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 RESPONDENT
ATTORNEY GENERAL OF CANADA

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

TEAM #2022-04

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 Respondent's Position

1 This appeal is about the necessity of national action to reduce greenhouse gas ("GHG") emissions as a cause of climate change. Intra-provincial solutions alone are insufficient to effectively respond to the existential threat of climate change.

2 The appeal must be dismissed for three reasons:

(a) The *Act* is a valid exercise of Parliament's criminal law power. It has the requisite form of prohibitions enforced by penalties and is directed at the public purpose of safeguarding the interests of Canadians against the impacts of climate change.

(b) The *Act* is valid under Parliament's power to legislate for the peace, order and good government of Canada ("POGG"). It is a national concern to effectively respond to the existential threat of climate change. The matter has singleness, distinctiveness and indivisibility. Provinces are constitutionally incapable of enacting this matter. Its scale of impact is proportionate to the distribution of legislative powers between federal and provincial governments.

(c) The charges under Part 1 of the *Act* are valid regulatory charges. They are sufficiently connected to the *Act*'s regulatory scheme as being the means to advance the regulatory purpose of reducing GHG emissions. The charges are behavioural incentives to reduce GHG emissions because they make it less economically desirable to emit GHGs.

B. Respondent's Position with Respect to the Appellants' Statement of the Facts

(i) *Climate change is an urgent national concern*

3 Climate change is an urgent environmental concern that has severe impacts within Canada that include major wildfires, floods, heat waves, species loss and extinction, thawing permafrost, melting Arctic ice and contaminated water quality from green algae blooms. Emitting GHGs causes climate change which has resulted in Canada's surface temperatures warming at a rate double than the global average.

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 at paras 10-11 [*Ontario Reference*].

4 Climate change threatens the health and safety of Canadians and has a significant cost on Canada's economy. The severity and frequency of climate impacts will continue to increase if urgent action is not taken to reduce GHG emissions.

Ontario Reference, supra para 3, at paras 15-16.

5 As a federal state, Canada's response to climate change must have a national dimension. The impacts of climate change are not correlated to the amount of GHGs a particular jurisdiction emits and as such, impacts are felt unevenly across borders. Efforts that appear to be sufficient for a particular province may be collectively insufficient to reduce Canada's overall GHG levels.

Ontario Reference, supra para 3, at paras 17, 20.

(ii) ***The development of the Act***

6 The *Act* is in part a product of Canada's *Paris Agreement* commitments and the subsequent Vancouver Declaration on Clean Growth and Climate Change ("*Vancouver Declaration*").

Record of the Attorney General of Canada [CR], Vol 1, Affidavit of John Moffet, affirmed 29 January 2019, at paras 53-54 [*Moffet*].

7 The *Paris Agreement* is an international treaty under the United Nations Framework Convention on Climate Change. The treaty was adopted as a response to the increased intensity of action required to reduce GHG levels and work towards a low-carbon future.

CR, Vol 1, *Moffet*, *supra* para 6, at para 37.

8 The *Vancouver Declaration* put the *Paris Agreement* into action by developing a plan to achieve Canada's international commitments for clean growth and climate change. Under the *Vancouver Declaration*, a Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms ("*Working Group*") was established to report on carbon pricing options and design mechanisms to meet Canada's emission reduction targets. The *Working Group* report generally considered carbon pricing to be "the most efficient policy approach to reduce GHG emissions because it provides flexibility to industry and consumers to identify the least-cost way to reduce their own emissions".

CR, Vol 1, *Moffet*, *supra* para 6, at paras 57, 59.

Vancouver Declaration on clean growth and climate change: Canadian Intergovernmental Conference Secretariat, March 3, 2016 (online) [*Vancouver Declaration*].

9 Parliament adopted the second carbon pricing option proposed by the *Working Group* report which involved broad-based carbon pricing in all jurisdictions with the flexibility for each jurisdiction to develop their own mechanisms and policies to conform with the price.

CR, Vol 1, *Moffet, supra* para 6, at para 68.

(iii) ***International and domestic consensus on the importance of GHG pricing***

10 The development of the *Act* was informed and supported by an international and domestic consensus that GHG pricing is an integral tool to reducing GHG emissions.

References Re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at para 170 [*GGPPA Reference*].

11 In addition to the *Working Group's* report on the importance of GHG pricing, Canada's Ecofiscal Commission published a study that concluded: "carbon pricing is the most cost-effective way to reduce GHG emissions and stimulate clean innovation".

CR, Vol 1, *Moffet, supra* para 6*,* at paras 51.

12 International climate change and economics experts on the High-Level Commission on Carbon Prices concluded that carbon pricing is an indispensable part of a strategy for efficiently reducing emissions. The International Monetary Fund reports carbon pricing should be at the forefront of climate strategies because a price signal directs technological changes toward low-emission investment.

CR, Vol 1, *Moffet, supra* para 6*,* at paras 16, 50.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS IN ISSUE

13 The questions in issue are:

(a) Is the *Act* 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 *Act intra vires* Parliament as a valid regulatory charge or tax?

14 The answer to question (a) is yes. The *Act* is also *intra vires* Parliament as an exercise of the criminal law power.

15 The answer to question (b) is yes, as a valid regulatory charge.

PART III -- ARGUMENT

16 To determine whether a matter is constitutional, a division of powers analysis must be conducted. The two-stage analysis first requires a characterization of the pith and substance of the matter and second a classification to determine if the matter is valid within a head of power set out in the Constitution. This analysis concludes the *Act* is a valid exercise of both Parliament's criminal law power and residual power of peace, order and good government under the national concern doctrine.

Reference re Pan-Securities Regulation, 2018 SCC 48, at para 186 [*Pan-Canadian Securities Reference*].

A. Pith and Substance: The *Act* establishes a minimum national standard of GHG price stringency to reduce GHG emissions

17 The pith and substance analysis identifies the true subject matter of the challenged legislation by determining the dominant characteristic of the legislation. A detailed analysis of the *Act's* purpose, effects, and extrinsic evidence concludes the *Act's* pith and substance is *"*establishing minimum national standard of GHG price stringency to reduce GHG emissions".

Reference re Assisted Human Reproduction Act, 2010 SCC 61 at para 199 [*AHRA Reference*].
GGPPA Reference, *supra* para 10, at para 57.

18 The *Act's* characterization is grounded in two important features consistently seen within all elements of the pith and substance analysis: price stringency and a national application.

19 The Appellants' characterization that the *Act* "regulates GHG emissions" is overbroad because it equates a national scheme focused on GHG price stringency to the general regulation of GHG emissions. The Appellants' characterization is unhelpful because it exaggerates the extent to which the *Act* extends into provincial jurisdiction.

AHRA Reference, *supra* para 17, at para 190.

20 The practical and legal effects of Part 1 and Part 2 of the *Act* give the provinces the flexibility to regulate GHG emissions as they choose with the single requirement of implementing a GHG-pricing system that is sufficiently stringent. The Appellants' characterization is inaccurate because the effects of the *Act* delineate only what the minimum national standard of GHG price stringency is applied to with no accompanying requirement on what means should be implemented to meet the *Act*'s price stringency standards. For this reason, the inclusion of "national price stringency" is essential to the characterization because it accurately reflects the limits of the *Act*'s application.

Factum of the Attorney Generals of Alberta, Saskatchewan, and Ontario, dated 24 January 2022, at paras 27 [Appellants' Factum].
GGPPA Reference, *supra* para 10, at para 73, 79.

B. The *Act* is valid under the criminal law power

21 The *Act* is valid as an exercise of Parliament's criminal law power. A valid criminal law contains prohibitions, directed at some evil or injurious or undesirable effect upon the public, that are enforced by appropriate penal sanctions.

Reference re Validity of Section 5(a) Dairy Industry Act (1948), [1949] SCR 1, 1 DLR 433 at p 49.

(i) ***The Act has the requisite criminal law form of prohibition***

22 The *Act* contains prohibitions of actions, satisfying the first aspect of the test. Part 1 of the *Act* prohibits the production, delivery and use of prescribed types of GHG-emitting fuel without paying emission charges. Part 2 of the *Act* prohibits the emission of GHGs from large industrial facilities in amounts that exceed a sector-specific standard level of emissions without paying charges for the excess emission.

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, at ss 17(1), 18(1), 19(1), 19(2), 21(1), 174(1), 174(2), 175 [*Act*].

23 The prohibitions in the *Act* are similar to the prohibitions in the *Environmental Protection Act* ("*EPA*"), which were upheld as valid criminal law in *Hydro-Québec*. The *EPA*'s prohibitions are based on a list of toxic substances. The *Act*'s prohibitions are based on a list of fuel types and a list of industrial activities. Whereas the *EPA* prohibits the use of listed substances in the manner provided by the *EPA*'s regulations, the *Act* prohibits the use of fuel and industrial emissions in a manner <u>not</u> provided by the *Act* or its *Regulations*. Specifically, whereas the *EPA* prohibits releasing listed substances into the environment from certain places, the *Act* prohibits the use of fuel and excess emission of industrial GHG without paying the charges required by the *Act*.

> *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32, at paras 104-105, 146, 150, 160 [*Hydro-Québec*].
> *Act*, *supra* para 22, at s 169.
> *Output-Based Pricing System Regulations*, SOR/2019-266, s 8 [*Regulations*].

24 The *Act* directly prohibits actions, contrary to the majority's view in the *Saskatchewan Reference* that "none of these provisions involves a prohibition" because they merely "impose a positive obligation to pay the relevant charges." The *Saskatchewan Reference* was the only provincial appeal that discussed the criminal law power in depth. It failed to recognize that the purpose of the *Act* is to establish minimum national standards of GHG price stringency to reduce GHG emissions. Importantly, the reduction of GHG emissions is part of the *Act*'s subject matter. This shows that Parliament created the charges with the intention of prohibiting acts that produce GHG emissions, rather than merely collecting fees.

> *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 SKCA 40 at para 183 [*Saskatchewan Reference*].

25 The majority's reading of the *Act* in the *Saskatchewan Reference* is not consistent with the modern approach to statutory interpretation. Under this approach, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

scheme of the Act, the object of the Act, and the intention of Parliament". Therefore, the majority's description of the *Act* as a positive obligation to pay charges is inaccurate because it fails to recognize the purpose for which the charges were created under the *Act*.

Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21.

26 The majority's view in the *Saskatchewan Reference* can be further countered by comparing the *Act*'s charges with utility rates, which are an example of "a positive obligation to pay the relevant charges" without any prohibition. Utility rates are user fees charged for a merchantable commodity such as water supply. They are not charged to reduce the public's consumption of any supply but to fund the provision of a service. In contrast, the *Act*'s charges were created to reduce GHG emissions by making it more expensive to use fuel and to emit excess industrial GHG. The charges in the *Act* do not fund the provision of services. Instead, the *Act* prescribes an obligatory return of the proceeds of charges to the province of origin. Therefore, the charges are not merely a payment for a service.

Minister of Justice for Canada v City of Lévis (1918), [1919] AC 505 at p 4, [1918] 11 WLUK 53 (PC)
Westbank First Nation v. British Columbia Hydro & Power Authority (1999), [1999] 3 SCR 134, 176 DLR (4th) 276 at para 19 [*Westbank*].
Act, supra para 22, at ss 165(2), 188(1).

(ii) ***The Act's prohibitions are supported by penalties***

27 The prohibitions of the *Act* are enforced by penalties, satisfying the second part of the test for a valid criminal law. If those subject to the *Act* fail to comply, they have committed an offence and are subject to a fine or imprisonment. This is similar to valid criminal law found in *Hydro-Québec*, where the *EPA* also enforced prohibitions with the penalty of an offence punishable by fine or imprisonment.

Act, supra para 22, ss 136, 137, 233(1), 233(2), 233(3), 233(4).
Hydro-Québec, supra para 23, at para 149.

(iii) ***The Act is directed at a valid criminal law purpose***

28 Valid criminal law prohibitions must be directed at a legitimate public purpose that addresses an "evil, injurious, or undesirable" effect. The *Act*'s public purpose is the protection of the environment and is specifically directed at the evil and undesirable effects of climate change.

Hydro-Québec, supra para 23, at para 121.

29 Protection of a clean environment is a legitimate public purpose of "superordinate importance", capable of supporting criminal prohibitions and penalties. This purpose was recognized as a major challenge in our time in 1997 and has become increasingly relevant with the urgency the climate crisis poses today.

Hydro-Québec, supra para 23, at para 85.

30 The *Act* works to protect the environment by responding to the cause of climate change with a scheme aimed at reducing Canada's GHG emissions. This goal is consistent with the fundamental value of stewardship that the criminal law seeks to protect.

31 The preamble states Canada is committed to reducing its national GHG contribution by meeting or exceeding Canada's *Paris Agreement* commitments and highlights that GHG-pricing is integral to these efforts without which "could contribute to significant deleterious effects on the environment". By reducing GHG emissions to levels delineated in the *Paris Agreement* with a plan that involves GHG pricing, the preamble states Canada would "significantly reduce the risks and impacts of climate change".

Act, supra para 22, at Preamble.

32 The integral role that GHG pricing plays in the plan to reduce GHG emissions to protect the environment from climate change is further supported by the *Vancouver Declaration*, International and Canadian expert research on effective GHG reduction strategies.

Act, supra para 22, at Preamble.
CR, Vol 1, *Moffet*, *supra* para 6*,* at paras 57, 59.
GGPPA Reference, supra para 10, at para 170.

C. *The Act is authorized by the national concern doctrine*

33 The *Act* is constitutional on the basis of the national concern doctrine. The national concern doctrine is within Parliament's power over peace, order and good government derived from the introductory clause of section 91 of the Constitution. The applicable framework to determine whether the *Act* is valid under the national concern doctrine requires satisfying a three-step test:

(a) The matter is of sufficient national concern to warrant consideration under the doctrine

(b) The matter has the requisite singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern

(c) The scale of impact on provincial power is reconcilable with the constitutional division of powers

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, at s 91
GGPPA Reference, supra para 10*,* at para 132, 162-166

(i) ***The Act is a matter of national concern***

34 The focus of this analysis centers on the common-sense inquiry of whether a national minimum standard of GHG price stringency is a national concern to Canada as a whole to warrant consideration under the doctrine.

GGPPA Reference, *supra* para 10, at paras 142-143.

35 It is a national concern to respond to climate change through means that will effectively contribute to the overall national reduction of GHG emissions.

36 The importance of provincial power to regulate GHG emissions is not contested. The Appellants' concern over the importance of retaining provincial jurisdiction to implement GHG reduction policies does not address the underlying question in this stage of the national concern doctrine analysis.

Appellants' Factum, *supra* para 21, at paras 39-40.

37 The *Act*'s preamble shows the *Act* is a response to climate change through efforts of reducing Canada's national GHG levels. The impacts of failing to sufficiently reduce GHG emissions on a national scale directly fuel the grave concern the climate crisis poses. The facts show an international and domestic consensus that GHG pricing is an essential element to reducing GHG emissions to levels that will result in a stable climate.

Act, supra para 22, at Preamble.

(ii) ***The matter is single, distinct and indivisible***

38 "Establishing minimum national standards of GHG price stringency" has the requisite singleness, distinctiveness and indivisibility to qualify as a matter of national concern. There are three factors underpinning the requirement of "singleness, distinctiveness and indivisibility": (1) specific and identifiable; (2) distinct from provincial matters; and (3) provincial inability test. Each will be addressed below.

R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401, 49 DLR (4th) 161 at para 33 [*Crown Zellerbach*].

39 <u>The matter is specific and identifiable</u>*:* The matter identifies "what it is over which the law purports to claim jurisdiction". The law purports to claim jurisdiction over a specific and precisely identifiable type of pollutant (GHGs, set out in precise detail in Schedule 3 of the *Act*), and a precisely identified regulatory mechanism (carbon pricing) of a specific application (a national backstop).

Act, *supra* para 22, at Sch 3.
Hydro-Québec, supra para 23, at para 67.

40 The matter is distinct from provincial matters: The matter also has "a degree of unity that [makes] it indivisible, an identity which [makes] it distinct from provincial matters and a sufficient consistence to retain the bounds of form". The specific and identifiable type of pollutant, regulatory mechanism and application form a sufficient degree of unity to make the matter indivisible. The matter also sets minimum national standards, which gives it an identity that is, by definition, distinct from provincial matters.

Re Anti-Inflation Act, [1976] 2 SCR 373, 68 DLR (3d) 452 at p 458 [*Anti-Inflation Reference*].

41 Contrary to the Appellants' contention, the matter at hand is also not an aggregate of provincial powers. Beetz J. held in the *Anti-Inflation Reference* that "containment and reduction of inflation" does not pass muster because it is an aggregate of several subjects falling under provincial jurisdiction, "totally lacking in specificity" and "so pervasive that it knows no bounds". In contrast, "establishing minimum national standards of GHG price stringency to reduce GHG emissions" is specifically and precisely bound. Stating that the *Act* "imposes charges on manufacturing, farming, mining, agriculture and other intra-provincial economic endeavours" is an overbroad characterization: the *Act* implements a fuel charge to producers, distributors and importers of various carbon-based fuel and sets out a pricing mechanism for industrial GHG emissions by large emission-intensive industrial facilities. It is not contested that provincial regulation of GHG emissions is possible through s. 92A. The *Act* contemplates and relies upon that fact. However, the matter is nonetheless indivisible. In Brown J.'s dissenting judgment, he described "indivisible" as meaning that the responsibility for the matter "cannot be divided between Parliament and the provinces": establishing minimum national standards cannot be divided. Minimum national standards are federal by definition.

Anti-Inflation Reference, *supra* para 40, at p 458.
GGPPA Reference, *supra* para 10, at para 441.

42 Brown J. expressed concern that "[a]lmost any provincial head of power [would be] open to federal intrusion by recasting the federal matter as one of 'minimum national standards'". However, standards of GHG price stringency to reduce GHG emissions is not "any provincial head of power". Rather, they are a circumscribed aspect of a subject matter that the court has recognized as one of the major challenges of our time. The principles underpinning the requirement of "singleness, distinctiveness and indivisibility" demand a level of specificity and qualitative difference in order to protect provincial powers, and that requirement is met by the matter in this case.

GGPPA Reference, supra para 10, at para 441.
Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3, 88 DLR (4th) 1 at para 1. [*Oldman River*].
Hydro-Québec, supra para 23, at para 85.
Anti-Inflation Reference, supra para 41, at p 458.

43 A proposed matter of national concern will also be distinct from provincial matters when it has a "predominantly extra-provincial as well as international character and implications". For example, the dissent in *Crown Zellerbach* suggested that a "single, distinct and indivisible form of pollution which can cross provincial boundaries … [would require] particular national measures for its proper control". The *Act* prices pollution that has a distinctly extra-provincial *and* international character and implications: GHGs emitted in one province does and will continue to cause impacts extra-provincially and internationally.

Crown Zellerbach, supra para 38, at paras 37, 68.

44 The matter satisfies the "provincial inability" test: In order to satisfy the "provincial inability" test:

a) the matter must "be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting", and
b) "[T]he 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".

General Motors of Canada Ltd v City National Leasing, [1989] 1 SCR 641, 58 DLR (4th) 255 at para 34.

45 The provinces are constitutionally incapable of legislating in relation to activities outside their borders. They cannot establish national standards.

Pan-Canadian Securities Reference, supra para 16, at para 114.

46 The "interrelatedness of the intra-provincial and extra-provincial aspects of [this] matter … [require] a single or uniform legislative treatment". As recognized in the preamble to the *Act*, climate change and GHGs "cannot be contained within geographic boundaries" and "the lack of stringency in some provincial [GHG] emissions pricing systems could contribute to deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity".

Crown Zellerbach, *supra* para 38, at para 35.

(iii) ***The Act's scale of impact is reconcilable with the constitutional distribution of legislative powers***

47 The scale of impact favours finding the *Act* constitutional because it has a limited impact on provincial jurisdiction, but there would be a significant impact on interests that would be

affected if Parliament were unable to constitutionally address the matter at a national level ("Other Interests"), including extra-provincial interests.

a) The Act has a shallow impact.

48 The *Act* has a shallow impact on any single item to which it applies. The breadth of items to which price stringency can be attached is only one measure of impact on provincial jurisdiction. Given that the *Act* only permits the payment of fuel and excess emission charges, and not the fine-grain regulation of GHG emissions in all aspects, the *Act* has a limited impact on provincial jurisdiction.

49 This impact is comparable to the legislation in *Pan-Canadian Securities Reference*. Despite being a case about trade and commerce power, it is applicable to the extent that it treats the regulation's level of detail as a measure of the degree of intrusion into provincial jurisdiction. The court found that unlike the previous legislation, the *Proposed Canadian Securities Act* intrudes far less into provincial jurisdiction because it does not "descen[d] into the detailed regulation of all aspects of trading in securities", such as licensing of securities professionals. Likewise, the *Act* does not control all aspects of GHG emissions. It only sets a minimum national standard on one aspect of GHG emission – pricing.

Pan-Canadian Securities Reference, *supra* para 16, at para 111.

b) The Act has inherent limits in its pith and substance.

50 The Appellants base their argument on an overbroad characterization that the *Act* "regulate[s] GHG emissions through the imposition of a fuel charge and industrial emission limits". But as Professor Chalifour observed, "it is only in the event of a very broadly defined matter", like regulating all aspects of GHG emissions, "that the risk of federal laws intruding too deeply into areas of provincial authority is a genuine one". As we have determined the pith and substance of the *Act* to be narrower, the realistic risk of federal intrusion is much smaller.

Appellants' Factum, *supra* para 21, at paras 59-62, 27.
Nathalie Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50 Ottawa L. Rev. 201 at 30 [Chalifour].

51 The Appellants' concern that there are no limits on what the *Act* covers on price stringency is inaccurate because the legislative means set inherent limits that form part of the *Act*'s pith and substance. The pith and substance of the *Act* is to establish minimum national standards of GHG price stringency to reduce GHG emissions. As a result, price stringency can

only be imposed on fuel and excess industrial emissions. This is a far cry from anything that produces GHGs.

Appellants' Factum, *supra* para 21, at para 62.

52 Provinces retain a wide array of means to enact non-carbon pricing methods to reduce GHG emissions. They can "price carbon through carbon taxes or cap and trade systems that meet the federal threshold", "impose technology standards on GHG-intensive production processes, modify building codes to reduce GHG emissions, or foster the development of renewable energy".

Chalifour, *supra* para 50, at 39.

c) The Act does not interfere with the provinces' jurisdiction over natural resources.

53 The *Act*'s proposed matter of national concern does not interfere with the provinces' jurisdiction over natural resources, contrary to the Appellants' argument. While the Appellants did not provide evidence to show that the *Act* contradicts provincial policy choices to use non-carbon pricing methods, the *Alberta Reference* that they cited gave an example. The *Act* supposedly contradicts Alberta's *Methane Regulation* by imposing charges on small facilities while the *Methane Regulation* exempted them from retail carbon taxes to help them invest in methane reduction measures. Because of the *Act*'s additional costs, the majority in the *Alberta Reference* concluded that it contradicts the *Methane Regulation*, as small facilities will slow or halt progress on reduction measures.

Appellants' Factum, *supra* para 21, at para 59.
Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 at para 328 [*Alberta Reference*].
Methane Emissions Reduction Regulation, Alta Reg 244/2018 [*Methane Regulation*].

54 However, the *Act* does not truly contradict this provincial policy. Small facilities can comply with both the *Act* and Alberta's *Methane Regulations* by simultaneously paying charges and being exempt from the carbon tax. The majority in the *Alberta Reference* impermissibly put itself in the place of the legislature and considered the efficacy of Alberta's policy. The mere fact that it is economically undesirable for small facilities to pay charges under the *Act* when they are exempt from the tax under the *Methane Regulation* does not make the *Act* an intrusion into provincial legislative jurisdiction. Where opposition to the *Act* is based on an efficacy-based preference to prevent economic burdens on local businesses rather than true interference with provincial jurisdiction, such opposition is irrelevant to the scale of impact.

Reference re Firearms Act, 2000 SCC 31 at paras 18, 57 [*Firearms Reference*].

d) The Act confers circumscribed discretion to the Governor in Council ("GIC").

55 The Appellants' concern about overbroad discretion is speculative. Even though the GIC has the discretion to make regulations and amend the *Act*, it is constrained by the *Act*'s background, purpose, statutory interpretation principles and challengeable on judicial review. For example, the presumption against absurdity prevents the GIC from defining terms in any way it likes. Even though the GIC can define "fuel" by amending Schedule 2, it would be absurd to define "fuel" as something not even remotely close to fuel, given that "fuel" has an ordinary meaning.

Appellants' Factum, *supra* para 21, at para 61.
GGPPA Reference, *supra* para 10, at para 87.
Act, *supra* para 22, at s 3.
Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) at p 88.

56 The GIC's discretion conferred by the *Act* is comparable to valid discretion under the *EPA*. In *Hydro-Québec*, the court found the *EPA* is not so broad as to allow the Minister to "regulate any substance that can in any way prove harmful to the environment" when considering the *EPA* "as a whole and in light of its background and purpose."

Hydro-Québec, *supra* para 23, at paras 133-134.

57 From the *Vancouver Declaration* to the Working Group, the *Act*'s background shows that it is aimed at setting a national standard on pricing to reduce GHG emissions because no one province can address climate change on its own. The preamble and legislative history show that the purpose is to set a federal floor price on carbon to reduce GHG emissions. Thus, although the GIC can "make regulations 'respecting GHG limits'", those regulations only affect GHG pricing.

GGPPA Reference, *supra* para 10, at paras 7, 14-15, 60, 66.
Appellants' Factum, *supra* para 21, at para 61.

e) <u>There would be significant impact on other interests if the Act is ultra vires.</u>

58 On the other hand, there is grave impact on Other Interests if the *Act* is *ultra vires* Parliament – a consideration that the Appellants omitted from their scale of impact analysis. There would be "irreversible consequences for the environment, for human health and for the economy…across the country" that would be borne "disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada's coastal regions". These findings also appeared in the *Vancouver Declaration*, with specific reference to outcomes of forest fires, flooding, eroding coastlines and thawing permafrost.

GGPPA Reference, *supra* para 10, at para 206.
Vancouver Declaration, *supra* para 8

59 Vital extra-provincial interests would be significantly harmed by the "unilateral action or inaction of" any single province to take sufficient intra-provincial measures to reduce GHG emissions. Although provinces can legislate GHG price stringency within their boundaries, they will invariably do so at different paces and standards. Otherwise, Canada would have already seen comparable, or at least, less disparity in GHG emission among its provinces. However, the reality is that if Alberta or Saskatchewan were independent countries, they would rank first in the world in per capita emissions. In 2016, Alberta, Ontario, Quebec, Saskatchewan and British Columbia accounted for about 90.5 percent of Canada's total GHG emissions. Yet, the detrimental effects of climate change disproportionately ravage the Yukon and the Northwest Territories. There is thus no guarantee that the provinces and territories with lower GHG emissions will be protected from climate change caused by high GHG emissions from other provinces.

> Factum of the Attorney General of British Columbia*, GGPPA Reference*, dated 27 January 2020, at paras 47, 51.
> *GGPPA Reference*, *supra* para 10, at para 10.

60 Given the limited intrusion into provincial jurisdiction and the significant impact on Other Interests, the scale of impact is reconcilable with the distribution of legislative powers under the *Constitution Act, 1867*.

D. The fuel charge under Part 1 of the *Act* is a valid regulatory charge

61 The fuel charge under Part 1 of the *Act* meets both steps of the two-step test set out in *Westbank* to determine if a governmental levy is a regulatory charge, as opposed to a tax. First, the Court must identify the existence of a relevant regulatory scheme. If a relevant regulatory scheme exists, the second step is to find a relationship between the charge and the scheme itself.

> *Westbank*, *supra* para 26, at paras 22 and 44.

62 The Appellants' argument that the fuel charge is a tax cannot be sustained because a tax is "unconnected to any form of regulatory scheme", but the fuel charge is connected—and in fact inheres in—a regulatory scheme. Thus, the fuel charge does not meet at least one of the criteria for a tax. All five of the *Westbank* criteria must be met for a levy to be a tax. Accordingly, the fuel charge is not a tax.

> *Westbank,* supra para 26, at para 44.

(i) ***The Act is a regulatory scheme that supports the existence of a regulatory charge***

63 Gonthier J. set out a non-exhaustive list of four factors indicating a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to

affect behaviour; (3) presence of actual/properly estimated costs; 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. Although not all of these factors must be present to find a regulatory scheme, all four factors are present in this case.

Westbank, supra para 26, at para 24.

a) The Act is part of a complete, complex and detailed code of regulation.

64 The pricing system established by the *Act* and the regulations can be properly described as "a complete, complex and detailed code of regulation" for pricing GHG emissions, as illustrated by our discussion of the *Act* in paragraphs 21-22, 28 and 40.

b) The Act has *a regulatory purpose which seeks to affect behaviour.*

65 The evidence illustrates that the fuel charge is intended to provide a financial incentive for GHG emitters to change their behaviour in such a way that will ultimately reduce GHG emissions.

66 The preamble of the *Act* states that behavioural change is "necessary for effective action against climate change" and that pricing GHG emissions "is an appropriate and efficient way to create incentives for … behavioural change".

67 The extrinsic evidence also points to the *Act*'s purpose of carbon pricing to reduce GHG emissions. The *Pan-Canadian Approach* introduced the federal government's pan-Canadian benchmark for carbon pricing. It recognized carbon pricing as the most efficient way to reduce emissions and thus drive innovation for low-carbon choices for consumers and businesses, illustrating again that the underlying thrust of the *Act* is affecting behavioural change through carbon pricing to reduce GHG emissions.

Act, *supra* para 22, at Preamble.
Canada, Environment and Climate Change, *Pan-Canadian Approach to Pricing Carbon Pollution* (Environment and Climate Change, 2016) [*Pan-Canadian Approach*].

68 Legislative debates also support the proposition that the *Act*'s purpose is to affect behaviour through GHG pricing and thus reduce GHG emissions. The then Minister of Environment and Climate Change, the Hon. Catherine McKenna stated that carbon pricing is "[c]entral to any credible climate plan" and "a major contribut[or] to helping Canada meet its climate targets under the *Paris Agreement*." The then Parliamentary Secretary to the Minister of the Environment and Climate Change, Jonathan Wilkinson, also identified that the focus of

carbon pricing "is to actually incent choices that drive people toward more efficient use of hydrocarbon resources so that we will reduce our GHG emissions over time".

House of Commons Debates, vol 148, No 289, 1st Sess, 42nd Parl, May 1, 2018, at p 18958.
House of Commons Debates, vol 148, No 294, 1st Sess, 42nd Parl, May 8, 2018, at p 19213.

c) There are actual/properly estimated costs.

69 Regulatory schemes "*usually* involve expenditures of funds on costs which are either known, or properly estimated" (emphasis added). However, the fuel charge does not "exist to defray the expenses of the regulatory scheme". Rather, the charge itself is "the means of advancing [the] regulatory purpose" of affecting behavioural change to reduce GHG emissions.

Westbank, supra para 26, at para 29.

70 The charge itself is clearly and properly identified. The charges apply when fuel is produced, delivered or used in a listed province; brought into a listed province; or imported into Canada at a location in a listed province. Part 1 of Schedule 1 sets out the listed provinces, and Schedule 2 lists the 22 types of carbon-based fuel to which the fuel charge applies and the applicable rates of charge for each one.

Act, *supra* para 22, at ss 17(1), 18(1), 19(1), 19(2), 21(1), Sch 1 Part 1, Sch 2.

71 Limiting the charge to the recovery of costs would hinder the scheme's purpose of providing a financial incentive for behavioural change. The Appellants suggest that there is no evidence of any attempt to match the revenues with the cost of the scheme, relying on the law set out in *620 Connaught* that "a significant or systematic surplus above the cost of the regulatory scheme would be inconsistent with a regulatory charge". However, the charges in *620 Connaught* are levied in order to defray the costs of the scheme, and the charges conferred a benefit on the person being regulated and the benefit came with costs to the government. The fuel charge is almost the opposite: it does not confer a benefit, and the costs to the government are minimal. As Rothstein J. stated in *620 Connaught*, levies such as the fuel charge are set "at a level to proscribe, prohibit or lend preferences to a behaviour", *not* to confer a benefit with a cost to the government.

Appellants' Factum, *supra* para 21, at 77.
620 Connaught Ltd. v Canada (Attorney General), 2008 SCC 7 at para 20.

72 Furthermore, not only is the fuel charge set at a price required in order to achieve the purpose of the regulatory scheme, the fuel charge does not raise revenue for the federal government. Although "it might be possible to attack a fee structure demonstrably intended to

raise revenue in excess of regulatory needs on constitutional grounds", the charges cannot be described as "in excess of regulatory needs": they are set at a price high enough to incentivize behavioural change. Furthermore, section 165(2) of the *Act* and the extrinsic evidence illustrates that the Act is—as described by Richards C.J.S. at the Saskatchewan Court of Appeal—"wholly disinterested in generating revenue". The *Pan-Canadian Approach* establishes the principle supported by the federal government that carbon pricing policies should include revenue recycling—that is, returning income generated through the scheme. The benchmark set out in the *Pan-Canadian Approach* also establishes that pricing stringency is to be based on modelling and "to contribute to our national target and provide market certainty", and that revenues remain in the jurisdiction of origin in order to "use carbon pricing revenues according to their own needs, including to address impacts on vulnerable populations and sectors and to support climate change and clean growth goals". Accordingly, section 165(2) of the *Act* states that the Minister must distribute the amount collected through the charges to the province.

Allard Contractors Ltd v Coquitlam (District), [1993] 4 SCR 371, 109 DLR (4th) 46 at para 73.
Pan-Canadian Approach.

d) There is a relationship between the person being regulated and the regulation.

73 The fuel charge is paid by producers, distributors and importers of fuel. By virtue of paying the charge, the people being regulated have a relationship to the regulation. The Appellants take issue with the fact that the expectation appears to be that the charge will be passed on to end-use consumers and that there is no guidance for fuel producers, distributors and importers to decide how to change their pricing structure. However, the people being regulated in this case cause the need for the regulation: the fuels and combustible waste being charged produce GHGs causing climate change.

Appellants' Factum, *supra* para 21, at 78.

74 The Appellants also suggest that the exemption available to farmers and fishers indicates that those subject to regulation are not selected based solely on GHG emissions, since there is no evidence that their work creates less GHG emissions. While it is true that there is no evidence to suggest that farmers and fishers produce less GHG emissions, the federal government provides relief to several groups—not just farmers and fishers—"because of the small number of alternative options they may have in the face of carbon pollution pricing". In any case, the exemption available for some groups does not lend to the inference that everyone else who is subject to the charge does *not* cause the need for the regulation. As already established, the

people being regulated produce, distribute and import fuels and combustible waste-producing GHGs causing climate change.

> Appellants' Factum, *supra* para 21, at 78.
> Canada, Department of Finance, *Backgrounder: Targeted Relief for Farmers and Fishers, and Residents of Rural and Remote Communities* (Department of Finance, 2018) <https://www.canada.ca/en/department-finance/news/2018/10/backgrounder-targeted-relief-for-farmers-and-fishers-and-residents-of-rural-and-remote-communities.html> accessed 7 February 2022.

(ii) ***There is a relationship between the charge and the regulatory scheme***

75 There is not just a sufficient nexus between the charge and the regulatory scheme: they are wholly interrelated. Gonthier J. contemplated that a relationship between the charge and the scheme could exist where "the charges themselves have a regulatory purpose, such as the regulation of certain behaviour", as is the case here. The evidence establishes that the purpose of the regulatory scheme is to affect behavioural change to reduce GHG emissions. The scheme achieves this purpose through the fuel charge: if producing, distributing and importing GHG-emitting fuels and combustible waste is made more expensive, then businesses and consumers will be incentivized to use such fuels and combustible waste more efficiently, thus reducing GHG emissions.

> *Westbank*, *supra* para 26, at para 44.

76 If the charges were minimal, there would be no financial incentive for people to change their behaviour. The Appellants suggest that in order for there to be a sufficient nexus between the charge and the regulatory scheme, the funds raised must be spent to further its regulatory purpose of reducing GHG emissions. However, *Westbank* establishes that "the regulatory charges themselves may be the means of advancing a regulatory purpose", and the regulatory purpose would be undermined if the charge was not sufficiently high.

> *Westbank*, *supra* para 26, at para 29.

77 In any case, while it is true that the *Act* does not strictly require fuel charge proceeds to be directed toward advancing the regulatory purpose, the federal government "uses approximately 90 percent of fuel charge proceeds to directly support families through Climate Action Incentive payments". Fuel charge proceeds also go towards schools, funding energy efficient retrofits for small and medium businesses, and other programs focused on climate monitoring and infrastructure improvements for Indigenous and remote communities. Thus, the federal government's current policy—which is aligned with the benchmarks established in the

Pan-Canadian Approach—is to direct fuel charge proceeds in a way that does advance the ultimate goal of the regulatory scheme to reduce GHG emissions.

> Canada, Environment and Natural Resources, *How carbon pricing works* (Environment and Natural Resources, 2021) <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html> accessed 7 February 2022.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

78 Canada does not seek costs and requests that no costs be awarded against it.

PART V -- ORDER SOUGHT

79 Canada asks that the appeal be dismissed in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of February, 2022.

[redacted]

[redacted]

[redacted]

Counsel for the Respondent
Attorney General of Canada

PART VI -- TABLE OF AUTHORITIES

Case Law	Cited at paragraph(s)
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House of Commons Debates, vol 148, No 289, 1st Sess, 42nd Parl, May 1, 2018	68
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Nathalie Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50 Ottawa L. Rev. 201	50, 52
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PART VII -- LEGISLATION AT ISSUE

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

Charge — delivery by registered distributor
17 (1) Subject to this Part, a particular registered distributor in respect of a type of fuel that delivers, at a particular time, fuel of that type in a listed province to another person must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40. The charge becomes payable at the particular time.

Charge — use by registered distributor
18 (1) Subject to this Part, every registered distributor in respect of a type of fuel that uses, at a particular time, fuel of that type in a listed province must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40. The charge becomes payable at the particular time.

Charge — bringing into a listed province
19 (1) Subject to this Part, every person that brings, at a particular time, fuel into a listed province from a place in Canada must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40 if the person is a registered emitter or is, in respect of that type of fuel, a registered user, a registered importer, a registered air carrier, a registered marine carrier or a registered rail carrier. The charge becomes payable at the particular time.

Charge — importation
(2) Subject to this Part, every person that imports, at a particular time, fuel at a location in a listed province must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40 if the person is a registered emitter or is, in respect of that type of fuel, a registered user, a registered importer, a registered air carrier, a registered marine carrier or a registered rail carrier. The charge becomes payable at the particular time.

Charge — production
21 (1) Subject to this Part, a person that produces at a particular time fuel in a listed province must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40 unless the person is

(a) a registered distributor in respect of that type of fuel;

(b) a registered specified air carrier in respect of that type of fuel;

(c) a registered specified marine carrier in respect of that type of fuel;

(d) a registered specified rail carrier in respect of that type of fuel; or

(e) a prescribed person, a person of a prescribed class or a person meeting prescribed conditions.

General offence
136 Every person that fails to comply with any provision of this Part for which no other offence is specified in this Part is guilty of an offence punishable on summary conviction and liable to a fine of not more than $100,000 or to imprisonment for a term of not more than 12 months, or to both.

Compliance orders
137 If a person is convicted by a court of an offence for a failure to comply with a provision of this Part, the court may make any order that it deems appropriate to enforce compliance with the provision.

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).

Compensation for excess emissions
174 (1) A person that is responsible for a covered facility that emits greenhouse gases in a quantity that exceeds the emissions limit that applies to the covered facility during a compliance period must, in accordance with the regulations, provide compensation for the excess emissions by the increased-rate compensation deadline.

Provision of compensation
(2) The compensation is to be provided, at a rate set out in subsection (3) or (4), by means of

(a) a remittance of compliance units to the Minister or a person specified in the regulations in lieu of the Minister;

(b) an excess emissions charge payment to Her Majesty in right of Canada; or

(c) a combination of both.

Issuance of surplus credits
175 If a covered facility emits greenhouse gases in a quantity that is below the emissions limit that applies to it during a compliance period, the Minister must, in accordance with the regulations, issue to a person that is responsible for the covered facility a number of surplus credits that is equal to the difference between that limit, expressed in CO_2e tonnes, and the number of CO_2e tonnes emitted.

Distribution — charge payments
188 (1) The Minister of National Revenue must distribute revenues from excess emissions charge payments that are made under section 174 or 178 in relation to covered facilities that are located in a province or area. The Minister of National Revenue may distribute the revenues to

(a) that province;

(b) persons that are specified in the regulations or that meet criteria set out in the regulations; or

(c) a combination of both.

Offences
233 (1) Every person commits an offence who

(a) contravenes any provision of this Part, other than a provision the contravention of which is an offence under paragraph 232(1)(a);

(b) contravenes any provision of a regulation made under this Part, other than a provision the contravention of which is an offence under paragraph 232(1)(c);

(c) with respect to any matter related to this Part, provides any person with any false or misleading information or samples; or

(d) with respect to any matter related to this Part, files a document that contains false or misleading information.

Penalty — individuals
(2) Every individual who commits an offence under subsection (1) is liable,

(a) on conviction on indictment,

(i) for a first offence, to a fine of not more than $100,000, and

(ii) for a second or subsequent offence, to a fine of not more than $200,000; or

(b) on summary conviction,

(i) for a first offence, to a fine of not more than $25,000, and

(ii) for a second or subsequent offence, to a fine of not more than $50,000.

Penalty — other persons
(3) Every person, other than an individual or a organization referred to in subsection (4), that commits an offence under subsection (1) is liable,

(a) on conviction on indictment,

(i) for a first offence, to a fine of not more than $500,000, and

(ii) for a second or subsequent offence, to a fine of not more than $1,000,000; or

(b) on summary conviction,

(i) for a first offence, to a fine of not more than $250,000, and

(ii) for a second or subsequent offence, to a fine of not more than $500,000.

Penalty — small revenue organizations
(4) Every organization that commits an offence under subsection (1) and that the court determines under section 234 to be a small revenue organization is liable,

(a) on conviction on indictment,

(i) for a first offence, to a fine of not more than $250,000, and

(ii) for a second or subsequent offence, to a fine of not more than $500,000; or

(b) on summary conviction,

(i) for a first offence, to a fine of not more than $50,000, and

(ii) for a second or subsequent offence, to a fine of not more than $100,000.

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 RESPONDENT ATTORNEY GENERAL OF CANADA

TEAM #2022-04

Counsel for the Respondent,
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