COURT OF APPEAL OF ALBERTA

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IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, SC 2018, c. 12

AND

IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA UNDER THE *JUDICATURE ACT*, RSA 2000, c. J-2, s. 26

DOCUMENT: **FACTUM**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 20th day of June, 2019

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PART I – OVERVIEW

1. This case is not about whether action needs to be taken to reduce greenhouse gas emissions or the relative effectiveness of particular policy alternatives. All parties agree that climate change is a real and pressing problem that must be addressed and that it is for governments and legislatures, not the courts, to decide how best to address that problem. Rather, this case is about whether the federal *Greenhouse Gas Pollution Pricing Act* (the "Act") can be supported under the national concern doctrine or any other head of federal power.

2. The Act should not be upheld under the national concern doctrine. The regulation of greenhouse gas emissions lacks the necessary singleness, distinctiveness and indivisibility. Virtually every activity regulated by the provinces generates greenhouse gas emissions. Every provincial head of power could be impacted by granting Parliament the power to impose minimum greenhouse gas emission standards. Giving Parliament so broad a power would seriously disrupt the balance of powers set out in the Constitution.

3. Nor should the Act be upheld under any other federal head of power. It is not temporary legislation enacted by Parliament in response to an emergency. It does not meet the test for it to be valid criminal law. And it regulates the wide range of local activities that cause greenhouse gases, not trade as a whole as needed to be upheld under the general trade and commerce power.

PART II – FACTS

4. Ontario accepts the facts as set out in Alberta's factum.

PART III – ARGUMENT

A. <u>The Pith and Substance of the Act is to Regulate Greenhouse Gas Emissions</u>

5. The Ontario Court unanimously found that Canada's proposed definition of the Act's pith and substance as the "cumulative dimensions of greenhouse gas emissions" was "too vague and

confusing, since GHGs are inherently cumulative and the 'cumulative dimensions' are undefined." Instead, the majority 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."[1] The majority in Saskatchewan held it was "the establishment of minimum national standards of price stringency for GHG emissions."[2] Canada now essentially adopts the definitions of the concurring judge in Ontario and the Saskatchewan majority.

6. As Justice Huscroft pointed out in dissent in Ontario, however, all of these definitions beg the question. The Ontario majority's definition leaves unanswered the key question for classification purposes – minimum standards of what? Canada 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. The concurring judge in Ontario, on the other hand, like the Saskatchewan majority, conflates the ***means*** Parliament has adopted to achieve its goal with the ultimate purpose Parliament seeks to achieve.[3]

7. Both definitions also 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."[4] 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"

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[1] Ontario Reasons at paras. 74 and 77 (*per* Strathy CJO), 165-66 and 187 (*per* Hoy ACJO), and 209-10 and 227 (*per* Huscroft JA dissenting)
[2] Saskatchewan Reasons at para. 125 (*per* Richards CJS)
[3] Ontario Reasons at paras. 211-12 and 224-26 (*per* Huscroft JA dissenting)
[4] *Greenhouse Gas Pollution Pricing Act, supra*, 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.[5]

8. Parliament's decision that provinces must regulate greenhouse gas emissions in the way Parliament thinks best (no matter how effective other, non-price-based mechanisms might be) or risk having Canada impose charges on virtually every activity that takes place in those provinces belies these narrow definitions of 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 achieves significant greenhouse gas reductions through non-pricing-based mechanisms would not satisfy the requirements of the Act no matter how significant those reductions were.

9. The Act's pith and substance is simpler: the regulation of greenhouse gas emissions.[6]

10. Regardless of how the Act's pith and substance is characterized, it cannot be supported by the national concern doctrine, the emergency doctrine, or Parliament's enumerated powers.

B. Regulating Greenhouse Gas Emissions is Not an Appropriate Matter to Add to the List of Enumerated Federal Powers Through the National Concern Doctrine

11. Reliance on the national concern doctrine to support federal legislation has "the effect of adding by judicial process new matters or new classes of matters to the federal list of powers."[7] In effect, recognizing a new matter of national concern ***permanently*** expands s. 91 of the

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[5] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 3, 166(1)(a), 169, 171-74, 190-92, 197-98, and 203. See e.g. SOR/2018-213 and *Greenhouse Gas Emissions Information Production Order*, SOR/2018-214.
[6] Ontario Reasons at para. 213 (*per* Huscroft JA dissenting)
[7] *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 458

Constitution Act, 1867. As a result, great care must be taken to ensure the proposed new matter is one that is appropriate to assign to exclusive federal jurisdiction on a permanent basis. It is not sufficient to demonstrate that a matter is of national concern in the colloquial sense – in our federation, many matters of the highest public importance (health care, education, social assistance, etc.) fall within provincial, not federal, jurisdiction.[8]

(1) The Proper Interpretation of the National Concern Test

12. The Supreme Court and the Privy Council have repeatedly cautioned that the national concern doctrine presents a serious threat to the federal structure of the Constitution, if not carefully circumscribed.[9] In the present day, with the increasingly interconnected nature of modern life, the national concern doctrine should be applied with even greater caution. In applying that test, this Court should interpret it in light of its purpose – limiting the scope of the national concern branch rather than expanding it.[10] It should also consider the Supreme Court's recent decisions concerning the analogous general trade and commerce power which suggest: (1) regard should be had to whether the matter is ***qualitatively*** distinct from provincial matters; and (2) the "provincial inability" factor should be restricted to matters of ***jurisdictional*** inability.

13. Our Constitution is a federal one. Under the Constitution, Parliament and the provinces are coequal in their respective spheres. Neither is subordinate to the other. The powers of the provincial Legislatures are not granted by the Parliament of Canada, and they cannot be taken away, altered or controlled by the Parliament of Canada.[11] Only a constitutional amendment

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[8] Ontario Reasons at paras. 217-23 (*per* Huscroft JA dissenting)
[9] *Ontario (AG) v. Canada (AG) (Local Prohibition)*, [1896] AC 348 at 360-61 (PC); *Anti-Inflation Reference*, *supra* at 443-45 and 458; *R. v. Hydro-Québec*, [1997] 3 SCR 213 at para. 67
[10] Ontario Reasons at para. 223 (*per* Huscroft JA dissenting); Saskatchewan Reasons at para. 420 (*per* Ottenbreit and Caldwell JJA dissenting)
[11] Saskatchewan Reasons at para. 216 (*per* Ottenbreit and Caldwell JJA dissenting); Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed. (Toronto: Carswell, 2007) at s. 5.1(a), "Federalism"; *Hodge v The Queen* (1883), 9 App Cas 117 at 132 (PC); *St Catherine's Milling*

passed with the consent of at least seven provinces with at least fifty percent of the aggregate provincial population can do so.[12] Courts should therefore show great caution before recognizing a permanent new head of federal power under the national concern doctrine.

(i) Distinctiveness Should Mean ***Qualitative*** Distinctiveness:

14. The third *Crown Zellerbach* factor asks, drawing on Justice Beetz's analysis in the *Anti-Inflation Reference*, whether the matter a court is considering transferring to federal jurisdiction under the national concern doctrine has attained the required degree of "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[13] When considering whether a proposed matter of national concern is sufficiently distinct from provincial matters to warrant transfer to exclusive federal jurisdiction, a Court should consider whether the matter is ***qualitatively*** distinct from provincial heads of power.

15. The importance of qualitative distinctiveness has been repeatedly recognized by the Supreme Court in delineating the scope of the general trade and commerce power given the need to ensure that power is not interpreted so broadly as to eviscerate provincial jurisdiction.[14]

16. The concerns that led the Court to require there to be a ***qualitative*** difference between matters suitable for regulation under the general trade and commerce power and matters that fall within provincial jurisdiction apply with even greater force to the national concern power.[15]

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and Lumber Co v R (1888), 14 App. Cas. 46 at 57-60 (PC); *Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General),* [1892] AC 437 at 441-44 (PC); *Re Initiative and Referendum Act,* [1919] AC 935 at 941-42; *Reference re Secession of Quebec,* [1998] 2 SCR 217 at paras 55-60

[12] *Constitution Act, 1982,* Part V, s. 38(1)

[13] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at 432 ; *Anti-Inflation Reference, supra* at 458

[14] *Canada (AG) v. Canadian National Transportation, Ltd.*, [1983] 2 SCR 206 at 266-67; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641 at 661-62; *Reference re Securities Act*, 2011 SCC 66 at paras. 70-90, [2011] 3 SCR 837; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras. 100-02, [2018] 3 SCR 189

[15] Saskatchewan Reasons at paras. 407-08 (*per* Ottenbreit and Caldwell JJA dissenting)

Unlike the general trade and commerce power which s. 91(2) expressly confers on Parliament and which must have some minimum content, the POGG power (including the national concern doctrine) is a residual and exceptional power. Unlike Parliament's enumerated powers which apply "notwithstanding" the powers conferred on the provinces, the POGG power only applies "in relation to all Matters ***not coming within*** the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[16] The national concern doctrine should be more, rather than less, carefully circumscribed than the general trade and commerce power.

17. Making it clear that the reference to distinctiveness in the third *Crown Zellerbach* factor refers to a ***qualitative*** difference would ensure that courts will not find a matter has become distinct from provincial matters simply because the ***quantitative*** nature of the matter – its scale or level of importance – has increased. Important matters are not by definition federal matters under our Constitution. On the contrary, some of the most important matters facing previous generations such as industrial regulation in the Great Depression and inflation in the 1970s have been found ***not*** to be suitable for federal regulation as matters of national concern.[17]

18. The kinds of matters that have been held to fall under the national concern branch of POGG have been qualitatively distinct from matters regulated by the provinces. They often have a close link to other, pre-existing federal powers. For example, the National Capital Region is the administrative centre for all federal governmental matters.[18] Nuclear power is closely tied to matters of national defence and can cause fundamentally different kinds of harm than other

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[16] See K Lysyk, "The Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531 [Emphasis added]
[17] *Canada (AG) v. Ontario (AG) (Labour Conventions)*, [1937] AC 326 at 350-53; *Anti-Inflation Reference*, *supra* at 443-45 and 458
[18] *Munro v. National Capital Commission*, [1966] SCR 663 at 669-71

sources of power.[19] The regulation of marine pollution, a narrow and well-defined activity of "dumping […] waste in waters, other than fresh waters, within a province," is closely tied to Parliament's existing jurisdiction over offshore and international waters, navigation, and fisheries.[20] Aeronautics is bound up with international and interprovincial transportation.[21]

19. In contrast, matters that have been rejected under the national concern doctrine tend to be ***qualitatively*** indistinguishable from existing provincial matters, even though they may have reached a ***quantitative*** scale of importance such that Parliament wishes to impose its will on the provinces. For example, in the *Anti-Inflation Reference*, the federal Act purported to implement wage and price controls across businesses and individuals in the provinces, to curb inflation. The Supreme Court held it could not do so because inflation was not qualitatively distinct from matters that fall within provincial jurisdiction: "It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction."[22] Similarly, "toxic substances" and "the environment" have been found to be too broad and amorphous to be recognized as matters of national concern. Nothing qualitatively separates them from matters the provinces can regulate.[23]

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[19] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 340 (*per* Lamer CJC), 379-80 (*per* LaForest J), and 425-27 (*per* Iacobucci J dissenting)

[20] Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 L. & Contemp. Probs. 121 at 136. Temperance does not fit so easily into this proposed "qualitatively federal" trend, but the *Russell* case is an anomaly, aptly characterized by Beetz J. in the *Anti-Inflation Reference* as a case with a "chequered" history, one that was "not easy to reconcile with the *Local Prohibition* case": *Anti-Inflation Reference*, *supra* at 453-57

[21] *Johannesson v. West St. Paul (Municipality)*, [1952] 1 SCR 292 at 318-19 (*per* Estey J) and 326-27 (*per* Locke J)

[22] *Anti-Inflation Reference*, *supra* at 437 (*per* Ritchie J.) and 459-59 (*per* Beetz J.)

[23] *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J dissenting) and 115-16 (*per* La Forest J)*; Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63-65

(ii) "Provincial Inability" Should be Limited to Provincial ***Jurisdictional*** Inability:

20. The fourth *Crown Zellerbach* factor (the "provincial inability" test), which is itself only one factor to consider in determining if the first half of the test is met, looks at whether the provinces are unable to effectively regulate a matter as evidence of whether it has become a matter of national concern.[24] The provincial inability test cannot mean that there is "provincial inability" whenever a province's decision not to exercise its undoubted jurisdiction may have an impact on other provinces. Interpreting the test so broadly would unduly fetter provincial sovereignty – the power to act must include the power to choose not to act or to act differently.

21. The "provincial inability" test should be seen as referring to provincial ***jurisdictional*** inability. Drawing again on the Supreme Court's jurisprudence under the general trade and commerce power, the provincial inability test should ask "whether [the matter] is of such a nature that provinces, acting alone or in concert, would be ***constitutionally incapable*** of enacting it."[25] To demonstrate that a matter "is genuinely national in importance and scope," rather than merely an aggregation of provincial jurisdiction, "the situation must be such that if the federal government were not able to legislate, there would be a constitutional gap."[26]

22. Systemic risk in the securities industry presents a good example of a matter the provinces are ***incapable*** of regulating without federal assistance. Regulating systemic risk ***requires*** simultaneously monitoring the actions of financial actors across multiple provinces in order to detect, identify and mitigate risk to national capital markets. Systemic risks are not merely an accumulation of local risks which the provinces working together could regulate. Rather, they are ***qualitatively*** different. Systemic risks are "risks that occasion a 'domino effect' whereby the

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[24] *Crown Zellerbach, supra* at 432
[25] *Securities Reference, supra* at para. 80; Saskatchewan Reasons at paras. 413-14 (*per* Ottenbreit and Caldwell JJA dissenting)
[26] *Securities Reference, supra* at para. 83

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 consequences that pervade an entire financial system." Systemic risks are risks to the market itself and addressing them requires the ability to issue orders that can quickly take effect in multiple jurisdictions across Canada.[27]

23. Where, however, the provinces acting together can regulate a matter, there is no provincial ***incapacity***. Whether the provinces should exercise their jurisdiction in a particular way is a policy question, not a legal one. The provincial inability test cannot mean that there is provincial inability whenever Parliament believes a national standard is desirable. By definition, no individual province can establish a national standard. Otherwise, any matter could be transformed into a matter of national concern by attempting to regulate it as a national standard.[28]

24. The fact that the inaction of one province (because of different policy choices or practical constraints) could impact another province cannot be determinative of jurisdiction. At the time of the *Anti-Inflation Reference,* provinces facing low employment and reduced industrial demand would have had no ability, practically speaking, to take measures to reduce inflation, which was primarily driven by events and policy decisions in other provinces and outside Canada. But this did not render measures to control "inflation" a matter of national concern.

(iii) <u>The Existence of International Treaties Do Not Make a Matter One of National Concern</u>

25. The existence and content of treaties dealing with greenhouse gas emissions such as the *Paris Agreement* are wholly irrelevant to the division of powers between Parliament and the

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[27] *Securities Reference*, *supra* at paras. 102-05, 112-17, and 123-25; *Pan-Canadian Securities Reference*, *supra* at paras. 106-07, 111-12, and 115-16; Steven L. Schwarcz, "Systemic Risk" (2008) 97 Georgetown LJ 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: LexisNexis, 2014) at 681

[28] Ontario Reasons at paras. 228-32 (*per* Huscroft JA dissenting); Saskatchewan Reasons at paras. 439-40 (*per* Ottenbreit and Caldwell JJA dissenting)

provincial legislatures. The Privy Council's decision in the *Labour Conventions Case*, recently reaffirmed by a unanimous Supreme Court in the *Pan-Canadian Securities Reference*, makes it clear that international treaties are binding on Canada in international law but can ***only*** be implemented in areas of provincial jurisdiction with the consent of the provincial legislatures.[29]

26. Finding a matter to be within federal jurisdiction under the national concern doctrine because doing so would assist Canada to implement international treaties agreed to by the federal Executive would create a treaty-making power through the back door. Doing so would also be inconsistent with Canada's constitutional architecture which does not give the federal Parliament the power to implement treaties in areas of provincial jurisdiction without provincial consent.[30] The scope of provincial heads of power can only be changed by a constitutional amendment made with federal and significant provincial ***legislative*** consent. Otherwise, with the stroke of a pen on an international treaty, the federal ***Executive*** could, without the consent of any provincial legislature, give Parliament broad new powers it was never intended to have.[31]

(2) Greenhouse Gas Emissions are Not a Single, Distinct and Indivisible Matter Suitable for Federal Regulation Under the National Concern Doctrine

27. Even if this Court does not accept the submissions above, greenhouse gas emissions are not a single, distinct, and indivisible matter suitable for federal regulation. Marine pollution is suitable for regulation as a matter of national concern because it is a narrow category of pollution closely tied to Parliament's existing jurisdiction over offshore and international waters, navigation, and fisheries. By contrast, greenhouse gas emissions encompass a wide variety of

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[29] *Labour Conventions*, *supra* at 350-52; *Pan-Canadian Securities Reference*, *supra* at para. 66
[30] *Reference re Senate Reform*, 2014 SCC 32 at paras. 26-27, [2014] 1 SCR 32. *Cf.* United States, *Constitution*, Art. II, §2, cl. 2 and Art. VI, §2; *Constitution* (Cth.), s. 51(xxix); *Constitution Act, 1867* (UK), 30&31 Vict., c. 3, s. 132
[31] *Constitution Act, 1867*, *supra*, ss. 91-95; *Constitution Act, 1982*, s. 38, Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11; *Senate Reference*, *supra* at paras. 29-36 and 54-63

pollutants (to which the Governor in Council can add at any time) and are not closely tied to Parliament's existing heads of jurisdiction. More importantly, even if the list of substances which can act as greenhouse gases is distinct, the wide range of human activities that produce them is not. Unlike the well-defined and relatively narrow activity of "dumping […] waste in waters, other than fresh waters, within a province" in *Crown Zellerbach*, here Canada asserts jurisdiction to regulate all activities that give rise to emissions.[32]

28. Justice La Forest, at that point writing for a minority of the Court, held that regulating pollution or the environment as a whole lacked the singleness, distinctiveness and indivisibility needed to be considered a matter of national concern. Trying to treat broad social, economic, and political issues like pollution or inflation as a single matter that only Parliament can regulate would have disrupted the federal/provincial balance of power. Pollution and inflation are not novel issues uncontemplated at the time of Confederation, even if their scale has increased.[33]

29. Justice La Forest's view that the environment was too diffuse a subject matter for Parliament to regulate under the national concern doctrine was adopted by the entire court in *Oldman River*. The entire Court again held that the environment was not a matter suitable for exclusive federal jurisdiction in *Hydro-Québec*. Finding the environment as a whole (or even just certain aspects of it such as pollution) to be an exclusively federal matter of national concern would pose too high a risk to the Constitution's carefully calibrated division of powers.[34]

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[32] *Crown Zellerbach*, *supra* at 417

[33] *Crown Zellerbach*, *supra* at 452 and 455; Gerald LeDain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall LJ 261 at 293; W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Cdn Bar Rev 597 at 604-06, 610-11, and 614

[34] *Oldman River*, *supra* at 63-65; *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J. dissenting) and 115-16 (*per* La Forest J)

30. The consequences of recognizing a new matter of national concern are sweeping. For example, the recognition that aeronautics falls within exclusive federal jurisdiction in *Johannesson* arose out of a single factual situation – the building of a private aerodrome on land where a municipal by-law prohibited such activity. So too did the recognition of radiocommunications in the *Radio Reference* – an attempt to implement an international radiotelegraph convention into domestic law. But the seed that grew from those narrow factual situations has expanded to support thousands of pages of federal aeronautics and broadcasting legislation. Even when Parliament has not legislated, those new federal powers have been held to oust the application of valid provincial legislation (including environmental legislation).[35]

31. In the present case, the consequences of recognizing exclusive federal jurisdiction over minimum national standards (or pricing standards) for greenhouse gas emissions would be even more sweeping, given that greenhouse gases are not qualitatively distinct from matters of provincial concern and are produced by virtually every activity that takes place in the provinces.

32. As Justice Huscroft recognized in the Ontario Court, recognizing federal jurisdiction over "minimum national standards to regulate greenhouse gas emissions" provides no intelligible limits on federal jurisdiction. Minimum national standards could be established concerning home heating and cooling; land use zoning; public transit; road design and use; and any other matter that impacts greenhouse gas emissions.[36] The ubiquity of the activities that generate greenhouse

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[35] *Johannesson, supra*; *Canada (AG) v. Ontario (AG) (Radiocommunications)*, [1937] AC 326; *Québec (AG) v. Canadian Owners and Pilots Assn.*, 2010 SCC 39 at paras. 25-61, [2010] 2 SCR 536; *Québec (AG) v. Lacombe*, 2010 SCC 38 at para. 66, [2010] 2 SCR 453; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 at paras. 37-61 (CA), leave to appeal to SCC dismissed [2001] SCCA No. 83; *Bell Canada v. Québec (Commission de santé et de la sécurité du travail)*, [1988] 1 SCR 749; *Rogers Communication Inc. v. Châteauguay (City)*, 2016 SCC 23 at paras. 57-74, [2016] 1 SCR 467; *Procureure générale du Québec c. IMTT-Québec inc.*, 2019 QCCA 1598

[36] Ontario Reasons at paras. 235-37 (*per* Huscroft JA dissenting)

gases means that granting the federal government exclusive jurisdiction 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.

33. Neither of Canada's proposed modifications addresses these concerns. Requiring standards to have a demonstrable impact on Canada's nationwide greenhouse gas emissions only means that federal intrusions are limited to major intrusions. And, since greenhouse gas emissions are cumulative, all greenhouse gas emissions impact Canada's nationwide emissions.

34. The narrower characterization of "minimum national ***pricing*** standards to regulate greenhouse gas emissions," adopted by the concurring judge in the Ontario Court and the majority of the Saskatchewan Court (which Canada did not adopt), 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 Canada is 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.

35. This is precisely the concern Justice Beetz raised in the *Anti-Inflation Reference* as a reason why the control of inflation should not be recognized as a matter of national concern: "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. Furthermore, all those powers would belong to Parliament permanently."[37]

36. A similar concern is present here. Greenhouse gases are a product of all we do. As such, recognizing federal jurisdiction over the establishment of minimum national standards (or

[37] *Anti-Inflation Reference*, *supra*, at 437 (Ritchie J) and 443-45 and 458-59 (Beetz J)

pricing standards) to regulate greenhouse gases would expand federal jurisdiction beyond limit. The regulation of greenhouse gases (however formulated) is therefore not a single, indivisible, and distinct matter suitable for recognition as a matter of national concern.

(3) There is No Provincial Inability to Combat Greenhouse Gas Emissions

37. The provincial inability test is only evidence of whether a proposed matter of national concern is single, indivisible, and distinct, not an independent criterion. In any event, the provinces are not ***incapable*** of regulating greenhouse gases even if they choose to do so through measures other than the measure (such as a carbon price) that Parliament prefers.

38. Unlike the regulation of aeronautics, the regulation of greenhouse gases would not be unworkable if different provinces imposed their own rules.[38] Unlike the regulation of systemic risk in the securities industry, the regulation of greenhouse gases does not require the simultaneous monitoring of the cumulative impact of greenhouse gas levels across multiple provinces or the ability to issue orders to govern actors across multiple jurisdictions.

39. While the gases themselves cross provincial borders, the ***regulation*** of greenhouse gases can be fully accomplished at the provincial level because the activities that produce greenhouse gas largely fall within provincial jurisdiction (with the exception of greenhouse gases produced by federally-regulated industries which, Ontario agrees, Canada has jurisdiction to regulate under its enumerated powers).[39] The decisions of different provinces to reduce greenhouse gases in different ways and on different timelines to account for their different circumstances do not preclude other provinces from reducing greenhouse gases in their own preferred manner.

40. The debate regarding the relative merits of the preferred federal approach to reducing greenhouse gases (applying a carbon price to fuels and industrial emitters) and the preferred

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[38] *Johannesson, supra* at 318-19 (*per* Estey J) and 326-27 (*per* Locke J)
[39] See e.g. Part 3 of the Act.

approaches of the various provinces (which include not only carbon pricing, but also non-pricing-based regulatory and incentive approaches) is a debate about policy effectiveness, not constitutional capacity.[40] Policy effectiveness has no place in the division of powers analysis.[41]

41. There is no jurisdictional or constitutional gap that requires federal regulation. The fact that one province's efforts to regulate greenhouse gases might be affected by the different policy choices of another does not mean that the provinces are ***unable*** to regulate them, in a constitutional sense. As noted above, while a single federal law to control inflation or imposing a nationwide minimum wage might be more economically efficient than a diversity of provincial approaches, that does not mean that the provinces are unable to regulate these matters. Economic efficiency, uniformity, and comprehensiveness are not constitutional principles. Federalism, by contrast, is. Federalism explicitly countenances a diversity of policy approaches to a problem, reflecting the diverse democratic choices of provincial electorates.

42. Moreover, as in *Hydro-Québec*, the Act itself "implicitly undermines any contention that the provinces are incapable of regulating" greenhouse gas emissions. In that case, the minority, without dispute from the majority, held that the Governor in Council's power to exempt a province from the application of federal regulations if the province already had equivalent regulations in force demonstrated that "the broad subject matter of regulating toxic substances, as defined by the Act, is inherently or potentially divisible."[42]

43. In the present case, ss. 166 and 189 of the Act go even further – they require the Governor in Council to "take into account, as the primary factor" whether a province has enacted

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[40] Saskatchewan Reasons at paras. 440-51 (*per* Ottenbreit and Caldwell JJA dissenting)
[41] *Securities Reference, supra* at para. 90 [Emphasis added]; *Pan-Canadian Securities Regulation Reference, supra* at para. 82; *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para. 18 and 57, [2000] 1 SCR 783
[42] *Hydro-Québec, supra* at paras. 57 and 77

a sufficiently stringent "provincial pricing mechanism" in determining whether to apply the Act to that province. Canada has acknowledged that the provincial legislatures ***can*** effectively regulate greenhouse gas emissions, including by way of carbon pricing if they so choose. Canada's concern is not that the provinces are unable to combat climate change; it is that they might choose a different way of doing so. That is federal overreach, not provincial inability.[43]

(4) Giving Parliament Jurisdiction Over Greenhouse Gas Emissions Would Radically Alter the Constitutional Division of Powers

44. Even if greenhouse gas emissions could be seen as a single, qualitatively distinct, and indivisible matter, Canada must still satisfy the second branch of the *Crown Zellerbach* test: the proposed new federal matter must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[44]

45. It is important to remember that it is the impact of granting Parliament permanent and exclusive jurisdiction over a new "matter" that must be considered at this stage of the analysis, not just the impact of upholding the constitutionality of a particular Act. As discussed above, once a new matter of national concern has been recognized, it can be relied on in subsequent cases to uphold a wide range of legislation beyond the Act that gave rise to the initial challenge.

46. Giving Parliament jurisdiction over the vast range of activities that can generate greenhouse gas emissions would radically alter the balance of the Canadian federation. Parliament would have near-plenary power to regulate almost all aspects of Canadian society and economy, contrary to the Constitution's intention to divide legislative power.[45]

47. As Justice La Forest for the minority in *Crown Zellerbach* and for the entire Court in *Oldman River* and *Hydro-Québec* made clear, giving the federal government plenary power over

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[43] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 166(2)-(3) and 189
[44] *Crown Zellerbach*, *supra* at 432
[45] Saskatchewan Reasons at paras. 456-61 (*per* Ottenbreit and Caldwell JJA dissenting)

the environment would be irreconcilable with the federal division of powers. Doing so "would effectively gut provincial legislative jurisdiction" because "all physical activities have some environmental impact."[46] A country where one level of government had plenary jurisdiction over the environment could not be considered a federal country, "because no system in which one government was so powerful would be federal."[47]

48. These cases demonstrate that the national concern doctrine must be applied in a manner that reflects the federal nature of Canada's constitution and does not disrupt the division of powers between Parliament and the provincial legislatures, transferring broad swathes of provincial jurisdiction to the federal level by allowing diffuse collections of local matters to be considered a single matter of national concern.

49. In the *Securities Reference*, the Supreme Court warned of the dangers of interpreting one level of government's powers so broadly that they "erode the constitutional balance inherent in the Canadian federal state." The need to interpret federal heads of power to leave continued space for the operation of provincial heads of power reflects the co-equal sovereignty of the federal and provincial governments in Canada and the importance of allowing continued space for provincial experimentation and diversity.[48] Ultimately, the Supreme Court concluded, "as important as the preservation of capital markets and the maintenance of Canada's financial stability are, they do not justify a wholesale takeover of the regulation of the securities industry."[49] So too with greenhouse gas emissions.

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[46] *Crown Zellerbach*, *supra* at 447-48 and 453-56; *Oldman River*, *supra* at 63; *Hydro-Québec*, *supra* at paras. 64-79 (*per* Lamer CJC and Iacobucci J dissenting) and 115-16 (*per* La Forest J)
[47] *Oldman River*, *supra* at 63-64 [Emphasis added]; Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 UTLJ 54 at 85
[48] *Securities Reference*, *supra* at paras. 7, 61-62, and 70-73
[49] *Securities Reference*, *supra* at para. 128

50. Reduction of greenhouse gas emissions does not justify a wholesale takeover of the vast array of provincially-regulated activities, such as home and office heating, land use planning, electricity generation, transportation, and industry, that would be the consequence of recognizing national pricing standards to reduce greenhouse gases as a matter of national concern.

51. "National concern" should not be interpreted as granting Parliament the plenary 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.

C. The Act Cannot Be Supported Under the Emergency Doctrine

52. The Act cannot be supported under the emergency branch of the peace, order, and good government power. The Supreme Court has repeatedly held that the national emergency doctrine can only be invoked to support "legislation of a temporary nature."[50]

53. Nothing about the Act suggests it is temporary. The Act's Preamble shows the Act is aimed at an ongoing problem requiring ongoing measures. It states "the pricing of greenhouse gas emissions on a basis ***that increases over time*** is an appropriate and efficient way to create incentives for [. . .] behavioural change." It says that Canada has ratified the *Paris Agreement*, whose aim is "***holding*** the increase in the global average temperature to well below 2°C above pre-industrial levels." It adds that Canada is committed to achieving its contribution under the *Paris Agreement* "and ***increasing it over time***." None of this language suggests Parliament sees greenhouse gas emissions as a temporary problem requiring temporary legislation.[51]

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[50] *Crown Zellerbach*, *supra* at 430; *Anti-Inflation Reference*, *supra* at 427 (*per* Laskin CJ), 437 (*per* Ritchie J), and 461 (*per* Beetz J)

[51] *Greenhouse Gas Pollution Pricing Act*, *supra*, Preamble [Emphasis added]

54. The Preamble also refers to documents that show the Act is intended to operate indefinitely because Parliament believes the issue of greenhouse gas emissions will be ongoing. The Preamble states Canada has ratified the *United Nations Framework Convention on Climate Change* (the "Convention"), whose objective is "the ***stabilization*** of greenhouse gas concentrations." There is no reference to how long measures will be necessary to maintain such a stabilization once it is achieved. The Convention itself sets no time limit on its operation. Similarly, the *Paris Agreement* also sets no time limit on its operation.[52]

55. The charges the Act imposes are not set to end at any particular time. Schedule 2 sets out fuel charge rates that increase each year from 2018 to 2021, with even higher rates applicable "after 2021." Schedule 4 similarly sets out excess emission charge rates that increase each year from 2018 to 2022, with the 2022 rate applying to all subsequent years. The Governor in Council can increase both rates even further by regulation.[53]

56. The Act's administrative provisions also demonstrate Parliament's intent to have the Act operate indefinitely. For example, s. 100(1) gives the Minister of National Revenue the power to waive, cancel, or reduce any amount or interest payable by a person under Part I "on or before the day that is ***10 calendar years*** after the end of a reporting period of a person." Subsection 104(7) says every person required under Part 1 to keep records must retain them "until the expiry of ***six years*** after the end of the year to which they relate or for any other period that may be prescribed." Subsection 187(5) requires records for covered facilities under Part 2 to be kept for

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[52] *Greenhouse Gas Pollution Pricing Act*, *supra*, Preamble; Affidavit of John Moffet, Ex. L, *United Nations Framework Convention on Climate Change* (9 May 1992), Canada's Record, Vol. 2, Tab 1L [Emphasis added]; and Ex. M, *Paris Agreement* (12 December 2015), Canada's Record, Vol. 2, Tab 1M, pp. R490-R505

[53] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 166(4), 168(1), 168(2)(b) and (c), 168(3), 174(3)(b), 174(5), 178(2), 181(3), and 191 and Schedules 2 and 4

seven years. All these provisions (of which there are many more) show the Act is intended to operate for a lengthy period of time, if not indefinitely.[54]

57. The *Paris Agreement* itself sets no end point on its operation and does not mention 2030 at all. Article 4, paragraph 3 of the *Paris Agreement* states that "[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then nationally determined contribution." The *Paris Agreement* thus contemplates parties like Canada progressively making their greenhouse gas emission reduction targets more stringent over time, not merely addressing the issue temporarily.[55]

58. In short, the Act's Preamble, the documents it references, and the Act's substantive provisions all make clear the Act is not "legislation of a temporary nature." It therefore cannot be upheld under the emergency branch of the peace, order, and good government power.[56]

D. The Act Cannot Be Supported Under the Criminal Law Power

59. The Act is not a valid exercise of Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867* for two reasons. First, the Act does not impose any prohibition on emitting greenhouse gas emissions. The Supreme Court has said "[t]he scope of the criminal law power extends to laws that create a prohibition backed by a penalty for a criminal law purpose." The Act does not prohibit greenhouse gas emissions in whole or in part. Persons subject to the Act are free to burn as much fuel or make as many products as they see fit, so long as they pay the charges the Act imposes on the related greenhouse gas emissions. The Act therefore lacks one of the fundamental elements of a criminal law.[57]

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[54] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 100(1), 104(7), 187(5) [Emphasis added]
[55] Affidavit of John Moffet, Ex. M, *Paris Agreement* (12 December 2015), Art. 4 para. 3, Canada's Record, Vol. 2, Tab 1M, p. R492
[56] *Crown Zellerbach*, *supra* at 430
[57] *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para. 33, [2015] 1 SCR 693; *Firearms Reference*, *supra* at para. 27

60. Preventing people from engaging in certain activities for free is not a prohibition; it is a price. Accepting that legislation structured this way falls within Parliament's criminal law power would radically expand the scope of the power. On such a theory, Parliament could impose a price on any type of activity by "prohibiting" the free conduct of the activity and thereby intrude into any part of provincial jurisdiction. For example, it could "prohibit" the free trading of securities, the free use of municipal roads by cars, or the free use of land that falls below federal density targets. Such an expansion of the criminal law power would seriously undermine the federal-provincial balance of powers in a manner that should not be countenanced.

61. Complex regulatory schemes have been upheld as valid exercises of Parliament's criminal law power. In each of those cases, however, there was an underlying prohibition of the activity being regulated, with complex exceptions. In the *Firearms Reference*, the impugned legislation prohibited the possession of a firearm without a licence and/or a registration certificate. Similarly, in *Hydro-Québec*, the impugned legislation set out a complex scheme wherein certain uses of certain substances were prohibited. The Supreme Court found this to be Parliament "carefully tailoring the prohibited action," citing earlier authority that stated "definition of the crime, defining the reach of the offence, [is] a constitutionally permissive exercise of the criminal law power." But there still must be a crime. Here, unlike in either of those cases, there is no careful tailoring of criminal liability because the Act does not contain any underlying prohibition on emitting greenhouse gases.[58]

62. *RJR-MacDonald* cannot be relied on to save the Act. In that case, the Supreme Court held Parliament could validly use the criminal law power to prohibit tobacco advertising, rather than

[58] *Firearms Reference*, *supra* at paras. 34-40; *R. v. Hydro-Québec*, [1997] 3 SCR 213 at paras. 150-151

tobacco consumption itself, as its chosen means of combatting the "evil" of tobacco consumption. Again, however, Parliament actually prohibited an underlying activity even though that prohibition had other desired indirect effects. Parliament could for example prohibit the use of coal in electricity generation in order to reduce greenhouse gas emissions (as it is in fact in the process of doing). But that is not what the Act does.[59]

63. Unlike the provisions upheld in the *Firearms Reference*, the prohibitions and penalties that do exist in the Act do not independently serve a valid criminal law purpose. They are confined to ensuring administrative compliance with the Act's pricing scheme.[60] The regulatory nature of the Act's prohibitions and penalties is apparent on their face. All of the prohibitions and penalties in the Act are directed towards ensuring people pay the prices imposed by the legislation. Section 132(1) makes it an offence to fail to file a return to determine the net fuel charge the filer must pay under Part 1 (s. 71(1)). It is also an offence to fail to keep records when directed to do so (ss. 104(6) and 132(1)), to make false or deceptive statements in a document required under Part 1 (s. 133(1)(a)), or to intentionally fail to pay a charge when required (s. 135). Part 2 of the Act contains similar regulatory prohibitions and penalties. It is an offence to knowingly make a false or misleading statement to an enforcement officer (s. 208), provide false or misleading information or samples (s. 232(1)(e)), or destroy required records (s. 232(1)(g)).[61]

64. Each of these prohibitions is backed by a penalty. But all of those prohibitions are designed to ensure compliance with the Act's pricing scheme, not to independently serve a

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[59] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at paras. 44 and 51 (*per* La Forest J. dissenting on other grounds); *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*, SOR/2012-167, s. 3(1)
[60] *Firearms Reference*, *supra* at paras. 38-39
[61] *Greenhouse Gas Pollution Pricing Act*, *supra*, ss. 71(1), 104(6), 132(1), 133(1)(a), 135, 208, 232(1)(e), 232(1)(g)

criminal law purpose. They do not prohibit behaviour that individuals or companies would engage in absent the Act's regulatory scheme. These prohibitions can only be said to promote environmental protection when viewed as incentives to comply with the Act's pricing scheme. Thus, they are ancillary regulatory prohibitions that do not make the Act valid criminal law.[62]

65. If the existence of ancillary regulatory prohibitions and penalties of this nature were sufficient to make any pricing scheme valid criminal law, the scope of Parliament's already broad criminal law power would be greatly extended. Parliament could use its criminal law power to, for example, impose a road congestion price on cars driving in downtown Toronto at certain times of day by creating a regulatory scheme and enforcing compliance with it through prohibitions and penalties (e.g. prohibiting failing to have a working transponder or falsifying car location data). Such a broad interpretation of the criminal law power would unduly expand the scope of federal legislative authority and should not be accepted.

E. The Act Cannot Be Supported Under the Trade and Commerce Power

66. The Act is not a valid exercise of Parliament's trade and commerce jurisdiction. If the creation of a "marketable commodity" within a regulatory scheme targeting a specific activity were sufficient for a federal law to satisfy the requirement under the third *General Motors* requirement that it be "concerned with trade as a whole rather than with a particular industry," the federal regulatory power would be nearly limitless. Any otherwise *ultra vires* regulatory law could be saved through the addition of tradeable permits. The better view is that the emitting activities governed by the Act are the type of "day-to-day conduct" that can be and is managed by provincial legislation.[63]

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[62] *Firearms Reference*, *supra* at paras. 38-39
[63] *General Motors*, *supra*; *Securities Reference*, *supra* at paras. 112-116

67. Like the proposed federal legislation struck down in the *Securities Reference* and unlike that upheld in the *Pan-Canadian Securities Reference*, the Act does not confine itself to regulating only those aspects of greenhouse gas emissions that are ***qualitatively*** different from the local activities that the provinces can and long have regulated. Instead, it reaches beyond such matters and descends into imposing a price on almost ***all*** activities that cause greenhouse gas emissions, most of which have long been viewed as provincial.[64]

68. Under the fourth *General Motors* requirement – that the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting – the provinces possess constitutional capacity to jointly agree to greenhouse gas emission reduction targets and pass the legislation necessary to do so. All of the provinces have in fact done so, they just have not all done so using Parliament's preferred policy tool.

69. The fact that individual provinces could change their approach to greenhouse gas emission reduction (as Ontario is doing by moving from a cap-and-trade system to a balanced mix of incentives, regulation, and a more targeted emissions performance standards plan) does not mean that the provinces acting in concert are unable to effectively reduce emissions.[65] The fact that provinces are always free to change their approaches cannot mean that the fourth *General Motors* requirement will always be met. As the Supreme Court noted, "it is in the nature of a federation that different provinces adopt their own unique approaches consistent with their unique priorities when addressing social or economic issues."[66]

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[64] *Securities Reference, supra* at paras. 70, 79, and 113-14; *Pan-Canadian Securities Reference*, *supra* at paras. 107 and 110-12
[65] *Securities Reference, supra* at para. 118
[66] *Securities Reference, supra* at paras. 119-20

70. Rather, the Court's concern was that the provinces acting in concert could not sustain a viable national scheme aimed at genuine national goals that were ***qualitatively*** different than matters subject to provincial jurisdiction. As discussed above, however, there is nothing ***qualitatively*** different and national about the cumulative dimensions of greenhouse gas emissions. The cumulative dimensions are simply the sum of the provinces' individual emissions, which the provinces can and have agreed to collectively reduce.[67]

71. Viewed in its entirety, the Act, for the same reasons that it is not supportable under the national concern doctrine, does not address "a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns." The regulation of a series of local industries is still the regulation of local industries, not trade as a whole. The Act cannot be supported under the general trade and commerce power.[68]

PART IV—ORDER SOUGHT

72. Ontario submits that this Court should answer the reference question as follows: "Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c.12, are unconstitutional in their entirety."

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 4TH DAY OF NOVEMBER, 2019

Josh Hunter Aud Ranalli

[67] *Securities Reference*, *supra* at paras. 121-22; *Pan-Canadian Securities Reference*, *supra* at paras. 113-14

[68] *Securities Reference*, *supra* at paras. 124-25; *Pan-Canadian Securities Reference*, *supra* at para. 116; *Labatt Breweries of Canada Ltd. v. Canada (AG)*, [1980] 1 SCR 914 at 941-44; *Canada (AG) v. Canadian National Transportation Ltd.*, [1983] 2 SCR 206 at 262-68 (Dickson J. concurring)

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13 (of OBA)	Gerald LeDain, "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall LJ 261	28
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14 (of OBA)	Katherine Swinton, "Federalism Under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 L. & Contemp. Probs. 121	18
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