C.A.No. CACV3239

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c C-29.01.

BETWEEN

ATTORNEY GENERAL OF SASKATCHEWAN

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

and

ATTORNEY GENERAL OF CANADA

Intervener Pursuant to Section 5(2) of *The Constitutional Questions Act, 2012*

and

ATTORNEY GENERAL OF ONTARIO

Intervener Pursuant to Section 6 of *The Constitutional Questions Act, 2012*

FACTUM OF THE ATTORNEY GENERAL OF SASKATCHEWAN

P. Mitch McAdam, Q.C. & Alan Jacobson
Agents for the Attorney General of Saskatchewan
820 - 1874 Scarth Street
REGINA SK S4P 4B3

INDEX

PART I - INTRODUCTION

1. This case is not about the risks posed to the country by climate change. This case is not even about whether a carbon tax is a good or a bad way to reduce the greenhouse gas emissions that fuel climate change. This case is fundamentally about the nature of our federation.

2. On June 21, 2018 Parliament enacted the *Greenhouse Gas Pollution Pricing Act*. This *Act* provides for the imposition of a carbon tax in those provinces and territories that have chosen not to implement their own carbon taxes. It is the Attorney General's position that the legislation is unconstitutional because it disregards fundamental principles of Canadian constitutional law, in particular, the principles of federalism. Each of the heads of power set out in sections 91 and 92 of the *Constitution Act, 1867*[1] must be read in light of the principles of federalism. These principles represent an overarching limit on the powers of both the federal and provincial governments. The Attorney General also says that the *Act* violates the constitutional principle of "no taxation without representation" enshrined in section 53 of the *Constitution Act, 1867* because it leaves fundamental questions about the application of the tax, such as which provinces and territories it will apply in, to the whim of the federal cabinet. Where these principles are ignored, the legislation is *ultra vires* and the courts, as the protectors of our Constitution, must intervene.

PART II - JURISDICTION

3. The Lieutenant Governor in Council commenced this reference case by Order-in-Council 194/2018 authorized under section 2 of *The Constitutional Questions Act, 2012*[2] on April 19, 2018. The Order-in-Council poses the following question to the Court for an advisory opinion:

> The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this *Act* be unconstitutional, in whole or in part?

---

[1] RSC 1985, Appendix II, No 5.
[2] SS 2012, c C-29.01, s 2.

PART III - SUMMARY OF FACTS

4. Saskatchewan joined with the federal government and all other provinces and territories in supporting the Vancouver Declaration on Clean Growth and Climate Change[3] on March 3, 2016. The Declaration committed the federal government, provinces and territories to work towards achieving reductions in national greenhouse gas emissions to 30% below 2005 levels by 2030. The Declaration expressly recognized the diversity of provincial and territorial economies and that provinces and territories should have flexibility in designing their own policies to meet the emissions reduction target. The Declaration acknowledged that carbon pricing mechanisms such as carbon taxes were one option for reducing emissions but did not prescribe that provincial policies had to include these mechanisms.

5. On October 3, 2016 the federal government released a document entitled "Pan-Canadian Approach to Pricing Carbon Pollution".[4] In this document, the federal government interpreted the commitments in the Vancouver Declaration as commitments by all provinces and territories to implement carbon pricing regimes. The document went onto set out a common set of rules for carbon pricing which was referred to as the "benchmark". In a nutshell, all jurisdictions were to have carbon pricing regimes in place by January 1, 2018. The scope of the regimes would be similar to British Columbia's existing carbon tax. The carbon price would start at $10 per tonne in 2018 and would increase by $10 per tonne each year until 2022, when it would be $50 per tonne. Most significantly for our purposes, the document went on to say that the federal government would introduce an explicit price-based carbon pricing system - ie, a carbon tax - that would apply in all jurisdictions that do not meet the benchmark. This was referred to as the federal backstop.

6. The Pan-Canadian Framework on Clean Growth and Climate Change[5] was announced on December 9, 2016. This document set out the federal government's plan to address climate

---

[3] Record of the Attorney General of Saskatchewan, Tab 1.
[4] Record of the Attorney General of Saskatchewan, Tab 2.
[5] Record of the Attorney General of Saskatchewan, Tabs 3 and 4.

change. It provided that carbon pricing is to be one of the central pillars of the plan. The Framework set out a carbon pricing benchmark that was identical to what had been set out in the document released on October 3, 2016. The Framework also repeated the threat of a federal backstop for those jurisdictions that did not adhere to the plan. Saskatchewan refused to sign the Framework.

7. In the spring of 2017, the federal government released a document entitled "Technical Paper on the Federal Carbon Pricing Backstop".[6] This document referred to the benchmark set out in the document from October 3, 2016 and made it explicit that the federal government intended to introduce new legislation and regulations to implement carbon pricing mechanisms – ie carbon taxes – for those provinces that did not adopt measures that met the benchmark. For jurisdictions, like Saskatchewan, that refused to implement carbon taxes, the backstop would fully apply. For jurisdictions that adopted carbon pricing regimes but who's mechanisms were not stringent enough to satisfy the benchmark, the backstop would supplement or "top up" those measures.

8. On June 15, 2017, the federal government announced the creation of the Low Carbon Economy Fund.[7] Under this Fund, $2 billion was committed to fund projects for reducing greenhouse gas emissions in Canada over the next five years. The bulk of this money – $1.4 billion dollars – is to be paid to provinces and territories. Saskatchewan's share of this money was earmarked at $62,050,000. However, Saskatchewan was excluded from participating in the Fund because of its refusal to sign onto the Pan-Canadian Framework and its refusal to impose a carbon tax. To date, the province has not been able to access any money from this Fund for projects in Saskatchewan.

9. Meanwhile, in December, 2017 Saskatchewan released its own climate change strategy. *Prairie Resilience: A Made-in Saskatchewan Climate Change Strategy*[8] outlines the steps that Saskatchewan will take to address climate change. These steps include a wide range of policies.

---

[6] Record of the Attorney General of Saskatchewan, Tabs 5 and 6.
[7] Record of the Attorney General of Saskatchewan, Tabs 7, 8 and 9.
[8] Record of the Attorney General of Saskatchewan, Tab 10.

However, the strategy does not include introducing a carbon tax. This issue is addressed at the outset of the document in the following terms:

> We wholeheartedly support efforts to reduce greenhouse gases. But those efforts must be effective and they must not disadvantage one region of Canada more than another. A federal carbon tax is ineffective and will impair Saskatchewan's ability to respond to climate change.
>
> Our opposition to the federal government's carbon tax should not be seen as reluctance to act. Rather, it is a recognition that we must act, and act decisively, with all our economic strength. For Saskatchewan, mitigation is not enough. Our agriculture and resource-rich province must also focus on climate adaptation and resilience in order to be effective.

10. On January 15, 2018 the federal government released a draft legislative proposal related to the federal backstop. This proposal became Part 5 of Bill C-74, an omnibus budget bill, which was introduced into Parliament on March 28, 2018 and ultimately received royal assent and became law on June 21, 2018 as the *Greenhouse Gas Pollution Pricing Act*.[9] The *Act* consists of two parts. The first part imposes a charge on the use of fuels such as gasoline, diesel and natural gas that are burned in "listed provinces". The second part provides carbon emission limits for businesses within certain industries in "listed provinces". If the limits are exceeded, the businesses will have to pay a charge or purchase credits from other businesses. Listed provinces are set out in Part 1 of Schedule 1 to the *Act*. The Governor in Council is given discretion to add or delete provinces from these lists by regulation. In formulating the lists, the Governor in Council is directed to ensure "that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" and is directed to take into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions." The key provisions of the Act, for the purposes of the reference case, are set out in Appendix "A".

11. The *Act* is unprecedented in Canadian history. It provides that where Provinces do not accept the policy of the federal government with respect to climate change and impose measures to deal with climate change that are satisfactory to the federal government, the federal Cabinet will step in and impose those measures for them. The result will be a federal carbon tax that

---

[9] *Budget Implementation Act, 2018, No 1*, SC 2018, c 12, Part 5 (Record of the Attorney General of Saskatchewan, Tab 11).

applies only in those Provinces that have not imposed their own carbon taxes or that have not imposed carbon taxes in a fashion satisfactory to the federal Cabinet. Saskatchewan has steadfastly refused to impose a carbon tax on its people and businesses. Therefore, the federal carbon tax will apply in Saskatchewan. It may only apply in Saskatchewan.

PART IV – POINTS IN ISSUE

12. The question posed by this reference is simply whether the *Act* is unconstitutional in whole or in part. The Attorney General acknowledges that this question is very wide. The question was deliberately stated this way because, at the time, the Attorney General was unaware of the constitutional authority that the federal government was relying upon to support the *Act*. While the federal Minister of Environment had stated publically that the government was relying on its authority over the environment and pollution to justify the *Act*,[10] under the Constitution these are not separate heads of power allocated to Parliament. Rather, the environment and pollution have been recognized as matters that may be subject to both federal and provincial laws. However, in each case, those laws must find a constitutional anchor in one of the specific heads of power set out in sections 91 and 92. There is no free standing federal jurisdiction over the environment or pollution.[11]

13. As indicated in the Statement of Particulars provided to the Court on June 15, 2018, it is the Attorney General's position that the *Act* imposes a carbon tax. The Attorney General says that this tax is constitutionally illegitimate because it applies only in provinces, like Saskatchewan, that have chosen not to implement their own carbon taxes. The federal carbon tax does not have uniform application across the country. It applies only in those Provinces that have not exercised their own jurisdiction in a way that the federal Cabinet thinks they should. It is the Attorney General's position that under our Constitution the federal government has no authority to second guess provincial decisions with respect to matters within provincial jurisdiction. Such a proposition is fundamentally at odds with the very nature of our federation. It

---

[10] Record of the Attorney General of Saskatchewan, No. 12: "Constitution gives Ottawa right to impose carbon price on provinces: McKenna", Canadian Press, May 18, 2017.

[11] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., Vol. 1, at pp 30-20 to 30-24.

represents the federal government taking a big brother or an "Ottawa knows best" role which was never envisioned by the framers of our Constitution and which strikes at the very bedrock foundations of our Constitution.

14. However, in the event that the Court finds the *Act*'s imposition of a carbon tax in only select provinces to be constitutionally valid, it is also submitted that the *Act* violates section 53 of the *Constitution Act, 1982* because it impermissibly delegates essential aspects of the taxing regime, such as which provinces and territories the tax will apply in, to the Governor in Council.

15. At the management conference held with the Court on June 4, 2018, counsel for the Attorney General of Canada indicated that she would be arguing that the *Act* is valid legislation under the national concern branch of the peace, order and good government (pogg) power contained in the opening words of section 91. No other head of power was mentioned as the rationale for the legislation. Given that the Attorney General is not aware of the specifics of Canada's pogg argument, this Factum will not address those issues. They will be addressed in the Attorney General's Reply Factum.

16. Therefore, the points in issue that will be addressed in this Factum are:

(a) Is there an unwritten constitutional principle that prevents the federal government from exercising its legislative jurisdiction in a way that singles out particular provinces for the application of federal laws in order to override decisions made by those provinces with respect to matters falling within their jurisdiction?

(b) Is the "charge" that consumers must pay under the *Act* with respect to their use of fuels like gasoline, diesel and natural gas a tax or a regulatory fee?

(c) Is the requirement of section 53 of the *Constitution Act, 1867* that Parliament must enact the substance of new taxing measures violated by the *Act*'s delegation to the Governor in Council of authority to determine essential aspects of the tax such as determining which provinces and territories the tax will apply in?

PART V - ARGUMENT

1. Recent Federalism Cases in the Supreme Court

17. The starting point for consideration of issues raised by this case is the Supreme Court's decision in *Reference re Secession of Quebec.*[12] In that case, the Court indicated that our Constitution contains unwritten as well as written principles.[13] These principles inform and sustain the Constitution. They were described by the Court as the very life blood of the Constitution. They can be relied upon to assist in interpreting the written text.

18. The Court went on to identify four fundamental unwritten principles that form the foundation of our Constitution. They are federalism; democracy; constitutionalism and the rule of law; and respect for minorities. For our purposes, the principles of federalism are obviously the most significant. The Court indicated at para 37 that the significance of the adoption of the federal system in Canada could not be exaggerated. At para 56, the Court described federalism as the "lodestar" of our constitutional structure.

19. The Court indicated that each level of government is sovereign in its assigned areas of jurisdiction. Each level of government is autonomous from the other within these areas. The Court indicated that these spheres of autonomy are guaranteed by the Constitution.

20. The concepts of provincial sovereignty and autonomy are not new. The Supreme Court discussed these principles in *Reference re Senate Reform*[14] in 2014. The Court affirmed that the interpretation of the Constitution's specific provisions must be informed by the foundational principles of the Constitution, such as federalism. In discussing the amending formulas enshrined in Part V of the *Constitution Act, 1982*, the Court said as follows:

---

[12] [1998] 2 SCR 217.
[13] See also, *Reference re Resolution to Amend the Constitution* [1981] 1 SCR 753 at 821 – 824; 840 – 841 and 905 - 906; *Reference re: Manitoba Language Rights* [1985] 1 SCR 721 at p 752.
[14] 2014 SCC 32, [2014] 1 SCR 704.

> The "underlying purpose" of these documents is "to constrain unilateral federal powers to effect constitutional change": P.J. Monahan and B. Shaw, *Constitutional Law* (4th ed. 2013), at para 204; *Supreme Court Reference* at paras. 98-100. They also consecrate the principle of "the constitutional equality of the provinces as equal partners in Confederation": *Constitutional Accord: Canadian Patriation Plan*, General Comment in Part A at p. 1.[15]

21. Earlier this year, the Supreme Court revisited the principles of federalism in *R v Comeau*.[16] The issue in that case concerned the meaning of section 125 of the *Constitution Act, 1867*. The Respondent argued that section 125 should be interpreted as imposing a free-trade regime on Canada. The Supreme Court disagreed. In reaching its conclusion, the Court relied on the principles of federalism as an interpretive tool and ultimately concluded that the full economic integration called for by the Respondent's interpretation of section 125 would curtail the freedom of action and the sovereignty guaranteed to the Provinces by the Constitution. The Court concluded that section 125 had to be interpreted in a way that provides space for each Province to regulate its own economy in a way that reflects local interests. The Court refused to accept an interpretation that would subsume provincial powers or eviscerate them. A jurisdictional balance was required and this was the most important consideration.

22. The Supreme Court's concern for the balance of the federation was also evident in its judgment in *Reference Re Assisted Human Reproduction Act*[17] in 2010. In this case the majority emphasized that the powers of the different levels of government in our federation are coordinate, not subordinate, powers. The majority also made the following apposite statement:

> In short, care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis. Be it in identifying the pith and substance of a statute or a provision or in reviewing the limits of an assigned power or of the exercise of an ancillary power, the courts must bear the importance of the unwritten constitutional principles in mind and must adhere to them.[18]

---

[15] *Ibid* at para 31 [emphasis added].
[16] 2018 SCC 15.
[17] 2010 SCC 61, [2010] 3 SCR 457.
[18] *Ibid* at para 196 [emphasis added].

23. The Court made similar comments in *Reference re: Securities Act*[19] in 2011. In determining whether Parliament had jurisdiction to create a national securities regulator pursuant to its power over trade and commerce under section 91(2), the Court said as follows:

> In the delineation of the scope of the general trade and commerce power, courts have been guided by fundamental underlying constitutional principles. The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlie the Constitution (*Secession Reference,* at para 58, citing *Re the Initiative and Referendum Act*, [1919] AC 935 (PC), at. 942).
>
> The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism – the recognition of the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction. As stated in the *Secession Reference*, "[T]he federal structure of our country also facilitates democratic participation by distributing power to the governments thought to be most suited to achieving the particular societal objective having regard to this diversity" (para 58).[20]

24. The Supreme Court has also recently endorsed the principle of subsidiarity as an interpretive tool for the division of powers. This principle provides that, whenever possible, the division of powers should be interpreted to provide the government closest to the citizens affected and most responsive to their needs with jurisdiction over the matter in issue.[21] With respect to regulating carbon emissions by individuals and businesses, this is clearly the provincial governments. In fact, regulations with respect to the release of carbon (ie, smoke) into the atmosphere have existed for centuries and have always been considered to be a local matter.[22]

---

[19] 2011 SCC 66, [2011] 3 SCR 837.
[20] *Ibid* at paras 71, 73 [emphasis added].
[21] *Reference re: Assisted Human Reproduction Act*, *supra*, note 16, at para 183; see also, Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21.
[22] Record of the Attorney General of Saskatchewan, No. 13: "History of Air Pollution in the UK" (27 July 2018), online: <http://www.air-quality.org.uk/02.php>; Record of the Attorney General of Saskatchewan No. 13A: Carlos Flick, *"The Movement for Smoke Abatement in 19th Century Britain"* (1980) 21 Technology and Culture 29; Record of the Attorney General of Saskatchewan, No. 13B: *Smoke Nuisance Abatement Act*, 16&17 Vict (1853) c. 128.

2. Privy Council Cases on Federalism

25. The Privy Council recognized very early on in its jurisprudence concerning the Canadian Constitution that the Provinces were sovereign and autonomous within the areas of jurisdiction assigned to them by the *Constitution Act, 1867* and have the right to make decisions with respect to these matters without their decisions being second guessed or overridden by the federal government. For example, in *Hodge v The Queen* in 1883, Sir Barnes Peacock described provincial powers as follows:

> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.[23]

26. Similarly, in *Reference re The Initiative and Referendum Act* in 1919, Viscount Haldane said as follows:

> The scheme of the Act passed in 1867 was thus, not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Province should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head. Within these limits of area and subjects, its local Legislature, so long as the Imperial Parliament did not repeal its own Act conferring this status, was to be supreme, and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it

[23] (1883-84) 9 AC 117 at 132 [emphasis added].

handed them over to the Dominion and the Provinces, in accordance with the scheme of distribution which it enacted in 1867.[24]

3. Preamble to the *Constitution Act, 1867*

27. In the *Quebec Secession Reference*, the Supreme Court refers to the principles of federalism as unwritten principles of the Constitution.[25] These principles are, in fact, expressly set out in the Constitution. Not only are they manifested in the distribution of legislative powers set out in sections 91 to 95 of the *Constitution Act, 1867*, they are expressly referred to in the preamble to the *Act* which reads as follows:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principal to that of the United Kingdom…"[26]

28. The preamble to the *Constitution Act, 1867* was recognized in *Provincial Judges Reference* to be an articulation of the political theory which the *Act* embodies and was held to be a useful guide to the interpretation of the specific provisions of the Constitution.[27] The preamble sets out the mandate that Canada is to be a federal state.[28] All other provisions of the *Act* must be interpreted with this theory foremost in mind.

4. Historical Evidence of Framers' Intention

29. The Attorney General also relies on the historical evidence concerning the intention of the framers of the *Constitution Act, 1867*. As indicated in *Comeau*, constitutional provisions

---

[24] [1919] AC 935 at 942 [emphasis added].
[25] *Supra* note 12 at para 32.
[26] *Supra* note 1 [emphasis added].
[27] *Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re: Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 95 [*Provincial Judges Reference*].
[28] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, at pp 375 – 378.

must be interpreted in their linguistic, philosophic and historical contexts.[29] The historical evidence is an important part of the interpretive exercise although the Attorney General readily acknowledges that this historical evidence is not conclusive. Nevertheless, in the Attorney General's submission the historical evidence supports the view that Canada was intended to be a federal state with a strong federal government and with strong provincial governments, each intended to act independently within the realms of their respective jurisdictions. While the federal government could play a limited supervisory role over the exercise of jurisdiction by the Provinces by exercising the power of disallowance set out in sections 56 and 90 of the *Act*, this power has long ago fallen into disuse and even this power did not authorize Parliament or the federal Cabinet to step in and makes the laws for individual provinces that they thought the provinces should be adopting.

30. The follow excerpt from a speech by Sir John A. MacDonald during the Confederation Debates[30] reflects the agreement that was ultimately reached and the importance of the principles of federalism:

> The Conference having come to the conclusion that a legislative union, pure and simple, was impracticable, our next attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union. And I am strong in the belief -- that we have hit upon the happy medium in those resolutions, and that we have formed a scheme of government which unites the advantages of both, giving us the strength of a legislative union and the sectional freedom of a federal union, with protection to local interests.[31]

31. The importance of provincial jurisdiction was stated by Hector Louis Langevin in the Confederation Debates in the following terms:

---

[29] *Supra* note 16 at para 52. See also *Hunter v. Southam Inc.*, [1984] 2 SCR 145 at 155-56; *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 344.

[30] With respect to the admissibility of the Confederation Debates, see *Reference re: Senate Reform, supra*, note 14, at paras 14 – 15 and *Quebec Secession Reference, supra*, note 12, at paras 33 – 48.

[31] *Parliamentary debates on the subject of the confederation of the British North American provinces*, 3rd session, 8th Provincial Parliament of Canada, Quebec: Hunter, Rose & Co., Parliamentary Printers, 1865, at pp 25 - 45 per Hon. J.A. MacDonald, Attorney General West on February 6, 1865 [emphasis added]; Record of the Attorney General of Saskatchewan, Tab 14.

> I may add that, under Confederation, all questions relating to the colonization of our wild lands, and the disposition and sale of those same lands, our civil laws and measures of a local nature – in fact, everything which concerns and affects those interests which are most dear to us as a people, will be reserved for the action of our local legislature.[32]

32. The Report of the Royal Commission on Dominion-Provincial Relations, commonly referred to as the Rowell-Sirois Report, from 1939[33] contains a useful discussion of the principles of federalism and the historical and legal arguments for and against a strong central government versus strong provincial governments. Interestingly, the Commission ultimately recommended the transfer of some provincial powers to the federal government, but was careful to highlight that its aim was always "to safeguard the autonomy of the provinces, and to ensure to each province the ability to decide issues of peculiar importance to itself." The Commission's discussion of taxing powers is also relevant. The Commission recommended the adoption of new national programs like unemployment insurance which would be funded by federal tax dollars. But the Commission emphasized that these new federal taxes would have to be applied on a uniform basis and would have to treat the residents of all provinces equally. It is submitted that in making these statements the Commissioners were not proposing something new or radical but rather were simply expressing the existing limits on federal taxing powers that flow out of the principles of federalism.

5. Provincial Autonomy and Need for Uniformity in Federal Laws

33. The Privy Council and the Supreme Court have both clearly recognized that provinces are "autonomous" within their realms of jurisdictional authority. But what does this provincial autonomy mean? The Attorney General relies on the definition provided by Louis Philippe Pigeon in an article that appeared in the Canadian Bar Review in 1951.[34] Professor Pigeon, who later became a Justice of the Supreme Court of Canada, defined constitutional autonomy in the

---

[32] *Ibid.*, at pp 362 – 378 per Hon. H. L. Langevin, Solicitor General East on February 21, 1865; Record of the Attorney General of Saskatchewan, Tab 15; see also, *Ibid.*, at pp 84 – 100 per Hon. George Brown, President Executive Council on February 8, 1865; Record of the Attorney General of Saskatchewan, at Tab 16.

[33] Newton Rowell & Joseph Sirois, *Report of the Royal Commission on Dominion-Provincial Relations, Book 1 – Canada: 1867 – 1939*, Government of Canada Publications, 1939 (Record of the Attorney General of Saskatchewan, Tab 17).

[34] Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy" (1951) 29 Can B Rev 1126.

Canadian federation as provinces being free to define their own policies within their own spheres of jurisdiction without being obligated to conform to policies set down by the central government. This is what federalism means – the freedom to adopt policies with respect to those matters falling within provincial jurisdiction without having those policies second guessed or overridden by the federal government. This is the very essence of Canadian federalism.

34. It is the Attorney General's position that the principles of federalism are an overarching limit on the federal government's powers under section 91. The federal government is not constitutionally entitled to exercise these powers in ways that are contrary to the principles of federalism. One manifestation of these principles is that federal laws should, generally speaking, have uniform application across the country. Parliament was given jurisdiction over the matters set out in section 91 by the framers because of their national significance and the need for uniform laws. Federal laws that apply in only one Province, but not in others, may be constitutionally suspect. If there is no need for a uniform national law, but rather there is only a need for a law that applies in one or two Provinces, the matter likely falls under provincial powers, not federal powers. This accords with the underlying logic of the division of powers.

35. This need for uniformity is demonstrated by one of the earliest decisions of the Privy Council concerning the Canadian Constitution – *Russell v The Queen* in 1882.[35] The issue in that case was whether Parliament could enact legislation to implement prohibition across the country. The legislation provided for prohibition to come into force in municipalities only after approval by a local vote. The Privy Council upheld the law as a valid exercise of the federal criminal law power and emphasized that the law applied uniformly across the country. The clear implication of this decision is that if the legislation had applied in only one or two provinces, it would have been struck down as dealing with "local matters" falling under the jurisdiction of the provinces.

36. The *Johnny Walker* case from 1923[36] is also relevant. The issue in this case was whether provinces and provincial agents were required to pay federal customs duties, excise taxes and sales taxes on alcohol imported into the country. The Privy Council held that they were, but included a very important caveat in its reasons. The Privy Council said that the federal laws

---

[35] (1881-82) 7 AC 829.

[36] *Attorney General of British Columbia v Attorney General of Canada*, [1924] AC 222 [*Johnny Walker*].

were constitutionally applicable but only to the extent that "there is no partiality in their operation."[37] Partiality must, in this context, mean that a federal law which singles out a particular province or provinces for its application operates impartially and is therefore beyond federal competence.

37. The proposition that Parliament cannot generally speaking enact legislation for a specific province is also reflected in the Privy Council's decision in *Attorney General of Ontario v Attorney General for the Dominion* from 1896.[38] One of the issues in this case concerned the validity of a provision of the *Canada Temperance Act* which purported to repeal pre-confederation legislation that applied only in Upper Canada. The Privy Council held that it was beyond Parliament's jurisdiction to repeal this legislation. The relevant passage reads as follows:

> The old *Temperance Act* of 1864 was passed for Upper Canada, or, in other words, for the Province of Ontario; and its provisions, being confined to that Province only, could not have been directly enacted by the Parliament of Canada. In the present case the Parliament of Canada would have no power to pass a prohibitory law for the Province of Ontario; and could therefore have no authority to repeal in express terms an act which is limited in its operation to that Province. In like manner, the express repeal, in the *Canada Temperance Act* of 1886, of liquor prohibitions adopted by a municipality in the Province of Ontario under the sanction of provincial legislation, does not appear to their lordships to be within the authority of the Dominion Parliament.[39]

38. The Attorney General does not, however, take the position that there is a bright line constitutional rule that all federal laws must have uniform application across the country. Federal laws should be able to take into account social and economic differences that arise in a country as vast as Canada. However, Attorney General says that it is a constitutional imperative that the federal government cannot condition the application of its laws in particular provinces based on how the Province has chosen to exercise its own legislative jurisdiction. This is constitutionally illegitimate. It fails to respect the autonomy that the Provinces are guaranteed by the Constitution.

---

[37] *Ibid* at 225.
[38] [1896] AC 348.
[39] *Ibid* at 367 [emphasis added].

39. Therefore, in this case, the Attorney General would have no constitutional objection if the federal government adopted a national carbon tax that applied uniformly all across the country. The Attorney General would also have no constitutional objection if the national carbon tax provided for variations based on objective criteria. The Attorney General's fundamental objection to the application of the federal carbon tax is that it is directly tied to how Provinces have chosen to exercise or not exercise their own legislative jurisdiction. The carbon tax will apply in Saskatchewan only because the Government of Saskatchewan has decided not to impose its own carbon tax. This is constitutionally illegitimate.

40. There have been very few cases over the years dealing with the propriety of federal legislation that applies selectively in some provinces, but not others. Two recent cases of note are *R v Sheldon S.*[40] and *Haig v Canada.*[41] In *Sheldon S.*, the accused challenged Ontario's decision not to adopt an alternative measures regime for young offenders under federal legislation. This meant that alternative measures were not available to the accused, while they were available to young offenders in other provinces. The challenge was based on section 15 of the *Charter*. In *Haig*, the challenge was to federal legislation that provided for a referendum on the Charlottetown Accord in all provinces except Quebec. The federal government chose to not have a referendum in Quebec because Quebec had already announced that it was having a referendum on the Charlottetown Accord on the same day. Haig had recently moved to Quebec from Ontario and did not satisfy the residency requirement to vote in the Quebec Referendum. Therefore, he had no right to vote in either referendum. He challenged the federal legislation under section 15 of the *Charter*. In the course of her judgment in *Haig*, L-Heureux-Dube J. adopted the following comments made by Dickson C.J. in *Sheldon S.*:

> It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by sections 91(27) and 92(14) of the *Constitution Act, 1867*. The area of criminal law and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates the diversity in the criminal law, in terms of provincial application, has been recognized consistently

[40] [1990] 2 SCR 254 [*Sheldon S.*].
[41] [1993] 2 SCR 995 [*Haig*].

> as a means of furthering the values of federalism. Differential application arises from recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.[42]

41. It is submitted that neither of these decisions can be extrapolated into an unfettered constitutional right for Parliament to apply its laws in some provinces but not others. In particular, the Attorney General points out neither case dealt squarely with division of powers issues. They were both *Charter* cases. Furthermore, the specific context of the cases must be kept in mind. In *Sheldon S.*, the issues concerned the criminal law and the administration of justice, areas where the Constitution recognizes a role for both levels of government. In *Haig*, the issues related to a referendum in which the federal government was consulting citizens about important questions of public affairs. In neither case was the issue related to federal legislation that was being imposed on a province against its will or in response to a province's failure to exercise its legislative jurisdiction in a particular way thought desirable by the federal government. As noted by Dickson C.J., the Constitution should always be interpreted in a way that "encourages federal-provincial cooperation".

6. Nova Scotia Inter-Delegation Case

42. It is the Attorney General's position that the *Act* imposes a local tax on consumers of carbon in Saskatchewan. Parliament does not have jurisdiction under section 91(3) to impose local taxes. Only provincial legislatures have this power. The issues are somewhat analogous to the ones considered by the Supreme Court in the *Nova Scotia Interdelegation* case in 1950.[43] The issue in that case concerned the constitutionality of proposed legislation which would have authorized Nova Scotia to delegate some of its jurisdiction over employment matters to Parliament and for Parliament to delegate some of its jurisdiction over indirect taxation to the province. The Court held that such a scheme was contrary to the principles of federalism embodied in the *Constitution Act, 1867* and was unconstitutional. During the course of his judgment in the case, Rinfret C.J. made the following relevant comments:

---

[42] *Supra* note 40 at 289-90.
[43] *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31.

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate only on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are only entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.[44]

7. Pith and Substance Analysis

43. The Attorney General acknowledges that the general approach to determining the constitutionality of legislation begins with a pith and substance analysis. The Court must determine the true meaning of the legislation by examining its purposes and its legal and practical effects and must then slot the matter into the appropriate head of power under section 91 or section 92.[45] However, the Attorney General suggests that it is not necessary for the Court to engage in a pith and substance analysis in this case because the legislation is constitutionally illegitimate on a more fundamental basis. The legislation is constitutionally illegitimate because it flies in the face of the principles of federalism irrespective of its pith and substance.

44. However, even if a traditional pith and substance analysis is conducted, it is submitted that the *Act* does not fall within federal powers. The *Act* contains two parts and they must be assessed separately. Part 1 imposes a carbon tax on consumers. The Attorney General readily acknowledges that Parliament has the jurisdiction to enact legislation implementing a national carbon tax under section 91(3). However, it is submitted that the pith and substance inquiry cannot be divorced from the geographical scope of the legislation. Therefore, while the pith and substance of legislation imposing a national carbon tax would bring the legislation within section 91(3), what is important in this case is that both the purpose and the effects of the legislation is to

---

[44] *Ibid* at 34 [emphasis added].

[45] See *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 25 – 32, [2007] 2 SCR 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, [2002] 2 SCR 146, at paras 52 - 54.

impose a carbon tax only in Saskatchewan and in other provinces that do not meet the federal benchmark.

45. Furthermore, it is well established that the federal government cannot use its taxation power as a guise to regulate matters within provincial jurisdiction.[46] This was precisely the issue considered by the Privy Council in *Re: the Insurance Act of Canada* in 1931 where Viscount Dunedin said as follows:

> Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall.
>
> ...
>
> Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the *Reciprocal Insurers'* case. (1) He says: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s.91, head 3," and for the word "criminal" substitute "taxing", the sentence expresses precisely their Lordships' views.[47]

46. With respect to Part 2 of the *Act*, the purpose of the legislation is to impost carbon emission limits on businesses within specific industries in Saskatchewan, like the oil and gas industry. The effect of the legislation will be to cause these businesses to change some of their business practices in order to reduce their carbon emissions, to reduce the amount of business that they do in order to stay under their emissions limit or to increase the prices that they charge to their customers in order to recoup the charges that they have to pay under the *Act*. The question is then which head of power does this legislation fall under? The Attorney General

---

[46] See Gerard V. LaForest, *The Allocation of Taxing Power under the Canadian Constitution* (Canadian Tax Foundation, 1967) wherein the author notes at p 31 that "[t]he comprehensive reach of section 91(3) indicates that no limitations should be imposed on the power except such as are clearly spelled out or inhere in the federal structure of the constitution." [emphasis added]

[47] [1932] AC 41 at 52-53.

submits that the answer to this question is clear – the *Act* imposes the type of detailed industrial regulation on specific businesses that has always been considered to fall under provincial jurisdiction under sections 92(10), 92(13) and 92(16) of the *Constitution Act, 1867*. While the purpose of the legislation may be aimed at reducing carbon emissions, the effect of the legislation is a massive intrusion by the federal government into an area of jurisdiction that has always been provincial. Therefore, under a traditional pith and substance analysis, the legislation is *ultra vires*.

8. Manitoba's Legal Opinion

47. The Government of Manitoba commissioned a legal opinion on the constitutionality of the federal carbon pricing benchmark and backstop proposals from Dr. Bryan Schwartz of the University of Manitoba. Schwartz's opinion was released publically by Manitoba on October 17, 2017.[48] While Schwartz concluded that the federal government likely had jurisdiction to impose the backstop on recalcitrant provinces, he also suggested that credible arguments exist to challenge the constitutionality of the backstop. He said that there is an argument that the federal government's scheme is unconstitutional because it ignores the underlying principle of the equality of the provinces which was recognized in the *Senate Reference*. While he acknowledges that the case law suggests that federal laws do not have to apply uniformly throughout the country, he suggested that where federal laws are applied in different provinces arbitrarily, it could be argued that the legislation is unconstitutional. In this case, he suggested that the application of the backstop in Manitoba could be said to be arbitrary because the federal government was not respecting Manitoba's initiatives to reduce greenhouse gas emissions which would be just as effective as a carbon tax. The Attorney General accepts and adopts Schwartz's argument that the scheme is unconstitutional, with one variation. The Attorney General says that where the differential treatment is based not on varying social or economic conditions among the provinces but rather is based on how a province has chosen to exercise its legislative jurisdiction with respect to the matter, the legislation is *per se* unconstitutional. There is no need for the Court to weigh the relative merits of the various approaches to determine if the federal government is acting arbitrarily. Whether provincial measures will be as effective as federal

[48] Record of the Attorney General of Saskatchewan, Tabs 18 and 19.

measures is not the test. Whether the federal government is respecting provincial autonomy with respect to matters within their jurisdiction is the test.

9. Antithesis of Co-operative Federalism

48. The Supreme Court has acknowledged many times over the years that the Constitution should be interpreted in a way that enhances cooperative federalism. Under a constitution where jurisdictions often overlap, cooperative efforts will be necessary in order to fully and adequately address issues that involve the jurisdiction of both levels of government. Marketing schemes for agricultural products and interprovincial trade agreements are two examples of these types of cooperative efforts. The Attorney General submits that addressing the issues associated with climate change is a matter that calls for federal and provincial cooperation. The *Act,* however, is the antithesis of cooperative federalism. It represents the unilateral imposition by the federal government of its preferred approach to dealing with the issues on unwilling provinces like Saskatchewan. The Attorney General recently argued in the *Quebec Securities Act Reference* in the Supreme Court that the courts should show deference to voluntarily agreed upon approaches to dealing with jurisdictional issues where both levels of government have an interest, like securities regulation. However, it is submitted that exactly the opposite applies here – the Court should show no deference to unilateral approaches with respect to matters that clearly cry out for cooperative measures. There will, quite simply, be no need for cooperative federalism if the federal government can unilaterally pursue its policy objectives with respect to matters falling within provincial jurisdiction without the need for the willing and voluntary participation of the provinces. As noted in the *Quebec Secession Reference*, the principles of federalism mean that provinces are allowed to pursue their own policies with respect to matters within their legislative jurisdiction in ways that reflect the concerns and interests of the people in the province.[49]

49. The Attorney General also submits that cooperative federalism must be understood to include the right not to cooperate. This is demanded by the very nature of our federation and was recognized by the Supreme Court in *Quebec (Attorney General) v Canada (Attorney General)* in

---

[49] *Supra* note 12 at para 66.

2015.[50] Therefore, even if the federal government and nine other provinces had agreed to deal with climate change by certain measures, to the extent that those measures fall within provincial jurisdiction, a hold-out province is entitled to chart its own course. Nothing less will satisfy the principle that provinces are sovereign and autonomous within the realms of their jurisdiction and that neither level of government is subordinate to the other. One of the virtues of a federal system is that individual provinces can act as "social laboratories" and can test out new social programs, like medicare, to see how they work before the programs are adopted by others.[51] Federalism recognizes that there may be more than one way to solve problems and that "one size fits all" approaches are not necessarily the best.

50. The Attorney General submits that the Court should not be swayed by arguments about the importance of climate change in today's world. Legislative jurisdiction under our Constitution is not determined by the importance of the matter. As noted in *Quebec (Attorney General) v Canada (Attorney General)*, competing views about the merits of Parliament's policy choices are not the issue.[52] While the need for uniform and national standards may be seen as desirable by the federal government, as pointed out in *Reference re: Assisted Human Reproduction Act*, this wish cannot overcome the division of powers.[53] Nor, as pointed out in *Comeau*, can the desirability of particular policies or the federal government's perception of what is good for the country.[54] Maintaining the jurisdictional balance of the division of powers is always more important.

10. Taxation or Regulatory Charge?

51. The *Act* does not refer to a tax on carbon. Rather, it speaks of a "charge" on carbon. Federal officials have denied publically that the *Act* imposes a carbon tax[55] and, at the

---

[50] 2015 SCC 14, [2015] 1 SCR 693 at paras 15 - 21.
[51] Peter W. Hogg and Wade K. Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38.2 UBC Law Review 329 at 343.
[52] *Supra* note 50 at para 3.
[53] *Supra* note 17 at para 206.
[54] *Supra* note 16 at para 83.
[55] Record of the Attorney General of Saskatchewan, No. 20: "It's not a carbon tax, it's a 'behavior-changing measure': government officials" Global News, May 18, 2017 and No. 21: House of Commons Debates, Vol 148, No. 279 at p 18317 (April 6, 2018 per Mr. Joel Lightbound, Parliamentary Secretary to the Minister of Finance, during debate on second reading of the *Budget Implementation Act, 2018*.

management conference held on June 4, 2018, counsel for the Attorney General of Canada did not suggest that she would be relying on Parliament's power to impose taxes under section 91(3) as the basis for the legislation, but rather, indicated that she would be relying exclusively on the national concern branch of the pogg power. Nevertheless, it is the Attorney General's position that the *Act* imposes a carbon tax on consumers. Furthermore, it is the Attorney General's position that while the constitutional principle that the federal government cannot condition the application of its legislation to individual provinces based on how those provinces have chosen to exercise their own jurisdiction is a principle of general application that applies to all of the heads of power set out in section 91, the principle has particular application with respect to the exercise of Parliament's taxing powers. The authority to tax is one of the most powerful tools that governments possess. As noted by Laforest J. in the *GST Reference*, the power to tax is the power to destroy.[56] The potential for misuse of a power to tax in one province, but not others, is manifestly apparent. The power to tax therefore must be confined to its strict constitutional limits.

52. It is anticipated that the Attorney General of Canada will argue that the charges imposed by the *Act* on consumers are not taxes but rather are simply regulatory charges. The Attorney General submits that this characterization will not withstand scrutiny. First, from the perspective of the consumer at the gas pumps, the charges operate exactly like any other tax. Second, the legal test developed by the Supreme Court to distinguish between taxes and regulatory charges also suggests that the charges are in fact and in law taxes.

53. Whether the impost is called a "charge" or a "tax" is of no moment. In recent years, the Supreme Court has held that Ontario's probate fees were in fact taxes[57] and that Canada's employment insurance premiums in 2002, 2003 and 2005 were in fact taxes.[58] The leading case with respect to the constitutional distinction between taxes and regulatory charges is *Westbank First Nation v British Columbia Hydro and Power Authority*.[59] The issue in that case concerned whether BC Hydro was required to pay assessments imposed by the First Nation pursuant to its

---

[56] *Reference re: Goods and Services Tax*, [1992] 2 SCR 445 at 497 [*GST Reference*].
[57] *Re: Eurig Estate*, [1998] 2 SCR 565.
[58] *Confédération des Syndicats Nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511.
[59] [1999] 3 SCR 134; see also *Ontario Home Builders Association v. York Region Board of Education* [1996] 2 SCR 929 at paras 34 – 67 and *620 Connaught Ltd. v. Canada (Attorney General)* 2008 SCC 7, [2008] 1 SCR 131.

powers under the *Indian Act*. If the assessments were taxes, BC Hydro, as an agent of the provincial Crown, was constitutionally exempt by virtue of section 125 of the *Constitution Act, 1867*. On the other hand, if the assessments were regulatory charges, BC Hydro was required to pay.

54. The Court began at para 21 by setting out the traditional hallmarks of a tax – a compulsory levy that is imposed by law by a public authority for a public purpose. This is a very wide definition that could embrace practically all monies extracted by governments from their citizens. The Court then noted that levies that arise in the regulatory context are not constitutionally considered to be taxes. This rule was developed largely in the context of provincial regulatory charges that were said to constitute indirect taxes and, therefore, were alleged to be beyond the province's jurisdiction under section 92(2) of the *Constitution Act, 1867*. The distinction is irrelevant to the federal government because it can levy both direct and indirect taxes. At para 24, the Court discussed the criteria that identify regulatory regimes. The criteria include a clear regulatory purpose, a complete and detailed code of regulation and a clear relationship between the person regulated and the regulated activity. The Court also indicated that regulatory charges are used to offset the costs of the regulatory scheme. They cannot be used to raise revenue. If they are, they are taxes.

55. It is the Attorney General's position that Part one of the *Act* imposes a tax on consumers. All of the traditional hallmarks of a tax are present – consumers of carbon are required to pay money to the state under the compulsion of law. Furthermore, it is noteworthy that Part one of the *Act* is administered by the Minister of Finance. The monies collected are paid into the Consolidated Revenue Fund. Any disputes with respect to the payment of the charges are to be adjudicated upon by the Tax Court of Canada. These aspects of the scheme all point to the charges being in fact and in law taxes.

56. It is anticipated that the Attorney General of Canada will make two arguments to say that the charges are in fact regulatory charges and not taxes. First, that the charges are simply part and parcel of a broader regulatory scheme encompassed by Part two of the *Act*. The Attorney General's response to this argument is, as argued earlier, that the scheme to reduce carbon emissions by businesses in Saskatchewan set out in Part two of the *Act* is clearly *ultra vires*. It

has long been recognized that under our Constitution the regulation of businesses is primarily a local matter that falls under provincial jurisdiction. This broad principle applies just as much to businesses that emit carbon as it does to insurance, securities or the provision of health services. An unconstitutional regulatory regime cannot provide the basis for imposing valid regulatory charges. However, even if the regulatory parts of the *Act* were found to be constitutional, there is simply no connection between the regulation of businesses called for by Part two of the *Act* and the taxation of consumers under Part one of the *Act.* The two parts of the *Act* are separate and distinct just like the different parts of the *Assisted Human Reproduction Act* were separate and distinct, Consumers are not being regulated in any way. They are only being asked to pay a tax. The *Act* contains no provisions aimed at reducing the amount people drive their cars or how warm they keep their houses in the winter. Consumers of carbon are simply not part of any regulatory regime.

57. Second, it is anticipated that the Attorney General of Canada will argue that it is not necessary for the charges to be part of a regulatory regime because the charges are intended to alter the behavior of people and this is, in and of itself, sufficient to make the charges something other than a tax. The Attorney General urges the Court to resist the notion that the federal government can avoid all of the implications of a tax, such as sections 53 and 125 of the *Constitution Act, 1867,* simply by asserting that the purpose of a levy is to change someone's behaviour. To do so would largely wipe out the distinction between taxes and regulatory charges in the federal sphere and goes far beyond anything recognized in previous cases dealing with per tonne charges on landfill waste[60] and refundable deposits on pop bottles and beer cans.[61] There is no warrant to see the charges as anything other than what they really are – taxes.

58. It is also anticipated that the Attorney General of Canada will argue that the charges are not taxes because the legislative scheme is designed to be "revenue neutral". Under section 165(2) of the *Act,* the net amount of all charges collected are to be paid out to either the province where they were collected or to prescribed persons. It is submitted that this does not change the essential nature of the charges as taxes. How Parliament choses to spend the tax dollars it raises

---

[60] *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371.
[61] *Cape Breton Beverages Ltd. v Nova Scotia (Attorney General)* (1997), 144 DLR (4th) 536, 1997 CanLII 9915 (NSSC).

does not determine whether the money was collected as a tax or a regulatory charge. The Alberta Court of Appeal considered a similar issue in *Winterhaven*[62] and held that tax revenues collected by the federal government and paid over to the provinces remained federal taxes under section 91(3) of the *Constitution Act, 1867*. The situation is the same here. The fact that the federal government has chosen to pay out the revenue collected from the charges to Provinces and individuals is simply a decision about how to spend the money that it collects. Furthermore, this aspect of the *Act* demonstrates that it is really about redistributing wealth, which is typically a consideration for tax regimes, and not the goal of a regulatory regime.

11. Section 53 of the *Constitution Act, 1867*

59. It is further submitted that the carbon tax imposed on consumers in Saskatchewan by the *Act* is unconstitutional because it constitutes "taxation without representation" contrary to section 53 of the *Constitution Act, 1867*. Section 53 provides as follows:

> 53.Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

60. The principles enshrined in section 53 and their background were described by Rothstein J. in *620 Connaught Ltd. v Canada (Attorney General)* as follows:

> [4] Central to our concept of democracy is the principle that the Crown may not levy a tax except with the authority of Parliament or the legislature. This principle harkens back to the *Bill of Rights of 1689*, I Will. & Mar. sess. 2, c. 2, art. 4, and ensures not only "that the executive branch must call the legislative branch into session to raise taxes (and vote supply)" (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 246
>
> [5] This principle is found in s. 53 of the *Constitution Act, 1867*, which mandates that bills imposing any tax shall originate in the House of Commons. In *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 Major J. explained the rationale underlying s. 53 at paras. 30-32:
>
> > The provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature. My interpretation of s. 53 does not prohibit Parliament or the legislatures

[62] *Winterhaven Stables Limited v Canada (Attorney General)*, 1988 ABCA 334, [1989] 1 WWR 193 [*Winterhaven*].

> from vesting any control over the details and mechanism of taxation in statutory delegates such as the Lieutenant Governor in Council. Rather it prohibits not only the Senate, but also any other body other than the directly elected legislature, from imposing a tax on its own accord.[63]

61. Section 53 reflects the fact that the imposition of taxation, as noted earlier, is one of the most powerful tools possessed by governments. The imposition of taxes is an act of "unique political significance" and much historical importance and is accordingly subject to special constitutional rules and requirements. Taxing statues must always be strictly construed in order to ensure that these rules and requirements are adhered to. The principles embedded in section 53 ensures "parliamentary control over, and accountability for, taxation."[64] It has long been recognized that the federal government can use its taxing powers to pursue policy goals other than raising revenue. The imposition of tobacco taxes is an obvious example. *Westbank* recognizes that aspects of tax and regulation are often present in the same legislation.

62. The leading case on the meaning of section 53 is *Eurig Estate*. In this case, Major J. indicated that section 53 stands for the basic proposition that taxes must be imposed by Parliament, not the executive. Major J indicated that only the "details and mechanisms" of the tax could be delegated to another body like the Governor in Council.[65] It is submitted that in order to make section 53's guarantee meaningful, taxation legislation must set out the essentials or the fundamentals of the taxation scheme – the who, what and where of the tax.

63. In this case, it is submitted that the *Act* delegates far more than the "details and mechanisms" of the carbon tax to the Governor in Council. For example, it provides that the determination of which provinces and territories the carbon tax will apply in is a decision to be made by the Governor in Council. The Governor in Council has an almost unfettered discretion when it comes to making this decision. The only limitation is that the Governor in Council must take into account the stringency of provincial pricing

---

[63] *Supra*, note 59 at paras 4 – 5; see also, *Kingstreet Investments Ltd. v. New Brunswick (Finance)* 2007 SCC 1; [2007] 1 SCR 3, at para 14.
[64] *Eurig Estate*, *supra* note 57 at para 32.
[65] *Ibid.*, at para 30.

mechanisms for greenhouse gas emissions. But the term "stringency" is not defined in the *Act*. The decision to impose the carbon tax in one province but not another can be based on a political decision as opposed to the application to any objective criteria. It is submitted that who the tax applies to and where geographically the tax applies (as opposed to merely setting the rate of taxation)[66] are critical components of any taxation scheme and are not mere matters of "details and mechanisms". Therefore, Parliament's failure to set out in the *Act* itself which provinces and territories the tax will apply in is, constitutionally, a fatal flaw.

64. There is also a second rule that emerges from *Eurig Estate*. It is that any delegation of taxing powers must be clear and unambiguous.[67] In *Eurig Estate*, the legislature did not delegate the authority to impose taxes. It delegated the authority to impose fees. Once the Court held that the fees were in fact taxes, it held that the requirement for a clear and unambiguous delegation was violated. Accordingly, if the statute does not acknowledge that it is delegating taxing powers but rather purports to delegate powers concerning regulatory fees, once a court finds that the fees are in fact taxes, this rule will be, *ipso facto,* violated. This is precisely the case here. The *Act* does not purport to delegate any taxing powers but rather pretends that the taxes are regulatory charges. Therefore section 53 is violated.

PART VI – RELIEF SOUGHT

65. For all of the reasons outlined above, the Attorney General says that the *Act* is unconstitutional and should be declared to be *ultra vires*.

DATED at the City of Regina, in the Province of Saskatchewan, 30th day of July, 2018.

P. Mitch McAdam, Q.C.
Counsel for the Government of Saskatchewan

Alan Jacobson
Counsel for the Government of Saskatchewan

[66] *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470.
[67] *Supra* note 57 at para 39.

PART VII – AUTHORITIES

Legislation	**Tab**
Constitution Act, 1867, RSC 1985, Appendix II, No 5.	1
The Constitutional Questions Act, 2012, SS 2012, c C-29.01.	2
Greenhouse Gas Pollution Pricing Act, being Part 5 of the *Budget Implementation Act, 2018, No. 1, SC 2018,* c12.	3
Cases	
620 Connaught Ltd. v Canada (Attorney General), 2008 SCC 7, [2008] 1 SCR 131.	4
Allard Contractors Ltd. v Coquitlam (District), [1993] 4 SCR 371.	5
Attorney General of British Columbia v Attorney General of Canada, [1924] AC 222.	6
Attorney General of Nova Scotia v Attorney General of Canada, [1951] SCR 31.	7
Attorney General of Ontario v Attorney General for the Dominion, [1896] AC 348.	8
Canadian Western Bank v Alberta, 2007 SCC 22, [2007] 2 SCR 3.	9
Cape Breton Beverages Ltd. v Nova Scotia (Attorney General) (1997), 144 DLR (4th) 536, 1997 CanLII 9915 (NSSC).	10
Confédération des Syndicats Nationaux v Canada (Attorney General), 2008 SCC 68, [2008] 3 SCR 511.	11
Haig v Canada, [1993] 2 SCR 995.	12
Hodge v The Queen, (1883-84) 9 AC 117.	13
Hunter v. Southam Inc., [1984] 2 SCR 145.	14
Kingstreet Investments Ltd. v New Brunswick (Finance) 2007 SCC 1	15
Kitkatla Band v British Columbia (Minister of Small Business Tourism and Culture) 2002 SCC 31	16
New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly) [1993] 1 SCR 319	17
Ontario English Catholic Teachers' Assn. v Ontario (Attorney General), 2001 SCC 15, [2001] 1 SCR 470.	18
Ontario Home Builders Association v York Region Board of Education [1996] 2 SCR 929	19
Quebec (Attorney General) v Canada (Attorney General), 2015 SCC 14, [2015] 1 SCR 693.	20

Reference Re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 SCR 457.	21
Reference re: Goods and Services Tax, [1992] 2 SCR 445.	22
Reference re: Manitoba Language Rights [1985] 1 SCR 721	23
Reference re: Resolution to Amend the Constitution [1981] 1 SCR 753	24
Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re: Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3.	25
Reference re Secession of Quebec, [1998] 2 SCR 217.	26
Reference re: Securities Act, 2011 SCC 66, [2011] 3 SCR 837.	27
Reference re Senate Reform, 2014 SCC 32, [2014] 1 SCR 704.	28
Reference re The Initiative and Referendum Act, [1919] AC 935.	29
Re : Eurig Estate, [1998] 2 SCR 565.	30
Re: the Insurance Act of Canada, [1932] AC 41.	31
Russell v The Queen, (1881-82) 7 AC 829.	32
R v Big M Drug Mart Ltd., [1985] 1 SCR 295.	33
R v Comeau, 2018 SCC 15.	34
R v Sheldon S., [1990] 2 SCR 254.	35
Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134.	36
Winterhaven Stables Limited v Canada (Attorney General), 1988 ABCA 334, [1989] 1 WWR 193.	37
Secondary Sources	
Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21	38
Gerard V. LaForest, *The Allocation of Taxing Power Under the Canadian Constitution*	39
Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy" (1951) 29 Can B Rev 1126.	40

Peter W. Hogg and Wade K. Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38.2 UBC Law Review 329 at 343	41
Peter W. Hogg, *Constitutional Law of Canada,* 5th ed.	42

Appendix "A"

Key Provisions of the *Greenhouse Gas Pollution Pricing Act*

Amendments to Part 1 of Schedule 1

166 (2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.

Factors

(3) In making a regulation under subsection (2), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

Amendments to Part 2 of Schedule 1

189 (1) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by order, amend Part 2 of Schedule 1 by adding, deleting or amending the name of a province or the description of an area.

Factors

(2) In making an order under subsection (1), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.