 333, 335 (Alta. C.A.), *per* Fraser C.J.A.

⁹⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] A.J. No. 234, 2020 ABCA 74, at para. 337 (Alta. C.A.), *per* Fraser C.J.A.; *Constitution Act, 1940* (U.K.), 3 & 4 Geo. VI, c. 36; *British North America Act, 1951* (U.K.), 14 & 15 Geo. VI; *Constitution Act 1964* (U.K.), c. 73.

⁹⁹ R.S.C. 1985, c. C-6.

carbon pricing; it would not deprive Canada of the ability to take cooperative and effective action to combat climate change.