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 # 2022-03

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

AND TO: **ALL REGISTERED TEAM**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

1. Alberta, Saskatchewan, and Ontario challenge the constitutionality of Canada's *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") by references to their respective appellate courts. The question divided the courts.
2. The Supreme Court of Canada ("SCC") held the *GGPPA* to be constitutionally valid. The SCC found that the importance of addressing climate change justifies the federal government controlling how the provinces exercise their jurisdiction to regulate greenhouse gas ("GHG") emissions. However, this reasoning transforms Parliament's residual and exclusive power over matters not falling within provincial jurisdictions into a novel, supervisory, and overlapping power over matters that clearly do fall within provincial jurisdictions.
3. This appeal must be allowed. The *GGPPA* fails to meet the test for identifying matters that are inherently of national concern under Parliament's "Peace, Order and Good Government" ("POGG") power. Further, Part 1 of the *GGPPA* cannot be supported as a valid regulatory charge or tax.
4. If the SCC decision is upheld, the *GGPPA* will deprive provinces of the power to address matters, within their exclusive jurisdiction, in manners that best promote federalism and cater to provinces' unique local circumstances.
5. This court cannot and should not base its decision on what it considers necessary to address the global problem of climate change or what it believes are the best policy solutions for reducing GHG emissions.
6. The Appellants seek this court's opinion that the entire *GGPPA* is unconstitutional.

A. Overview of the Appellant's Position

7. This appeal must be allowed because the SCC erred on two accounts.
8. First, the SCC erred in applying the national concern test to assign a matter under federal jurisdiction.
9. Regulating GHG emissions is outside of federal jurisdiction for four reasons. First, GHG emissions are too all-encompassing to be a specific and identifiable matter suitable for federal regulation. Second, provinces already have power to regulate GHG emissions through various constitutional provisions. Third, Parliament's residual power should be

invoked only when provinces are unable to act because of limits to their jurisdiction. Fourth, granting federal jurisdiction to regulate GHG emissions is not reconcilable with the fundamental distribution of legislative power.

10. Second, the SCC erred in finding that the fuel charge under Part 1 of the *GGPPA* is a valid regulatory charge.

11. The fuel charge under Part 1 of the *GGPPA* is not a valid regulatory charge for two reasons. First, Part 1 is not a constitutionally valid regulatory scheme because it fails to properly estimate the cost of the regulation and does not select the industries and companies it regulates based on its regulatory purpose of reducing GHG emissions. Second, there is no adequate nexus between the fuel charge set out in Part 1 and any regulatory scheme because Part 1 does not require that the funds raised by the fuel charge be spent to further its regulatory purpose of reducing GHG emissions. The SCC's holding that the required nexus exists where the charges themselves have a regulatory purpose provides the federal government with an avenue to circumvent s. 53 of the *Constitution Act, 1867*.

12. Overall, the *GGPPA* fails to meet the national concern test to invoke Parliament's POGG power. Further, Part 1 of the *GGPPA* cannot be supported as a valid regulatory charge or as a valid tax. Thus, this court must determine that the entire *GGPPA* is unconstitutional.

B. Statement of the Facts

Global climate crisis and Canada's climate action

13. Since the 1950s, the concentration of GHG in the atmosphere has nearly doubled due to human activities. As a result, global surface temperatures have already increased by 1.0°C above pre-industrial levels. The increase is expected to reach 1.5°C by 2040 if the current rate of warming continues. Consequently, climate change causes extreme weather events, like floods and forest fires, variations in precipitation levels, degradation of soil and water resources, increased frequency and severity of heatwaves, rising sea levels, and the spreading of potentially life-threatening vector-borne, infectious diseases.

Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at paras 8-9 ["*Re GGPPA"*].

14. In response to the climate crisis, Canada has committed to collective action in addressing climate change. During the lead-up to the *Paris Agreement,* provinces and the federal government agreed to work together to meet the country's international commitments.

Re GGPPA, supra para 13, at para 14.

15. All First Ministers met in March 2016 to adopt the *Vancouver Declaration on clean growth and climate change* ("*Vancouver Declaration*"). Through the *Vancouver Declaration,* the First Ministers committed to "[i]mplement[ing] GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, including specific provincial and territorial targets and objectives." Notably, "the federal government ha[d] committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets."

Re GGPPA, supra para 13, at paras 14-15.
Vancouver Declaration on clean growth and climate change at 3, online (pdf): Canada Intergovernmental Conference Secretariat <https://scics.ca/en/product-produit/vancouver-declaration-on-clean-growth-and-climate-change/> ["*Vancouver Declaration*"].

A wide range of approaches to reducing GHG emissions

16. The *Vancouver Declaration* resulted in the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms ("Working Group"). The *GGPPA* was introduced against the backdrop of the Working Group's Final Report. However, the Final Report did not recommend a single carbon pricing solution. Instead, the Final Report entertained forms of carbon pricing (e.g., carbon taxes, cap-and-trade, and performance standards systems) and non-pricing-based counterparts (e.g., emission caps, clean energy standards, coal-fired power plant shut down, clean technology development).

Working Group on Carbon Pricing Mechanisms Final Report (2016) at 1, 9, 50*,* online (pdf): Government of Canada <https://publications.gc.ca/collections/collection_2016/eccc/En4-287-2016-eng.pdf> ["*Final Report"*].

17. In its conclusion, the Final Report recognized that "there is a trade-off to be made between *economic efficiency* for Canada as a whole, *reducing GHG emissions*, and *maintaining successful systems* already in place in respect to rules and responsibilities of the federal, provincial and territorial governments".

Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 at para 80 ["*Alberta Reference*"].

18. Despite First Ministers agreeing to implement a broad range of domestic measures, the federal government insists that every jurisdiction put an explicit price on carbon. Otherwise, the *GGPPA* imposes a federal price on GHG emissions in "listed provinces", where emissions are not sufficiently priced, as determined by the federal Governor in Council.

Alberta, Saskatchewan, and Ontario take and will continue to take strong actions to address GHG emissions

19. The provinces and territories agree with Canada that climate change is real and needs to be addressed. All Canadian jurisdictions are undertaking initiatives to reduce GHG emissions. For example, Alberta, Saskatchewan, and Ontario opt for proactive, "made-in" provincial approaches that account for each jurisdiction's unique industries and socioeconomic circumstances.

20. In 2004, Alberta became the first jurisdiction to require large industrial emitters to measure and report their GHG emissions. In 2007, the province was the first jurisdiction to adopt carbon pricing as part of its overall policy approach to address anthropogenic climate change. The centrepiece of Alberta's current GHG emission reduction strategy is the *Technology Innovation and Emissions Reductions* program, which imposes a carbon price on large scale industry. The program is forecasted to reduce GHG emissions by forty to forty-five million tonnes from 2016 business-as-usual levels by 2030.

> *Re GGPPA, supra* para 13, at para 79.
> *Alberta Reference, supra* para 17, at para 39.

21. Saskatchewan released its own climate change strategy in December 2017, the *Prairie Resilience: A Made-in Saskatchewan Climate Change Strategy*. *Prairie Resilience* outlines a wide range of policies to reduce GHG emissions, including a methane action plan and commitments to developing and deploying small modular reactors. However, *Prairie Resilience* intentionally does not introduce a carbon tax on consumers. Saskatchewan, like Alberta, focuses on reducing emissions from its largest industrial emitters. Importantly, Saskatchewan adopted its own industrial emissions standards under *The Management and Reduction of the GHG Act, 2018,* which is more stringent than Part 2 of the *GGPPA*.

> *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 at paras 33, 298 ["*Saskatchewan Reference*"].

22. Ontario was the first province to shut down coal-fired power plants, which led to the single largest reduction of GHG emissions anywhere across Canada. Like Alberta and Saskatchewan, Ontario also uses various regulatory tools to address GHG emissions. In the transport sector, Ontario enacted the *Greener Diesel Regulation, 2015* to mandate greater use of clean fuels like ethanol. In the waste sector, Ontario enacted the *Resource Recovery*

and Circular Economy Act, 2016 to create a system of resource recovery and waste reduction. As a result, Ontario's emissions have fallen 22% below 2005 levels.

> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 55 ["*Ontario Reference*"].
> Environment and Climate Change Canada, *National Inventory Report 2018*, Table A11-12: 1990-2016 GHG Emission Summary for Ontario (2018).
> Ontario, *Preserving and Protecting our Environment for Future Generations: A Made-in Ontario Environment Plan* (November 2018) at 7, 10, 21, 23-24, 33-44.
> *Resource Recovery and Circular Economy Act*, 2016, SO 2016, c. 12, Sched. 1, ss. 2(c).

23. While there is broad consensus about the importance of urgently addressing climate change, parties to the *Paris Agreement* are not required to implement carbon pricing as part of their efforts to reduce GHG emissions. Article 6.8 of the *Paris Agreement* specifies that the Parties "recognize the importance of integrated, holistic and balanced non-market approaches being available to the Parties." The *GGPPA* imposes standards that are narrower than the requirements of the *Paris Agreement*. It imposes explicit carbon pricing requirements on provinces and territories that already have GHG reduction measures, which are tailored to each province and territory's needs. Therefore, the reason for the *GGPPA* is unclear.

> *Paris Agreement to the United Nations Framework Convention on Climate Change,* 12 December 2015, Treaty Reg. No. 54113 at art. 6.8.

PART II -- QUESTIONS IN ISSUE

24. The questions in issue are:

    a. Is the *GGPPA,* as a whole, *intra vires* Parliament as an exercise of Parliament's jurisdiction to legislate for the peace, order, and good government of Canada to address a matter of national concern?

    b. Is the fuel charge under Part 1 of the *GGPPA intra vires* Parliament as a valid regulatory charge or tax?

25. The answer to both questions is no.

PART III -- ARGUMENT

A. The *GGPPA* is not authorized by the national concern branch of the POGG power.

The pith and substance of the GGPPA is to regulate GHG emissions through the imposition of a fuel charge and setting industrial emission limits.

26. To determine whether a law is a valid exercise of Parliament's legislative power, courts must first examine the law's purpose and effect to identify its true subject matter or "pith and substance". Courts must then classify the subject matter with reference to constitutional federal and provincial heads of power.

    Re GGPPA, supra para 13, at para 51.

27. The *GGPPA*'s pith and substance is to regulate GHG emissions through the imposition of a fuel charge and setting industrial emission limits.

28. The purpose of a piece of legislation can be identified by reference to intrinsic and extrinsic evidence. Intrinsic evidence relating to the *GGPPA* is found in its full name, the Preamble, and structure of the statute. The full name of the *GGPPA* speaks for itself: "An *Act* to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of GHG emission sources."

    Re GGPPA, supra para 13, at para 51.
    Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23 at para 36.

29. The *GGPPA*'s Preamble also sets out the breadth of its purpose – Parliament intended to take "comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change." Imposing "a federal GHG pricing scheme" is the *means,* while regulating GHG emissions to mitigate climate change is the *end.*

    Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12, s. 186, Preamble ["*GGPPA*"].
    Alberta Reference, supra para 17, at paras 51 and 196.

30. Specifically, Parts 1 and 2 of the *GGPPA* operate as comprehensive *means* to regulate GHG emissions. Part 1 imposes a charge on twenty-one GHG producing fuels and combustible waste. Part 2 introduces an output-based pricing system for industrial facilities, where covered facilities must compensate for GHG emissions that exceed an annual limit.

31. Extrinsic evidence relating to the *GGPPA* is found in its legislative history and Parliamentary debates.

32. The *Vancouver Declaration* and the Working Group's Final Report do not insist on provinces implementing fuel charges, let alone partaking in a federal, one-size-fits-all regulatory scheme on GHG emissions. Instead, the First Ministers agreed to transition to a low carbon economy by adopting a broad range of domestic or local measures to regulate GHG emissions.

> *Vancouver Declaration, supra* para 15, at 3.
> *Final Report, supra* para 17, at 1, 9, 50.

33. Further, when the *GGPPA* was directly put to the Parliamentary Secretary by the Minister of Finance, the Parliamentary Secretary clarified that "through Bill C-74, the government is taking action in order to reduce emissions by introducing the *GGPPA*."

> Canada, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. 148, No. 279 (16 April 2018) at 18315 (MP Joël Lightbound) ["*House of Commons Debates*"].

34. Adding that the regulation of GHG emissions is to be done by "national standards" to achieve "nationwide" objectives does not change the character or substance of the essential subject matter being regulated by those national standards. As Brown J. articulated in the SCC's *GGPPA Reference*, "this simply begs the question – minimum national standards *of what?*" The subject of those "minimum national standards" is still to regulate GHG emissions.

> *Re GGPPA, supra* para 13, at paras 303, 326, 327.

35. Thus, the pith and substance of the *GGPPA* is the regulation of GHG emissions through the imposition of a fuel levy and setting industrial emission limits.

Regulating GHG is not an appropriate matter to add to the list of enumerated federal powers through the national concern doctrine.

36. Regulating GHG emissions is not a matter suitable for permanent federal regulation under the national concern doctrine because it lacks the necessary singleness, distinctiveness, and indivisibility. Conferring Parliament jurisdiction to regulate GHG emissions will radically alter the balance of Canadian federalism.

37. The test for identifying matters that are inherently of national concern involves a three-step process: (1) the threshold question of whether the matter is of sufficient concern to Canada as whole; (2) the singleness, distinctiveness, and indivisibility analysis; and (3) the scale of impact analysis. Regulating GHG emissions does not meet any of the three steps.

(1) Threshold Question: Regulating GHG emissions is important to people in Canada.

38. Provinces do not dispute the *importance* of regulating the reduction of GHG emissions. However, what is important to the country is that GHG emissions are addressed by all orders of government within their respective jurisdiction, not that all provinces have adopted the same or similar policies to achieve this objective.

39. It is imperative to distinguish what is important to people in Canada and what is inherently a matter of national importance (i.e., national concern). The national concern analysis begins by asking, as a threshold question, whether the matter is of sufficient concern to Canada to warrant consideration under the doctrine. This invites a common-sense inquiry into the national importance of the proposed matter.

> *R. v. Crown Zellerbach Canada Ltd., [1988]* 1 SCR 401 at 436 ["*Crown Zellerbach*"].
> *Re GGPPA, supra* para 13, at paras 143 and 144.

40. Regulating GHG emissions is important to people in Canada. Comprehensive "made-in" provincial approaches have been adopted to that end. Strategically, allocating powers to the provinces produce policies tailored to local realities, since provinces are closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.

> *Re GGPPA, supra* para 13, at para 467.
> *Alberta Reference, supra* para 17, at para 291.

(2) Singleness, Distinctiveness, and Indivisibility Question: Regulating GHG emissions is not a "single, distinct and indivisible matter".

41. Regulating GHG emissions is neither a matter that is "distinct" or separate from matters regulated by the provinces, nor a matter that is "singular and indivisible" that by its very nature requires a uniform national regime.

42. Three principles underpin the singleness, distinctiveness, and indivisibility inquiry:

    a. First, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern;

    b. Second, federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter; and

c. If these two principles are satisfied, courts proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.

Re GGPPA, supra para 13, at paras 164-165.

(a) GHG emissions are too all-encompassing to be a specific and identifiable matter suitable for federal regulation.

43. A proposed head of power must have a narrow focus that clearly distinguishes it from matters of provincial concern. However, the *GGPPA* lacks precision and specificity in its subject matter, and, in turn, deeply intrudes on provinces' exclusive jurisdictions.

Alberta Reference, supra para 17, at para 845.

44. The fuel charge imposed under Part 1 of the *GGPPA* can apply to any "prescribed substance, material or thing," while the output-based emissions trading scheme in Part 2 of the *GGPPA* can apply to emissions of any "gas" the Governor in Council decides is a "GHG." Similar to the issue of "toxic substances" being too broad in *Hydro-Québec,* or "environment" in *Oldman River,* the definitions and scope under the *GGPPA* are too all-encompassing and have no clear limits.

R. v. Hydro-Québec, [1997] 3 SCR 213 at paras 64-79, 115-116 ["*Hydro-Québec*"].
Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3 at paras 63-65.

45. GHG emissions are created from virtually every aspect of provincial industrial, economic, and municipal activity, including construction, transportation, roadways, schools, hospitals, heating and cooling of buildings, generation of electrical power, farming, mining, and development of natural resources.

46. Even if the list of substances that are "GHGs" is distinct, the wide range of human activities that emit GHG is not. Unlike the well-defined and narrow activity of "dumping […] waste in waters, other than fresh waters, within a province" at issue in *Crown Zellerbach*, in the present case, Canada seeks jurisdiction to regulate all activities that give rise to GHG.

GGPPA, supra para 29, at ss. 3, 166(1)(a), 169, 190.
Hydro-Québec, supra para 44, at paras 69-73.
Crown Zellerbach, supra para 39, at para 16.

47. The *Alberta Reference* entertained the possibility of Canada proposing a narrower new head of power, which would likely pass the pith and substance requirement that a challenged act

must be described as precisely as possible. For example, the scale of impact of "GHG emissions of light trucks" would not constitute as draconian an abridgment of provincial lawmaking rights. Nevertheless, a narrower head of power would not give Canada the extra lawmaking jurisdiction to control GHG emissions.

Alberta Reference, supra para 17, at para 849.
Re GGPPA, supra para 13, at para 52.

(b) Regulating GHG emissions is not qualitatively distinct from matters of provincial jurisdiction.

48. The "matter" of the *GGPPA* is not distinctive as it is an aggregate of virtually all provincial powers. Essentially, it is not enough for a matter to be quantitatively different from matters of provincial concern; that is, the mere growth or extent of the climate crisis is insufficient to justify federal jurisdiction. Furthermore, as in the *2011 Securities Reference* and the *2018 Securities Reference,* federal legislation will not be qualitatively distinct if it overshoots and *duplicates* provincial regulation or regulates issues that are primarily of local concern.

Re GGPPA, supra para 13, at paras 147 and 150.
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48, [2018] 3 S.C.R. 189 at paras 105-106.
Reference re Securities Act, 2011 SCC 66, [2011] 3 S.C.R. 837 at paras 115 and 124-28.

49. The *GGPPA* imposes charges on manufacturing, farming, mining, agriculture, and other intra-provincial economic endeavours. These activities occur in provinces and can be provincially regulated, pursuant to s. 92 of the *Constitution Act, 1867*. Notably, s. 92(16) authorizes the regulation of land use and most aspects of mining, manufacturing, and other business activity, including the regulation of emissions arising from land use. The combination of ss. 92(8)(10)(13)(16) authorizes municipal regulation of local activity that affects GHG emissions in relation to, for example, property, railways, construction, sewage, and garbage disposal. Overlaps are also found in s. 92(5), which authorizes provincial regulation on the management of public lands, where mining and lumbering may occur. Further, s. 92A already permits the regulation of GHG emissions, through provincial powers to regulate non-renewable natural resources and electric energy generation.

Constitution Act, 1867 at ss. 92 and 92A.
Alberta Reference, supra para 17, at para 20.
Saskatchewan Reference, supra para 21, at para 230.
Ontario Reference, supra para 22, at para 542.

50. Therefore, no jurisdictional gap exists that must be filled with the general residual power of the national concern doctrine. Moreover, aggregating provincial powers to create a federal

power ignores Beetz J.'s caution in *Anti-Inflation* that an aggregate is not sufficiently distinctive to justify creating a new head of power.

Re GGPPA, supra para 13, at paras 457 and 582.
Crown Zellerbach, supra para 39, at para 34.
Re: Anti-Inflation Act, [1976] 2 SCR 373 at 458.

(c) <u>There is no provincial inability to combat GHG emissions.</u>

51. Provinces are constitutionally capable of enacting regulations to address GHG emissions. Further, one provinces failure to regulate GHG emissions will not necessarily jeopardize other provinces' mitigation efforts.

Final Report, supra para 17, at 34.

52. Two factors need to be present for provincial inability to be established for the purposes of the national concern doctrine:

a. The legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
b. Failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country

Re GGPPA, supra para 13, at para 152.
General Motors of Canada Ltd. v. City National Leasing, [1989] 1 SCR 641 at 662.

53. Both factors are absent in this case. First, provinces *can* regulate GHG pricing from a local perspective (e.g., under ss. 92(13) and (16) and 92A of the *Constitution Act, 1867*). This was accepted by the majority in the SCC's *GGPPA Reference*. Subsequently, provinces *have* regulated their GHG emissions. Alberta and Saskatchewan have imposed carbon pricing on large industrial emitters. Nevertheless, regulating GHG emissions does not necessitate emission pricing. Different strategies may be more suitable given local needs and conditions. For example, Ontario's elimination of coal was an efficient policy choice since, at the time Ontario committed to the phase-out, coal represented 25 percent of the province's grid supply mix.

Re GGPPA, supra para 13, at paras 197 and 343.

54. Targeted provincial approaches are more efficient, and accommodating to local realities, at addressing GHG emissions than the *GGPPA*. For example, provincial carbon pricing allows provinces to determine how to reinvest the collected funds, create policy alternatives (e.g., issue offset credits), and offer smaller companies flexibility. Further, provincial climate

action plans allow provinces to improve energy efficiency based on what is "low-hanging fruit" for each province. The *GGPPA*'s one-size-fits-all approach fails to account for regional differences, resulting in a more costly and inefficient policy.

55. The existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. When the respondent in *Crown Zellerbach* dumped wood waste in the water, provincial acts and regulations were lacking, creating a gap that warranted exercise of federal power through the *Ocean Dumping Control Act, 1975.* In *Crown Zellerbach,* the SCC held that the national concern doctrine bestows only residual powers. Here, there is no provincial jurisdictional inability that requires the *GGPPA* to fill the gap.

> *Crown Zellerbach, supra* para 39, at para 34.
> *Alberta Reference, supra* para 17, at para 187.
> *Ontario Reference, supra* para 22, at para 542.

56. Regarding the second provincial inability factor, there is no tangible evidence that the decision of one province not to adopt carbon pricing harms another province. The *Alberta Reference* observed that the evidence of the harms of *interprovincial carbon leakage* is equivocal at best. The evidence suggested that, in most sectors and for most provincial economic activity, such concerns were insignificant. In contrast, the Working Group recognized the significance of *international carbon leakage* and its impact on competition and climate change.

> *Re GGPPA, supra* para 13, at paras 385 and 585.
> *Alberta Reference, supra* para 17, at para 331.
> *Final Report, supra* para 17, at 34.

(3) Scale of Impact Question: Giving federal jurisdiction to regulate GHG emissions would radically alter the constitutional division of powers.

57. The impact of the *GGPPA*'s subject matter – the regulation of GHG emissions – is not reconcilable with the fundamental distribution of legislative power.

58. At this stage of the analysis, court must balance the federal intrusion on provincial autonomy against the impact on other interests that will be affected if federal jurisdiction is not granted. New matters of national concern are justified only if the latter outweighs the former. Granting federal jurisdiction is not justified for three reasons.

> *Re GGPPA, supra* para 13, at para 161.

59. First, federal jurisdiction interferes with the provinces' exclusive jurisdiction under ss. 92A and 109 of the *Constitution Act, 1867,* over the development and management of their natural resources. Imposing a carbon price under Part 1 of the *GGPPA* can contradict provincial policy choices in GHG reduction efforts that are not based on carbon pricing or that have exemptions to the pricing scheme.

    Alberta Reference, supra para 17, at para 328.

60. Second, federal jurisdiction interferes with the provinces' exclusive jurisdiction over property and civil rights. Since a price can be attached to anything, price stringency charges could be imposed on an endless list of GHG producing items.

    Alberta Reference, supra para 17, at paras 333 and 335.

61. Third, the *GGPPA* confers broad discretion on the Governor in Council with no limits on the executive's power. For instance, s. 192 of the *GGPPA* is key to the operation of Part 2. The provision allows the Governor in Council to make regulations "respecting GHG limits" and create a scheme that defines the emissions limits. The only stated restriction on the Governor in Council is that the regulations must be "for the purposes of this Division." Although the "Division" does not have a stated purpose, an open-ended purpose can be inferred from the title, "Pricing Mechanism for GHG Emissions".

    Re GGPPA, supra para 13, at para 613.
    GGPPA, supra para 29, at s. 192.

62. Essentially, there are no limits on what the *GGPPA* covers and no limits on "price stringency". The executive is effectively given broad and pervasive discretion to take whatever other steps the executive decides should be taken to mitigate climate change. As a result, the federal government can impose "minimum national standards" on innumerable areas under provincial jurisdiction and alter current pricing schemes with no meaningful checks.

    Re GGPPA, supra para 13, at paras 222-223.
    Alberta Reference, supra para 17, at para 221.

63. These wide-ranging powers grant Canada unfettered broad discretion to amend Parts 1 and 2 of the *GGPPA.* This unfettered broad discretion is unlike previous SCC cases that deal with regulating parts of the environment.

64. For example, in *Crown Zellerbach,* "marine pollution" – in contrast to freshwater pollution by dumping – was a matter of national concern. This was because marine pollution was a

narrow category of pollution that was closely tied to Parliament's existing jurisdiction of offshore and international waters, navigation and shipping (s. 91(10)), and seacoast and inland fisheries (s. 91(12)). In contrast, GHG emissions encompass a wide variety of pollutants that lack "ascertainable and reasonable limits" and are not closely tied to Parliament's existing heads of power. Further, unlike marine pollution, determining the source of pollution for GHG emission is possible and, therefore, regulatable for provinces.

Crown Zellerbach, supra para 39, at para 49.

65. In *Hydro-Québec,* the federal government was given broad powers to add substances to the list of "toxic substances" because of considerable uncertainty as to what substances are toxic. Uncertainty arose because the technology for identifying toxic substances was still being developed. However, GHG emissions do not suffer the same uncertainty as toxic substances since sources of GHG emissions are precisely identifiable.

Hydro-Québec, supra para 44, at paras 145-147.

66. In conclusion, the *GGPPA* is *ultra vires* Parliament because the *GGPPA* does not meet any of the three steps of the national concern test.

67. The threshold requirement was not met because regulating GHG emissions, while important to provinces and people in Canada, is not of sufficient concern to Canada as a whole.

68. The "singleness, distinctiveness and indivisibility" requirement was not met for three reasons. First, regulating GHG emission is too all-encompassing to be a specific and identifiable matter suitable for federal regulation. Second, regulating GHG emissions is not qualitatively distinct from regulatory matters of provincial jurisdiction. Third, Parliament's residual powers should be invoked only when provinces are unable to act because of limits to their jurisdiction.

69. The scale of impact is not reconcilable for three reasons. First, federal jurisdiction interferes with the provinces' exclusive jurisdiction under ss. 92A and 109 of the *Constitution Act, 1867*. Second, federal jurisdiction interferes with the provinces' exclusive jurisdiction over property and civil rights. Third, the *GGPPA* confers unfettered broad discretion on the Governor in Council with no intelligible limits on the executive's power.

B. The fuel levy under Part 1 of the *GGPPA* is neither a valid tax nor a valid regulatory charge.

The fuel charge in Part 1 is not a regulatory charge.

70. The fuel charge set out in Part 1 of the *GGPPA* is not a regulatory charge.

71. To determine if the levy is indeed imposed for regulatory purposes, *Westbank* directs courts to apply a two-step test. First, courts need to identify the presence of a "regulatory scheme." Second, courts must establish a nexus between the aforementioned regulatory scheme, and the revenue generated from the impugned levy.

> W*estbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134, 176 DLR (4th) 276 at paras 24 and 44 ["*Westbank"*].

72. Under the first step of the test to determine whether a levy is a regulatory charge, courts should look for the indicia listed in the non-exhaustive list provided in *Westbank*:

> (1) a complete, complex, and detailed code of regulation;
>
> (2) a regulatory purpose which seeks to affect some behaviour;
>
> (3) the presence of actual or properly estimated costs of the regulation; and
>
> (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.
>
> *Westbank*, *supra* para 71, at para 44.

73. The presence of some or all of the indicia above signals the existence of a regulatory scheme.

74. Under the second step of the regulatory charge test, the required nexus between the regulatory scheme and the revenue generated by the charge may be established in two ways. First, by demonstrating a connection between the revenue generated by the levy and the costs of the regulatory framework, or second, by showing that the charge itself is the regulatory scheme.

> *620 Connaught Ltd. v Canada (Attorney General)*, [2008] 1 SCR 131 at para 20 ["*620 Connaught*"].

75. The fuel levy under Part 1 is not a valid regulatory charge because it fails the first and second steps of the test outlined above: it lacks both a regulatory scheme and the required nexus between the revenue generated by the levy and the regulatory scheme.

76. There is no regulatory scheme associated with the fuel charges because only the first and second Westbank factors – a complex code of regulation, and a regulatory purpose – are

present. While the SCC held in *Westbank* that "not all of [the] factors must be present to find a regulatory scheme," the absence of two of four listed factors is strong evidence against the existence of a regulatory scheme.

Westbank, *supra* para 71, at para 24.

77. The third *Westbank* factor is absent because Part 1 fails to properly identify the costs of the fuel charge it seeks to impose. While the formula for the charge per unit of fuel is provided, there is no estimation as to the regulatory costs that will be incurred in the operation of the federal scheme. Moreover, the fuel charge is set to increase over time and may be modified by the Governor in Council under s. 166(4) of the *GGPPA*, so the revenue from the charge may increase without connection to the cost of administration and operation of the scheme. The SCC stated in *Connaught* that while a small inconsistency between the revenue and the cost of the scheme is acceptable where there has been a reasonable attempt to match the two, "a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge." Here, there is no evidence of any attempt to match the revenues with the cost of the scheme. On the contrary, as the dissent of the Saskatchewan Court of Appeal opined, "Parliament designed the fuel charge to generate significant surpluses above the cost of the scheme itself... [a]ccordingly, the quantum of the fuel levy cannot be said to be connected to the cost of the scheme established under Part 1."

Saskatchewan Reference, supra para 21, at paras 82, 93 322.
Connaught, supra para 74, at para 40.
GGPPA, supra para 29, at s. 166(4).

78. Finally, Part 1 fails to fulfill the fourth *Westbank* factor. While fuel producers, distributors, and importers in certain provinces face the changes set out in the *GGPPA*, the expectation appears to be that the charge will be passed on to end-use consumers. However, there is no guidance for this in the *GGPPA*, and it is up to companies to decide, for themselves, how to change their pricing structure. Additionally, there are exemptions for some industries, including farming and fishing, with no evidence that their practises are less harmful or create less GHG emissions. The companies and industries being regulated are not selected based solely on GHG emissions, and thus lack the relationship required to fulfill the fourth *Westbank* factor.

Saskatchewan Reference, supra para 21, at paras 83, 94.
CR, Vol 4, Tab 5, Expert Report of Dr. Nicholas Rivers, Exhibit "B" at R1148-58.
Carbon pollution pricing – what you need to know (May 2020), online: Government of Canada < https://www.canada.ca/en/revenue-agency/campaigns/pollution-pricing.html>.

79. When determining whether a levy is a regulatory charge, courts must carefully consider whether the levy is imposed "primarily for regulatory purposes" because, unlike taxes, regulatory charges do not need to comply with s. 53 and s. 125 of the *Constitution Act, 1867*. Courts must therefore distinguish between the two characterizations to ensure the impugned levy is not a tax disguised as a regulatory charge in an attempt to circumvent s. 53.

    Reference re Exported Natural Gas Tax, [1982] 1 SCR 1004 at 1070 ["*Re Exported Natural Gas Tax*"].

80. In summary, the *Westbank* factors indicate that the charges imposed pursuant to Part 1 are not part of a regulatory regime. Courts must be cautious in characterising a levy as a regulatory scheme due to the lack of safeguards on Parliamentary overreach offered by s. 53 and s. 125 of the *Constitution Act, 1867*, which apply to taxes. The fuel charge set out in Part 1 of the *GGPPA* lacks the indica to support its characterization of a regulatory charge.

Part 1 is not a constitutionally valid regulatory charge because the nexus between the charge and the regulatory scheme is insufficient

81. Even if Part 1 is a regulatory scheme, the fuel charge imposed under it is not constitutionally valid because the *GGPPA* fails to satisfy the requirement that there be a sufficient nexus between the revenue generated and the scheme's regulatory purpose.

    Connaught, supra para 74, at para 27.

82. Part 1 lacks the required nexus: it does not require that the funds raised by the fuel charge be spent to further its regulatory purpose of reducing GHG emissions. On the contrary, 90 percent of the proceeds raised by the fuel charge is to be distributed back to the province the amount was collected from. This marks a departure from precedent, as before its decision to uphold the *GGPPA*, the SCC had never authorized the use of revenue from a regulatory charge for general purposes.

    GGPPA, supra para 29, at s.165(2).

83. Allowing the nexus between the revenue and the scheme to be met solely by alleging that "the levy is a regulatory mechanism" allows the federal government to levy regulatory charges on behaviours it wishes to disincentivize without having to seek express legislative authorization to impose a tax.

    Re GGPPA, supra para 13, at para 218.

84. In conclusion, the fuel charges set out under Part 1 of the *GGPPA* are not constitutionally valid regulatory charges because the nexus between the revenue raised by the charge and the regulatory purpose of reducing GHG emissions is insufficient. The SCC's decision in the *GGPPA Reference* runs contrary to precedent and renders constitutional protections against taxation without representation meaningless.

The fuel charge in Part 1 is a tax.

85. The Court in *Westbank* established that a levy will be a tax if it meets the following five defining criteria:

    (1) compulsory and enforceable by law;

    (2) imposed under the authority of the legislature;

    (3) levied by a public body;

    (4) intended for a public purpose; and,

    (5) unconnected to any form of a regulatory scheme.

    Westbank, *supra* para 71, at para 43.

86. Part 1 of the *GGPPA* is a tax, as it meets the five defining criteria.

87. Part 1 is compulsory and enforceable under law, as per the *GGPPA*. The *GGPPA* is imposed under the authority of the legislature, and the associated levy is levied by the Canadian Revenue Agency, a public body. The levy is furthermore intended for a public purpose: collecting money for Carbon Pricing rebates, and public jurisdictional use. Finally, as discussed in the previous sections, the *GGPPA* is unconnected to a regulatory scheme.

    GGPPA, supra para 29, at s. 186.

The tax set out in Part 1 is not constitutionally valid.

88. The tax set out in Part 1 is not constitutionally valid because the *GGPPA* cannot be supported under Parliament's s. 91(3) taxation power.

89. Parliament has the power to raise money by any mode or system of taxation under section 91(3) of the *Constitution Act, 1867*. Monetary measures implemented primarily for federal revenue-raising purposes are taxation, while other measures, such as regulatory charges, must be supported by different heads of power. The imposition of tax is one of the most

powerful tools any government can possess; "the power to tax involves the power to destroy" as noted by the SCC in *Westbank*.

> *Constitution Act, 1867* at s. 91(3).
> *Re Exported Natural Gas Tax*, *supra* para 79, at 1068-70.

90. Due to the destructive potential of taxes, Parliament's broad taxation power must be limited by the principle of "no taxation without representation" enshrined in s. 53 of the *Constitution*. The SCC emphasized in *Connaught* that this principle is central to our concept of democracy. *Eurig Estate*, the leading case on the meaning of section 53, indicated that taxes must be imposed by Parliament and only "details and mechanisms" of the tax could be delegated to a body, such as the Governor in Council. Moreover, to ensure that Parliamentary oversight of taxation is not circumvented, the power to tax must be exercised "expressly and unambiguously."

> *Constitution Act, 1867* at s. 53.
> *Connaught, supra* para 74, at paras 4-5.
> *Eurig Estate (Re), [1998] 2 SCR 565* at para 30 ["*Eurig Estate (Re)*"].
> *Confédération des syndicats nationaux v. Canada (AG)*, 2008 SCC 68 [2008] 3 SCR 511 at para 92 ["*Syndicats*"].

91. Part 1 violates s. 53. First, this law constitutes an improper delegation of taxation powers that violates the principle of "no taxation without representation." Second, Parliament did not expressly and unambiguously state its intention to impose taxation through the *GGPPA*. The absence of evidence supporting the latter can be seen through an examination of the text and legislative history of the *GGPPA.*

(1) Overbroad delegation of taxation powers

92. Part 1 infringes s. 53 of the *Constitution* because it is an improper delegation of the legislative power to tax to the executive.

93. The powers delegated to the Governor-in-Council are overbroad for three reasons. First, the Governor-in-Council can decide which provinces the fuel charge will apply to under s. 166(4) of the *Act.* Second, she may also modify the very nature of the fuel charge because most definitions under s. 3 are open ended and because s. 168(3) grants her the power to define "words or expressions used in [Part 1], Part 1 of Schedule 1 or Schedule 2". For instance, fuel can mean refer to "a substance, material or thing set out in column 2 of any table in Schedule 2" or "a prescribed substance, material or thing. (*combustible*)." The

Governor-in-Council can therefore expand the application of the fuel charge at her discretion. Finally, if the *GGPPA* conflicts with regulation enacted by the executive, s. 168(4) provides that "*the regulation prevails to the extent of the conflict*."

GGPPA, supra para 29, at ss. 3, 166(4), 168(4).

94. Part 1 grants broad discretion to the Governor-in-Council in deciding which provinces and which substances the fuel charge applies to, she may also redefine any aspect of Part 1, and any regulation she makes trumps the legislature's own *Act*. Part 1 therefore allows the executive to impose taxation without oversight by Parliament and without respecting the restrictions on Parliament's taxation powers imposed by s. 53 and s. 125 of the *Constitution*. For these reasons, the fuel charge set out in Part 1 is not a constitutionally valid tax.

(2) Lack of clear delegation of taxation powers

95. The *GGPPA* was enacted as part of the *Budget Implementation Act, 2018, No. 1.* In contrast to the *GGPPA*, other parts of the *Budget Implementation Act* impose taxation using the language of taxation. While there is no requirement that Parliament enact taxation using the word "tax," Parliament's distinct uses of "taxes" and "charges," lead to the presumption that Parliament meant the different words to embody different concepts, absent strong evidence to the contrary.

Budget Implementation Act, 2018, No. 1 at Parts 1, 2, 3, and 5.
Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at §§8.32 and 8.36-8.37.

96. During Parliamentary debates in 2018, Mr. Joël Lightbound, the then-Parliamentary Secretary to the Minister of Finance, was quoted explicitly denying that the *GGPPA* imposes a tax:

> "Here is where I disagree with my esteemed colleague: we see this as a price on carbon pollution. My colleague calls it a tax, but it is actually a price on carbon pollution."

House of Commons Debates, *supra* para 33.

97. The fuel charge set out in Part 1 of the *GGPPA* is not a valid tax because it violates s. 53 of the Constitution, which requires that Parliament's power to tax must be exercised "expressly and unambiguously". The fuel charge violates s. 53 because the *GGPPA*'s Preamble sets out regulatory purposes, the *GGPPA* carefully avoids using the word "tax," and the

sponsoring Parliamentary Assistant expressly denied that the *GGPPA* intended to impose a tax. Therefore, the *GGPPA* should not be read as evidence that Parliament "clearly and unambiguously" authorized imposing a tax – especially when almost all the key details of the charge are delegated to the Governor in Council.

Eurig Estate (Re), *supra* para 90, at para 32.
Syndicats, *supra* para 90, at para 92 note 19.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

98. The Appellants do not seek costs and requests that no costs be awarded against it.

PART V -- ORDER SOUGHT

99. The Appellants seek this court's opinion that the entire *GGPPA* is *ultra vires* Parliament, as an exercise of Parliament's POGG power to address matters of national concern.

100. In the alternative, the Appellants seek this court's opinion that Part 1 is *ultra vires* Parliament, being neither a valid regulatory charge, nor validly enacted under Parliament's taxation power.

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

Counsel for the Appellants
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PART VI -- TABLE OF AUTHORITIES

	Paragraph(s) Referred to in Factum
Case Law	
620 Connaught Ltd. v Canada (Attorney General), [2008] 1 SCR 131	74, 77, 81, 90
Confédération des syndicats nationaux v. Canada (AG), 2008 SCC 68, [2008] 3 SCR 511	90, 97
Eurig Estate (Re), [1998] 2 SCR 565	90, 97
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Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74	17, 20, 29, 40, 43, 47, 49, 55, 56, 59, 60, 62, 64
Reference re: Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544	22, 49, 55
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Reference re Pan-Canadian Securities Regulation, 2018 SCC 48, [2018] 3 SCR 189	48
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produit/vancouver-declaration-on-clean-growth-and-climate-change/>	
Working Group on Carbon Pricing Mechanisms Final Report (2016), online (pdf): Government of Canada <https://publications.gc.ca/collections/collection_2016/eccc/En4-287-2016-eng.pdf>.	16, 32, 51, 56

PART VII -- LEGISLATION AT ISSUE

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

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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 # 2022-03

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