WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2022

S.E.M.C.C. File Number: 03-04-2022

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF CANADA)

B E T W E E N:

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANTS
ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2022

TEAM # 2022-01

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 The Appellants agree that climate change is a grave and existential threat and applaud stringent and progressive legislative solutions to this global collective action problem. However, this appeal is not a debate on the most effective solutions to climate change. Rather, it is a question of the extent of the federal government's constitutional powers.

2 The *Greenhouse Gas Pollution Pricing Act* (the "Act") is unconstitutional. In *Reference re Greenhouse Gas Pollution Pricing Act*, the Supreme Court of Canada ("SCC") majority upheld the constitutionality of the Act by rewriting the Peace, Order and Good Government ("POGG") national concern doctrine ("National Concern"). However, the importance of climate change cannot override the *Constitution Act, 1867* and its established jurisprudence.

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*].
> *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 [*SCC Decision*].
> *Constitution Act, 1867 (UK),* 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution*].

3 The SCC ignored the residual nature of the National Concern power, thereby skewing the validity analysis in the Respondent's favour. It did this by failing to consider the Act's characterization within the enumerated heads of power under ss. 91 and 92. Instead, it began its analysis with the POGG power, a power that must be restricted to that of last resort.

4 Had it respected POGG's residual nature, the majority would have found that the pith and substance of the Act is wholly within provincial jurisdiction. The Act also fails the National Concern test (*Crown Zellerbach*). The matter of the Act is neither single, distinct, nor indivisible.

> *R v Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401 at 431-432, ACS no 23 [*Crown Zellerbach*].

5 A matter of national concern cannot include "minimum national standards" when excluding such would be fatal to its validity under POGG National Concern. This approach would render the singleness, distinctiveness, and indivisibility analysis useless because provinces are incapable of legislating national standards. Yet, that is what the SCC has done. "Minimum national standards" artificially frame the matter to make the Act valid.

6 The effects of greenhouse gas ("GHG") emissions pricing are pervasive; they affect nearly every industrial and consumer undertaking. Contrary to the SCC's reasoning, simply minimizing federal intrusion on provincial jurisdiction is irreconcilable with the division of power. Federalism demands that provinces maintain their sovereign jurisdiction. Parliament

cannot override provincial independence to achieve its desired policy goals (*Manitoba Language Rights*).

> *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 28-29, 38-39, 4 WWR 385 [*Manitoba Language Rights*].

7 Even if the Act could be justified under National Concern, the levy imposed by Part 1 is unconstitutional. Part 1 is a tax, not a regulatory charge. The authority held by the Governor in Council ("GIC") contravenes s. 53 of the *Constitution* and the principle of no taxation without representation.

> *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357, 2 DLR 193 [*Lawson*].
> *620 Connaught Ltd v Canada (Attorney General),* 2008 SCC 7 [*620 Connaught*].
> *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134, ACS no 38 [*Westbank*].
> *Constitution, supra* para 2 at s 53.
> *Re Eurig Estate*, [1998] 2 SCR 565, 165 DLR (4th) 1 [*Eurig Estate*].

8 The SCC majority's analysis is results-driven and expands federal power beyond its established limits. "The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state" (*2011 Securities Reference*). As further set out below, the SCC unduly centralized Canadian federalism in its ruling of the Act's validity.

> *Reference re Securities Act,* 2011 SCC 66 at para 62 [*2011 Securities Reference*].

B. Statement of the Facts

9 The Appellants generally agree with the SCC's description of the seriousness of the climate crisis and the background of the *GGPPA* identified at paras 7-25 of the *SCC Decision*.

10 The *GGPPA* consists of four parts. Part 1 is titled "Fuel Charge" and Part 2 "Industrial Greenhouse Gas Emissions." Parts 3 and 4 are not in issue.

11 Part 1 establishes a "backstop" government levy on GHG emissions. The provinces where the backstop applies, the rate of charge, and the list of priced GHG emissions are prescribed in Schedules 1, 2, and 3 respectively. The Fuel Charge is paid by the distributors, producers, and importers of Schedule 3 substances.

12 Part 2 is a distinct scheme that regulates the emissions of industrial facilities through an output-based-pricing system. Each "covered facility" is subject to a federally prescribed emissions allowance.

13 The *GGPPA* was challenged in three separate provinces. The Court of Appeal of Alberta ("ABCA") ruled that the Act was *ultra vires* Parliament on the basis of National Concern.

Conversely, the Court of Appeal for Saskatchewan ("SKCA") and the Court of Appeal for Ontario ("ONCA") ruled that it was *intra vires* Parliament. The SCC heard joint appeals from Ontario and Saskatchewan and opined that the Act was *intra vires* Parliament. Justices Côte, Brown, and Rowe each wrote dissenting opinions.

PART II -- QUESTIONS IN ISSUE

14 Is the *GGPPA* as a whole *intra vires* Parliament as an exercise of Parliament's jurisdiction to legislate Peace, Order and Good Government of Canada to address matters of national concern?

15 Is the Fuel Charge under Part 1 of the Act *intra vires* Parliament as a valid regulatory charge or tax?

PART III -- ARGUMENT

16 The Appellants submit that the *GGPPA* is not a valid exercise of the National Concern branch. Moreover, Part 1 imposes an unconstitutional tax.

A. The POGG Power is Residual in Nature

17 To determine an Act's validity, a court must carefully follow the division of powers analysis, first characterizing the Act then considering the enumerated heads of power under s. 91 and s. 92 of the *Constitution* (*Chatterjee*). The SCC majority ignored this fundamental step by neglecting the established heads of power and beginning with the POGG analysis.

Chatterjee v Ontario (Attorney General), 2009 SCC 19 at para 16 [*Chatterjee*].

18 S. 91 of the *Constitution* restricts Parliament's legislative authority to "all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

Constitution, *supra* para 4 at s 91.

19 It follows that the subject matter Parliament wishes to legislate on must be wholly distinct from that which may be classified under s. 92 of the *Constitution.* Indeed, the leading authority on POGG National Concern, *Crown Zellerbach*, established that a matter "must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern".

Crown Zellerbach, supra para 4 at 432.

20 By beginning the classification analysis with the POGG power, the SCC began its division of power analysis with its preferred conclusion. However, only if the pith and substance of the Act cannot be classified under the existing division of powers may POGG National Concern be considered as a source of jurisdiction.

B. The Validity of the Act

(i) Part 1 and Part 2 of the *GGPPA* Must be Characterized Independently

21 The Appellants agree with Justice Brown that Part 1 and Part 2 of the *GGPPA* are distinct; they require separate characterizations of their pith and substance. "[T]he pith and substance of Part 1 of the Act is the reduction of GHG emissions by raising the cost of fuel. The pith and substance of Part 2 of the Act is the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure" (*SCC Decision*).

SCC Decision, supra para 2 at para 340.

22 Justice Brown's characterization is appropriate because the Act must be characterized precisely to accurately classify it under a head of power (*SCC Decision*). However, the Act cannot be precisely described using a single characterization. Part 1 prescribes a uniform tax to incentivize reductions. Part 2 allows excess emissions for sectors that are trade-exposed.

SCC Decision, supra para 2 at paras 52, 320, 531.

(ii) Including "Minimum National Standards" in the Characterization of the Act is Deceptive and Incorrect

23 Defining the pith and substance of the Act as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" is arbitrary and conceptually favourable to the federal government because only Parliament can legislate national standards. Consciously or not, framing the Act this way circumvents any meaningful consideration of provincial jurisdiction. The SCC erred in this regard because a court may not reverse engineer an interpretation of the *Constitution* to achieve a desired objective (*SCC Decision*). Instead, it must determine the pith and substance of the impugned law wholly independent of its subsequent classification (*Chatterjee*).

SCC Decision, supra para 2 at paras 463, 490, 563.
Chatterjee, supra para 2 at para 16.

24 The SCC's characterization cannot be justified. Specifying "minimum" standards in the context of GHG emissions pricing adds nothing to the characterization of the Act. It creates "something out of nothing" (Newman).

> [S]ince the Act prescribes a minimum price for GHG emissions but no maximum, the federal government would also control GHG emissions from a zero price to infinity. In the result, this would give the federal government control over "the regulation of GHG emissions" in their entirety… there is no substantive difference between the two characterizations [emphasis added] (*ABCA*).

Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82 Sask L Rev 187 at 199 [Newman].
Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 at para 253 [*ABCA*].

25 The SCC provided no persuasive explanation for why characterizing the Act as establishing "minimum national standards" was appropriate. For example, "[t]he Chief Justice does not sufficiently explain why the backstop nature of the impugned legislation in *Hydro-Quebec* was described only as a 'mere feature' as opposed to the description of the *GGPPA*'s backstop nature as the 'dominant characteristic', and 'defining nature'" (*SCC Decision*).

SCC Decision, supra para 2 at paras 328, 82.

26 Including "minimum national standards" reflects the majority's attempt to unify the tenuous characterizations of the Act presented by the courts below (*SCC Decision*). However, Part 1 and Part 2 of the Act do not share a narrow subject matter; the only unifying theme is GHG emissions pricing.

SCC Decision, supra para 2 at paras 57, 322-323.

(iii) Classification: The Act Regulates Provincial Jurisdiction

27 The majority acknowledges that the Act is premised on the provinces having jurisdiction to price GHG emissions. As Chief Justice Wagner concedes, "the only thing not permitted by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent" (*SCC Decision*). In this regard, Parliament has chosen to only legislate on GHG emissions pricing if the provinces have not exercised their jurisdiction in a manner acceptable to the federal government.

SCC Decision, supra para 2 at para 79.

28 In other words, where the Act operates as a backstop, it is precisely because the provinces have decided not to exercise their own legislative authority.

(iv) Provincial Heads of Power

29 The broad provincial authority over property and civil rights under s. 92(13) of the *Constitution* is the most apparent head of power to legislate in relation to the pith and substance of Part 1 and Part 2 of the Act. Unless exempted by the enumerated powers under s. 91 of the *Constitution*, the regulation of business is a matter within property and civil rights in the province (Hogg, *Ward*).

> Peter W Hogg, Constitutional Law of Canada 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021), ch 30 at 21:8 [Hogg].
> *Ward v Canada (Attorney General),* 2002 SCC 17 at para 42 [*Ward*].

30 For instance, Part 1 of the Act imposes a levy on consumers and producers of fuel. Most activities that produce Schedule 3 substances are local matters confined to provincial jurisdiction (*SKCA Decision*). According to Professor Hogg, s. 92(13) "authorizes the regulation of land use and most aspects of mining, manufacturing and other business activity, including the regulation of emissions that could pollute the environment" (Hogg).

> *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 at para 339 [*SKCA*].
> Hogg, *supra* para 29 at 30:33 [Hogg].

31 The federal government has failed to demonstrate how its numbered heads of power may justify the operation of Part 1 or Part 2 of the Act. However, the Act is premised on the provinces having the power to legislate on the pith and substance of both. Accordingly, resorting to the residual POGG power, in this case, is unnecessary, and the analysis may conclude at this point.

C. Peace, Order, and Good Government: The National Concern Doctrine

32 Even if one accepts the majority's flawed classification analysis, POGG National Concern cannot justify the *GGPPA*.

(i) The Matter that the Act Regulates is Broader than its Pith and Substance

33 The majority imports their pith and substance of the *GGPPA* to describe the matter of national concern. However, the jurisprudence is unclear whether the pith and substance and matter of national concern are interchangeable.

34 As discussed earlier, "minimum national standards" is an untenable characterization of the pith and substance of the law. It is even less desirable as a proposed matter of national concern. Including "minimum national standards" effectively constitutionalizes the matter and the means it adopts (*ONCA*). Justice Brown explains that, so understood, every subject matter listed under s. 92 could be viewed as national. For example, "'minimum national standards' governing hospital and health care administration; 'minimum national standards' governing the

availability of bilingual municipal services; 'minimum national standards' governing the location or construction of hydroelectric generating stations" (*SCC Decision*).

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 at para 224 [*ONCA*].
SCC Decision, supra para 2 at para 357.

35 Moreover, the extra-provincial impacts of GHG emissions do not mean that national-level standards are essential. This was demonstrated in *Anti-Inflation* where Justice Beetz concluded that the extra-provincial economic impacts of inflation did not justify inflation as a matter of national concern.

Reference re Anti-Inflation, [1976] 2 SCR 373, 68 DLR (3d) [*Anti-Inflation*].

36 The Appellants also maintain that the legislative means adopted by Part 1 and Part 2 of the Act are mutually distinct, sharing only the common purpose of pricing GHG emissions. Jurisprudence demonstrates that identifying a potential matter of national concern at this level of generality is an acceptable characterization: aeronautics; radio; atomic energy; a national capital region; and marine pollution (*SCC Decision*). These matters function as heads of federal lawmaking authority under s. 91 and allow for the passage of additional federal legislation – or alternative legislation that employs other means – as required.

SCC Decision, supra para 2 at para 353.

37 Chief Justice Wagner states that "if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter" (*SCC Decision*). However, an analysis of the *GGPPA* suggests that this is precisely what the Act is intended to do. The *GGPPA* imports levies on a non-exhaustive list of GHG emitting substances (a list that the GIC can amend at any time) (*ABCA*). Those GHGs are produced by a vast range of diverse activities, including home and office heating, agriculture, and waste management. As discussed by the ABCA, the Act does not stipulate a price ceiling for Schedule 3 substances (*ABCA*). Furthermore, there is no meaningful distinction between the cumulative dimensions of GHG emissions and GHG emissions per se (*ONCA*).

SCC Decision, *supra* para 2 at para 117.
ABCA, *supra* para 24 at paras 875, 246.
ONCA, *supra* para 34 at para 227.

38 The federal government is attempting to establish exclusive federal law-making authority over a broad range of GHG emissions. The only matter that can be recognized under national concern is GHG emissions pricing because this is the narrowest unifying theme of Part 1 and

Part 2 of the Act. GHG emissions pricing in provinces is ultimately a matter of policy and not law. The federal government cannot intervene in the policy choices of democratically elected provincial leaders (*ABCA*, *Secession Reference*). The SCC majority tailored its rhetoric to the undisputable necessity to combat climate change; however, in doing so, it conflated policy efficacy with the legal requirements of a matter of national concern.

ABCA, *supra* para 24 at paras 316-317.
Reference re Secession of Quebec, [1998] 2 SCR 17 at para 66, ACS no 61 [*Secession Reference*].

(ii) "Modernizing" the *Crown Zellerbach* Test is Inappropriate

39 POGG National Concern cannot justify the *GGPPA* even with the SCC majority's tailored characterization of the matter of national concern.

40 The test for POGG National Concern was established by Justice Le Dain in *Crown Zellerbach*. For a matter to qualify as that of national concern, "it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." When assessing singleness, distinctiveness, and indivisibility, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter" (*Crown Zellerbach*).

Crown Zellerbach, *supra* para 4 at 431-432.

41 The SCC majority "modernized" the *Crown Zellerbach* test through its new "three-step process" for identifying matters of national concern (*SCC Decision*). The majority incorporated principles from the trade and commerce power jurisprudence and indicia that point to the importance of the national concern it proposes as valid under POGG National Concern (*SCC Decision*).

SCC Decision, *supra* para 2 at paras 132, 428-430.

42 As discussed below, importance is irrelevant to the analysis.

43 Additionally, s. 91(2) jurisprudence cannot supplant the POGG National Concern requirements since the *Crown Zellerbach* test mandates additional requirements than that of general trade and commerce (*SCC Decision*).

SCC Decision, *supra* para 2 at paras 113, 422.

44 The result of the majority changing the POGG National Concern test is that matters will more easily qualify as being of national concern under POGG. The *Crown Zellerbach* test is

diluted (*SCC Decision*). It effectively transforms nearly any matter of provincial jurisdiction into one of national concern through the device of *minimum national standards*. This is because the double aspect doctrine can be used to justify both heads of power legislating on a matter. In this case, the federal government establishing minimum national standards and the provincial government regulating GHG emissions pricing. The effect is an artificial division of an exclusive matter: provincial jurisdiction over GHG emissions pricing.

SCC Decision, *supra* para 2 at para 376.

45 This artificial division is problematic. Although, on its face, minimum national standard meets the majority's new requirement of "qualitatively different from matters of provincial concern" (*SCC Decision*), "qualitatively different" is a subjective standard that manipulates the determination of what is "distinct."

SCC Decision, *supra* para 2 at para 146.

46 The majority changed the *Crown Zellerbach* test because the *GGPPA* is invalid under the established test. It "modernized" the doctrine to meet the facts of the case and make the *GGPPA* constitutional.

47 The SCC must formally adhere to its prior decisions and is bound by *stare decisis* when it contemplates overturning its precedent (Hogg; *Vavilov*). Hogg states that a departure from horizontal *stare decisis* by the SCC should be based on explicit and "compelling reasons." Centralizing the federalist state through the liberalization of POGG National Concern is not a "compelling reason". Therefore, the SCC's departure from *Crown Zellerbach* should be overturned.

Hogg, *supra* para 29 at 8:13.
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 255 [*Vavilov*].

D. The Act Does not have Singleness, Distinctiveness, and Indivisibility

(i) Distinctiveness

48 Applying *Crown Zellerbach*, the Act's matter is not distinct. The ONCA outlines that distinctiveness requires that the matter be beyond the capacity of any one province to manage (*ONCA*). As the foregoing outlines, the provinces are wholly capable of legislating on GHG emissions. Furthermore, unlike marine pollution in *Crown Zellerbach*, GHG emissions are not distinct from provincial boundaries. This is because all GHG emissions produced by Canada originate in the provinces; the share of emissions from point sources can be determined.

ONCA, *supra* para 34 at para 113.

49 Furthermore, the inclusion of "minimum national standards" at this stage of the inquiry is not appropriate since an act prescribing harmonized federal standards would make any matter distinct. As Justice Huscroft writes, "[t]he difficulty is that this reasoning begs the question: it depends on the premise that a national standard is required – something that, by definition, no province can establish" (*ONCA*).

ONCA, *supra* para 34 at para 229.

50 POGG's status as a residual power means that it should be read narrowly (*SCC Decision*). A narrow interpretation of distinctiveness must necessarily mean that unlike marine pollution, which is neatly separable from other types of water pollution, the sources of GHG emissions can be traced to individual provinces and do not enter federal jurisdiction like the pollution did in *Crown Zellerbach* (*SCC Decision*). Therefore, what the *GGPPA* is managing is not distinct.

SCC Decision, *supra* para 2 at paras 113, 106.

(ii) Singleness and Indivisibility

51 This part of the test ensures that either parliament or provincial legislatures can effectively legislate upon the matter (*SCC Decision*). It ensures that the absence of the Act will not result in a jurisdictional vacuum. The matter at hand is not single and indivisible so as to necessitate legislating it as an aggregate. Rather, it can be divided between enumerated heads of jurisdiction.

SCC Decision, *supra* para 2 at para 548.

52 As the distinctiveness analysis outlines, territorial jurisdiction from which GHG emissions are emitted is readily identifiable (*SCC Decision*). There is no difficulty quantifying emissions or determining the industrial activities that produce them.

SCC Decision, *supra* para 2 at para 381.

(iii) Provincial Inability

53 Additionally, the application of the provincial inability test shows that provinces can legislate on the matter. Provincial inability is an indicium to determine whether a matter has the character of singleness and indivisibility to bring it within the national concern doctrine (*Crown Zellerbach*).

Crown Zellerbach, *supra* para 4 at 434.

54 A matter will satisfy provincial inability if "the interrelatedness of the intraprovincial and extra-provincial aspects of the matter… [require] a single or uniform legislative treatment" (*Crown Zellerbach*).

Crown Zellerbach, *supra* para 4 at 434.

55 The Appellants concede that the interpretation of the provincial inability test is not settled in the POGG National Concern jurisprudence (*SCC Decision*). However, the principles of federalism demand that a finding of provincial inability must be limited to extra-provincial effects where "the matter, or part of the matter, is beyond the power of the provinces to deal with on their own or in tandem" (*SCC Decision*).

SCC Decision, *supra* para 2 at para 555.

56 The correct approach to provincial inability does not focus on the consequences of a failure to act (*ABCA*). Some extra-provincial effects must be accepted. "[U]nder the federal structure, provinces can adversely affect extra-provincial interest if they are acting within their sphere of jurisdiction" (*SCC Decision*). For example, higher COVID-19 cases due to relaxed restrictions in Alberta may lead to travellers spreading the disease in British Columbia. However, ss 92(7), (13), and (16) grant Alberta autonomy over its provincial public health orders. The impact on British Columbia does not mean that Alberta is provincially incapable of regulating its COVID-19 guidelines.

ABCA, supra para 24 at para 306.
SCC Decision, supra para 2 at para 556.

57 The public health example is also illustrative of how "minimum national standards" could quickly run afoul. Minimum national standards for COVID-19 health orders could be highly intrusive into provincial matters. Establishing a precedent of using "minimum national standards" should be abandoned in the POGG analysis to avoid this dangerous reasoning.

58 It is important to take a constrained approach to provincial inability because, as Brouillet notes, "the possibility of inability is assessed in *abstracto*, along with its effects on the other provinces. And since it is always hypothetically present, the criterion is worthless as a means of controlling the centralization of powers" (Brouillet).

Eugenie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54:21 SCLR 601 at 620 [Brouillet].

(iv) Provincial Inability Was Applied Too Loosely by the SCC Majority

59 An example of the majority's tailoring of the provincial inability test is its analysis of domestic carbon leakage without accounting for the same carbon leakage concerns at the

international level. As the ABCA defined it, "carbon leakage internationally leads to business leakage. Business craves certainty. If it cannot find it in one country, it will move to another" (*ABCA*).

ABCA, supra para 24 at para 331.

60 The Appellants do not suggest that Canada should take a passive role in reducing global GHG emissions. However, under a comprehensive understanding of carbon leakage that considers international leakage, the effects of domestic carbon leakage that the SCC majority heavily relies on for a finding of provincial inability carry less weight.

61 The foregoing illustrates the ineffectiveness of provincial inability to practically constrain federal jurisdiction. Its appearance depends on differing subjective determinations of provincial legislative effectiveness (Brouillet). In the *SCC Decision*, the majority favoured Parliament's choice of climate policy over the sovereignty of individual provinces. It then presented the provincial inability analysis in accordance with that preference.

Brouillet*, supra* para 58 at 621, 622.

(v) Absence of the Act Does Not Create a Jurisdictional Vacuum

62 Additionally, singleness and indivisibility are not met because the absence of a federal Act of this nature would not create a jurisdictional vacuum in relation to Canada's climate change commitments and GHG emissions pricing.

63 In the absence of the Act, provincial measures and Parliament's spending powers can sufficiently account for provincial cooperation on GHG emissions pricing. For example, the federal government may incentivize provinces to adopt their scheme using monetary mechanisms such as subsidies to provinces adopting a national carbon price.

64 Furthermore, provinces can and will continue to implement their own climate plans. For instance, "Alberta decided that one of the most cost-effective ways to accelerate reductions in GHG emissions in the oil and gas sector was to reduce methane emissions. Thus, in 2018, Alberta enacted the Methane Emissions Reduction Regulation… to reduce methane emissions 45% from 2014 levels by 2025" (*ABCA*).

ABCA, *supra* para 24 at para 108.

65 To create a "minimum national standard", there are ways that provincial governments may influence each other to enact a progressive national GHG emission reductions landscape, other than a paternalistic parliamentary mandate. For example, provinces could implement formal negotiations with each other. Indeed, this is how the First Ministers agreed to the

Vancouver Declaration on Clean Growth and Climate Change in March 2016. Such an approach allows all parties to be heard and accommodates changing provincial concerns.

66 Furthermore, the "court of public opinion" allows the public to elect (or not elect) governments based on their response to climate change (*Trillium*). However, it is essential to remember that the court's role in assessing climate standards is ultimately confined to legality, not policy efficacy. If provinces do not cooperate with federal policy goals, it reflects a democratic choice and not a legal failure. Provincial inability cannot be substituted with provincial unwillingness.

> *Trillium Power Wing Corp v Ontario (Ministry of Natural Resources),* 2013 ONCA 683 at para 47 [*Trillium*].

67 The Act does not meet the POGG National Concern requirements of singleness and indivisibility.

E. The Act is Not Reconcilable with the Division of Powers

68 Evaluating the scale of impact on the federal balance is the final step when determining whether a new permanent head of exclusive jurisdiction should, in effect, be added to the federal list of powers. This is not an analysis of whether the importance of a matter outweighs an alleged infringement on provincial jurisdiction; it requires courts to determine whether recognizing a new federal head of power would be compatible with the federal structure.

69 The *GGPPA* is not reconcilable with the division of powers because the power to legislate on "establishing minimum national standards of GHG price stringency to reduce GHG emissions" does not have identifiable boundaries to constrain invasion into provincial jurisdiction.

> It extends to the regulation of any activity that requires carbon-based fuel, including manufacturing, mining, agriculture, and transportation. Indeed, Part 2 of the Act, much like the impugned law in the *2011 Securities Reference*, descends into the detailed regulation of industrial GHG emissions reduction by imposing different carbon prices on different industrial activities (*SCC Decision*).
>
> *SCC Decision, supra* para 2 at para 388.

70 The Chief Justice justifies the Act by asserting that it does not mandate rules for provincial pricing mechanisms if they meet the federally prescribed standards (*SCC Decision*). The effect of this is that if provinces do not comply with Parliament's policy choice to legislate in relation to climate change, the federal government will step in for the provinces.

> *SCC Decision*, *supra* para 2 at paras 179, 200.

71 This is highly problematic. The structure of the Act conflates legislative competency with policy competency. Indeed, the ONCA majority, in its finding of validity under POGG National Concern, wrote that "the Act strikes an appropriate balance between Parliament and provincial legislatures, having regard to the critical importance of the issue of climate change caused by GHG emissions, the need to address it by collective action, both nationally and internationally, and the practical inability of even a majority of the provinces to address it collectively" (*ONCA Decision*). The words "importance" and "practical inability" are simply a disguise for subjective policy judgements.

> How the provinces exercise their jurisdiction to regulate GHG emissions is a policy question not a legal one. That policy question includes deciding how to balance environmental priorities with other provincial priorities. No government is in favour of pollution. Citizens of each province and territory elect their provincial or territorial governments knowing the platform on which each has run. If the federal government can successfully invoke the national concern doctrine because a province fails to see a policy issue the same way it does, then the federal government could effectively upend the election in any province or territory [emphasis added] (*ABCA*).

ONCA, *supra* para 34 at para 134.
ABCA, *supra* para 24 at para 311.

72 "Minimum standards" being a part of the matter does not change the POGG National Concern analysis. The *Constitution* does not allow federal intrusion simply because the means chosen preserve some provincial autonomy to the greatest extent possible (*SCC Decision*). Rather, it enumerates spheres of exclusive federal and provincial jurisdiction. Within their sphere of jurisdiction, provinces are sovereign, which affords them the power to act or not act as they see fit. Sovereign jurisdiction cannot be caveated with "as long as they do so in a manner that finds approval at the federal Cabinet table" (*SCC Decision*).

SCC Decision, *supra* para 2 at para 394.

F. Conclusion on Issue 1

73 The *Constitution* is the supreme law of Canada, and the Appellants urge this Court to follow it. The Appellants agree that climate change is important, but the *GGPPA* is unconstitutional. The pith and substance of Part 1 and Part 2 of the Act fall within the jurisdiction of the provinces. Modifying the *Crown Zellerbach* test to recognize the *GGPPA's* validity under National Concern would be irreconcilable with the principle of cooperative federalism that must respect constitutional constraints.

G. The Fuel Charge is a Tax

74 Even if legislation setting out "minimum national GHG pricing standards" could fall within the scope of National Concern, Part 1 is properly characterized and classified as an unconstitutional tax contrary to s. 53 of the *Constitution*.

75 By grouping Part 1 and Part 2 of the Act together, Chief Justice Wagner fails to conduct a robust analysis on the levy imposed by Part 1. This results in a failure to recognize that the Fuel Charge is in fact and in law a tax.

76 A government levy is a tax when the levy is (a) enforceable by law; (b) imposed under the authority of the legislature; (c) levied by a public body; and (d) raised for a public purpose (*Lawson*). Taxes are also compulsory and wide-ranging (*Lawson*). Because many levies can fit this characterization, the *Lawson* indicia must be "the dominant characteristics of the levy" (*620 Connaught*).

Lawson, *supra* para 7 at 363.
620 Connaught, *supra* para 7 at para 23.

(i) Characteristics of the Fuel Charge

77 The Fuel Charge satisfies all four of the *Lawson* indica. S. 71(3) prescribes a legal obligation to pay the fuel levy to the Receiver General. This obligation is reinforced through punishment and offence provisions which criminalize non-compliance.

SKCA, supra para 30 at para 266.
GGPPA, supra para 2, ss. 71(3), 132.

78 The Fuel Charge is imposed under the authority of Parliament and is levied by the Minister of National Revenue (the "Minister") and the Canada Revenue Agency. Under s. 112, the net revenue collected by the Fuel Charge is deposited in the Consolidated Revenue Fund with other collected taxes where it is distributed in a time and manner that the Minister considers appropriate (*GGPPA*). The Minister also has the power to make inspections and to carry out audits to determine the obligations of a person complying with Part 1. Part 1 also provides a right of appeal to the Tax Court of Canada (*GGPPA*).

GGPPA, supra para 2, ss. 112, 93, 35, 36, 137, 157.

79 The Fuel Charge is also compulsory and far-ranging. It applies to an indefinite list of GHG producing fuels and combustible wastes. It levies funds from "producers, importers, deliverers, and measurers of fuel and such other persons as the federal cabinet may designate as a distributor of fuel" (*SKCA*). These substances penetrate every sector of the economy. All Canadians are forced to pay this levy to varying extents.

SKCA, *supra* para 30 at para 266.

80 It is clear that the Fuel Charge raises revenue for a public purpose. This public purpose can be described as raising the cost of fuel to promote behaviour that indirectly reduces anthropogenic GHG emissions. Nevertheless, the only operative function of Part 1 is to raise revenue. Once funds are added to the Consolidated Revenue Fund, "there are no conditions or restrictions on its use once distributed" (*SKCA*).

SKCA, *supra* para 30 at 271.

81 Paras 77 to 80 of this factum support the conclusion that the dominant and leading characteristics of Part 1 are that of a tax. However, the authority held by the GIC is conclusive:

> [T]he Governor in Council must evaluate the *stringency* of Province's own exercise of its exclusive law-making powers in this regard to determine whether, and if so to what degree, the federal fuel levy will apply in the Province. By structuring Part 1 in this way, Parliament has lent considerable comfort to the conclusion that the fuel levy is a tax because, as the Attorney General of Saskatchewan concedes, Parliament has the power to tax; whereas the Provincial legislatures have the power to regulate in this area [emphasis added] (*SKCA*).

SKCA, supra para 30 at 271.

82 The Fuel Charge is in fact and in law a tax. The *Lawson* indicia are the most dominant and leading characteristics of Part 1.

H. Part 1 Cannot be Described as a Regulatory Charge

83 In addition to meeting the *Lawson* criteria, it must also be established that the levy is "unconnected to any form of regulatory scheme" (*Westbank*). If a regulatory scheme is found to exist and there is a relationship between the levy and the scheme itself, the government levy will be in pith and substance a regulatory charge (*620 Connaught*).

Westbank, supra para 7 at para 43.
620 Connaught, supra para 7 at para 44.

(i) Part 1 is Unconnected to a Regulatory Scheme

84 Chief Justice Wagner's conclusion that Part 1 establishes a regulatory scheme is an error grounded in the majority's failure to separately characterize Part 1 and Part 2 of the Act. Despite sharing a common purpose, they are wholly distinct on a functional and administrative level. Part 1 delegates its legislative authority to the Minister of National Revenue whereas Part 2 delegates its authority to the Minister of the Environment. There is no connection between the regulation of specific businesses under Part 2 and the tax imposed on consumers in Part 1. The SCC

majority unfairly conceals the tax imposed by Part 1 under the veil of the regulatory scheme established by Part 2.

SCC Decision, supra para 2 at para 219.

85 Justice Gonthier states that the court should "look for the presence of some or all of the following indicia of a regulatory scheme" (*Westbank*):

1. A complete, complex and detailed code of regulation;
2. A regulatory purpose that seeks to affect some behaviour;
3. The presence of actual or properly estimated costs of the regulation;
4. A relationship between the person being regulated and the regulation.

Westbank, supra para 2 at paras 43-44.

86 Part 1 does not establish a complete, complex, and detailed code of regulation. Consumers of carbon are only compelled to pay a tax. There are no regulatory provisions guiding "the production, import, delivery or use of fuel or combustible waste or any regulation of the levels of GHG emitted by the persons who directly pay the levy or the consumers who pay it independently" (*SKCA*). The distributors, importers, and producers simply offset the costs of the Fuel Charge to the consumer; they maintain minimal incentive to modify their behaviour. The provisions are not regulatory in nature, they are "supportive of a scheme of taxation or revenue collection" (*SKCA*).

SKCA, supra para 30 at paras 284-285.

87 It follows that there is no direct regulation of individual behaviour that would achieve the stated objective of the Act. Moreover, the Record of the Attorney General of Canada concedes that "the current levels of carbon prices are insufficient to induce the abatement levels consistent with the temperature objective of the Paris Agreement" (*SKCA*). This indicates that changing behaviour in listed provinces is ancillary to the goal of revenue collection "because the legislation does not achieve that purpose at the outset and no one seems able to say when it will."

SKCA, supra para 30 at paras 305, 314.

88 Even if the Fuel Charge were recognized as behaviour altering, this could not support the majority's conclusion that this inheres a regulatory mechanism. "Governments can and do effectively use taxes as a tool to modify behaviour in the marketplace" (*SKCA*). The excise taxes imposed on consumers of tobacco and alcohol are examples of this. Canada has long recognized placing excise "sin" taxes on socially harmful goods to deter undesirable market behaviour. There is no reason for a levy on the consumption of Schedule 3 items to be viewed any

differently than a sin tax. Because the Fuel Charge adds nothing to the existing framework of GHG regulation save revenue generation, it must be viewed as a tax (*Natural Gas*).

SKCA, supra para 30 at para 309.
Re Exported Natural Gas Tax, [1982] 1 SCR 1004, 136 DLR (3d) 385 [*Natural Gas*].

89 It is also necessary that the revenue generated from a regulatory charge does not exceed the cost of its implementation "in order to avoid rendering s. 53 of the *Constitution Act, 1867* meaningless" (*620 Connaught*). There must be a "reasonable attempt to match the revenues from the fees with the cost associated with the regulatory scheme" (*Allard*). Nevertheless, Chief Justice Wagner states that "limiting [Part 1] to the recovery of costs would be incompatible with the design of a scheme of this nature" (*SCC Decision*). The Chief Justice is correct because the purpose of the "scheme and design" of Part 1 is revenue generation through the imposition of a tax; limiting the recovery of costs would be incompatible with raising revenue.

Westbank, supra para 7 at para 43.
Allard Contractors Ltd, v Coquitlam (District), [1993] 4 SCR 371 at 411, 109 DLR (4th) 46 [*Allard*].
620 Connaught, supra para 7 at para 39.
SCC Decision, supra para 2 at para 216.

90 Finally, the Appellants reject the SCC majority's reasoning that Part 1 cannot be characterized as a tax because the *GGPPA* "could fully accomplish its objectives...without raising a cent" (*SCC Decision*). This is purely hypothetical. As it stands, the Fuel Charge applies in Alberta, Manitoba, Nunavut, Ontario, Saskatchewan, and Yukon. The constitutionality of the Act should be assessed on what it does, not what it could do under auspicious provincial policies.

SCC Decision, supra para 2 at para 219.

(ii) Conclusion on Tax-vs-Regulatory-Charge Analysis.

91 Part 1 does not satisfy the *Westbank* indicia of a regulatory scheme. Part 1 does not purport to regulate consumers of carbon; it establishes a scheme of revenue collection that is unconnected to Part 2. Behaviour modification is ancillary; the levy is analogous to an excise tax. Recognizing Part 1 as a regulatory charge would erase any meaningful distinction between taxes and regulatory charges.

I. The Tax Imposed by Part 1 is Unconstitutional

92 While Parliament does have the authority to impose a tax under s. 91(3), it is clear that the Fuel Charge contravenes s. 53 of the *Constitution.*

(i) *Constitution* s. 53

93 S. 53 of the *Constitution* is provided 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.

94 S. 53 stands for the fundamental principle that "[T]he Crown may not levy a tax except with the authority of Parliament or the Legislature" (*620 Connaught*). This codifies the longstanding principle of no taxation without representation. 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" (*Eurig Estate*). However, Parliament may confer a statutory delegate with authority "over the details and mechanisms of taxation" (*Eurig Estate*).

620 Connaught, supra para 7 at para 40.
Eurig Estate supra para 7 at paras 32, 30.

(ii) Part 1 of the Act Offends s. 53

95 The authority conferred to the GIC in relation to listed Schedule 1, 2, and 3 items is in clear confliction with s. 53; it allows the GIC to tax without the authority of Parliament or the Legislature. This far exceeds mere details and mechanisms of taxation.

GGPPA, supra para 2 ss. 166(2), 166(4), 190(1).

96 Chief Justice Wagner's assurance that the GIC's discretion is limited by the statutory purpose of the *GGPPA*, specific guidelines of the Act, and judicial review does not ease concerns raised by the ABCA that the listing is "open-ended and entirely subjective" (*SCC Decision*, *ABCA*). The only limitation on the GIC's power to tax is the stringency of provincial pricing mechanisms and "stringency" is not defined in the Act.

SCC Decision, supra para 2 at para 73.
ABCA, supra para 24 at para 221.

97 The items subject to discretion are critical components of any taxation structure; they are not mere matters of "details and mechanisms" (*Eurig Estate*). Parliament's failure to authorize the tax "expressly and unambiguously" and strictly construe where, who, and what it applies to is a clear circumvention of s. 53. Accordingly, Part 1 is an unconstitutional tax and cannot stand under 91(3).

Eurig Estate, supra para 7 at para 30.

J. Conclusion on Issue 2

98 The dominant and leading characteristics of Part 1 are those of a tax. The regulatory scheme established by Part 2 cannot be used to conceal the scheme of taxation found in Part 1. There are no provisions which purport to regulate the consumption of carbon; behavioural modification is ancillary to revenue collection.

99 Part 1 cannot be justified under s. 91(3) of the *Constitution* because it circumvents s. 53. The tax was not expressly authorized, and the powers delegated to the GIC go far beyond mere details and mechanisms of taxation. Recognizing the validity of this tax would undermine the fundamental principle of no taxation without representation.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

100 The Appellants seek no order as to costs.

PART V -- ORDER SOUGHT

101 For all the reasons outlined above, the Appellants seek a declaration that the *GGPPA* is *ultra vires* Parliament on two grounds:

102 The *GGPPA* cannot be supported under POGG National Concern.

103 Part 1 of the Act imposes an unconstitutional tax contrary to s. 53 of the *Constitution.*

104 ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24 day of January 2022.

[redacted]

[redacted]

Counsel for the Appellants
Attorney General of Alberta,
Attorney General of Saskatchewan and
Attorney General of Ontario

PART VI -- TABLE OF AUTHORITIES

Case Law	Para # in factum
620 Connaught Ltd v Canada (Attorney General), 2008 SCC 7.	7, 76, 83, 89, 94
Allard Contractors Ltd, v Coquitlam (District), [1993] 4 SCR 371, 109 DLR (4th) 46.	89
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.	47
Chatterjee v Ontario (Attorney General), 2009 SCC 19.	17, 23
Lawson v Interior Tree Fruit and Vegetable Committee of Direction, [1931] SCR 357, 2 DLR 193.	7, 76, 77
Re Eurig Estate, [1998] 2 SCR 565, 165 DLR (4th) 1.	7, 94, 97
Re Exported Natural Gas Tax, [1982] 1 SCR 1004, 136 DLR (3d) 385.	88
Reference re Anti-Inflation, [1976] 2 SCR 373, 68 DLR (3d).	35
Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74.	24, 37, 38, 56, 59, 64, 71, 96
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.	2, 21, 22, 23, 25, 26, 27, 34, 36, 37, 41, 43, 44, 45, 50, 51, 52, 55, 56, 69, 70, 72, 84, 88, 89, 90, 96
Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40.	30,77, 79, 80, 81, 86, 87, 88
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544.	34, 37, 48, 49, 71
Reference re Secession of Quebec, [1998] 2 SCR 17, ACS no 61.	38
Reference re Securities Act, 2011 SCC 66.	8
Re Manitoba Language Rights, [1985] 1 SCR 721, 4 WWR 385.	6
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 40, ACS no 23.	4, 19, 40, 53, 54
Trillium Power Wing Corp v Ontario (Ministry of Natural Resources), 2013 ONCA 683.	66
Ward v Canada (Attorney General), 2002 SCC 17.	29
Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134, ACS no 38.	7, 83, 85, 89
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Brouillet, Eugenie, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54:21 SCLR 601.	58, 61
Hogg, Peter W, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021), ch 30.	29, 30, 47

PART VII -- LEGISLATION AT ISSUE

***Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.**

Charge — annual net fuel adjustment
35 If the annual net fuel adjustment, determined under section 33, of a person for a particular calendar year, for that type of fuel and for a listed province is a positive amount, the person must pay to Her Majesty in right of Canada a charge in respect of that annual net fuel adjustment and the listed province in the amount determined under section 40. The charge becomes payable on June 30 of the calendar year following the particular calendar year.

Requirement to Pay
71(3) If the net charge for a reporting period of a person is a positive amount, the person must pay that amount to the Receiver General on or before the day on or before which the return for the reporting period is required to be filed.

Minister's duty
93 The Minister must administer and enforce this Part and the Commissioner may exercise the powers and perform the duties of the Minister under this Part.

Appeal to Tax Court of Canada
116 (1) Subject to subsection (2), a person that has filed a notice of objection to an assessment may appeal to the Tax Court of Canada to have the assessment vacated or a reassessment made after

References to Tax Court of Canada
121 (1) If the Minister and another person agree in writing that a question arising under this Part, in respect of any assessment or proposed assessment of the person, should be determined by the Tax Court of Canada, that question must be determined by that Court.

Reference of common questions to Tax Court of Canada
122 (1) If the Minister is of the opinion that a question arising out of one and the same transaction or occurrence or series of transactions or occurrences is common to assessments or proposed assessments in respect of two or more persons, the Minister may apply to the Tax Court of Canada for a determination of the question.

Offence for failure to file return or to comply with demand or order
132 (1) Every person that fails to file or make a return as and when required under this Part or that fails to comply with an obligation under subsection 104(6) or (9) or section 106, an order made under section 137, is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to a fine of not less than $2,000 and not more than $40,000 or to imprisonment for a term not exceeding 12 months, or to both.

Distribution
165(2) For each province or area that is or was a listed province, the Minister must distribute the net amount for a period fixed by the Minister, if positive, in respect of the province or area. The Minister may distribute that net amount

(a) to the province;
(b) to persons that are prescribed persons, persons of a prescribed class or persons meeting prescribed conditions; or
(c) to a combination of the persons referred to in paragraphs (a) and (b).

Distribution payment
165(4) The amount of any distribution under subsection (2) is to be calculated in the manner determined by the Minister and may, subject to subsection (8), be paid by the Minister out of the Consolidated Revenue Fund at the times and in the manner that the Minister considers appropriate.

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.

Amendments to Schedule 2
166(4) The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.

Amendments to Schedule 3
190 (1) The Governor in Council may, by order, amend Schedule 3 by
(a) adding a gas to column 1 and its global warming potential to column 2 or deleting a gas from column 1 and its global warming potential from column 2; and
(b) amending the global warming potential set out in column 2 for a gas set out in column 1.

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO
APPELLANTS
(Appellants)

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

S.E.M.C.C. File Number: 03-04-2022

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO

TEAM # 2022-01

[redacted]

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