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 #2022-05

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 This appeal concerns the constitutional validity of the federal *Greenhouse Gas Pollution Pricing Act* (the "*GGPPA*" or "*Act*"). Specifically, this appeal is about (1) whether the *GGPPA* as a whole is *intra vires* Parliament to address a matter of national concern under Parliament's jurisdiction to legislate for peace, order and good government ("POGG"); and (2) whether the fuel charges ("the charges") under Part 1 of the *Act* are *intra vires* Parliament as a valid regulatory charge or a valid tax. The Attorneys General of Alberta, Saskatchewan, and Ontario, here to jointly appeal the 2021 *GGPPA Reference* decision made by the Supreme Court of Canada ("SCC"), insist the answer to both questions should be no.

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 [*GGPPA*].
> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Reference*].

2 Climate change is the defining challenge of our time, requiring urgent action to mitigate the severity of warming and adapt to its projected impacts. It is indisputable that the cause of climate change is the accumulation of anthropogenic greenhouse gas ("GHG") emissions produced in large part by burning fossil fuels. While much attention has been paid to international efforts, the burden of reducing GHG emissions to meet *Paris Agreement* goals must necessarily occur at the local level, where emissions sources are located. There is no one-size-fits-all policy solution to climate change; measures to reduce and adapt to climate change must be targeted and responsive to local context.

> IEA, "A global pathway to net-zero emissions CO2 emissions by 2050" in *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Paris, 2021) at 47–98.

3 The *GGPPA* should not be held as constitutional under the national concern doctrine, as GHG regulation via market mechanisms is wholly within provincial jurisdiction. Canadian federalism readily accommodates effective, contextually responsive climate action, as the division of powers in the *Constitution Act* recognizes provincial diversity and emphasises provincial autonomy over local matters (Hogg). This model of climate policy accords with the principle of subsidiarity, recognized by the Supreme Court in *Spraytech* as a "proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs." Climate change touches directly upon many heads of provincial power within the *Constitution Act*, including property and civil rights in the province, management and sale of public lands,

non-renewable natural resources, and all matters of a merely local or private nature in the province. Within this fertile constitutional context, the Appellant provinces of Ontario, Alberta, and Saskatchewan have been leaders in implementing climate strategies, including market-based mechanisms.

> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92, 92(13), 92(5), 92A, 92(16), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].
> Peter Hogg, *Constitutional Law of Canada,* 5th Edition Supplemented, (Toronto, Thomson Reuters Canada, 2021), at §5:7, "Subsidiarity".
> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40 at para 3 [*Spraytech*].
> See for example: *An Act respecting the Management and Reduction of Greenhouse Gases and Adaptation to Climate Change,* SS 2010, c M-2.01; Alberta, "Reducing methane emissions" (2022), online: *Government of Alberta* <https://www.alberta.ca/climate-methane-emissions.aspx#jumplinks-1>; *Greenhouse Gas Emissions Performance Standards,* O Reg 241/19.

4 The fuel charges in Part 1 of the *Act* should not be held *intra vires* Parliament, as they are neither a valid regulatory charge nor valid taxation. Proper application of the tests from *Lawson*, *Westbank*, and *Connaught* indicate that the fuel charges do not form a relevant regulatory scheme, nor is there a sufficient nexus between the charges and the regulatory purpose, leaving the charges as a taxation scheme. However, the overreach afforded to the Governor in Council within Part 1 of the *GGPPA* offends s 53 of the *Constitution Act*, the "no taxation without representation" principle, deeming the taxation scheme invalid.

> *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357, [1931] 2 DLR 193 [*Lawson*].
> *Westbank First Nation v British Columbia Hydro and Power Authority*, 1999 CanLII 655 (SCC), [1999] 3 SCR 134 [*Westbank*].
> *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 [*Connaught*].
> *Constitution Act*, *supra* para 3, s 53.

B. Statement of Facts

(i) The *Greenhouse Gas Pollution Pricing Act*

5 The *GGPPA*, passed in 2018, contains two related but distinct market mechanisms schemes to attempt to reduce national GHG emissions. Part 1 imposes a fuel charge on producers, distributors, and importers of twenty-one hydrocarbon fuels. This is colloquially known as a "carbon tax", with a 2019 starting rate of $10 per tonne of carbon dioxide equivalent ("CO_2e"). The revenue collected is distributed to individuals and a range of organizations in listed provinces at a flat rate in the form of tax credits, referred to as Climate Action Incentive payments. Part 2 establishes an "output-based pricing system", better known as "cap-and-trade",

for certain large industrial emitters. Each "covered facility" is subject to an industry-specific emissions cap. Facilities may purchase credits to exceed the cap or sell excess credits. Carbon offset regulations are in development.

6 The *GGPPA* is distinctive in that it functions as "backstop" legislation, only applying in listed provinces whose emissions pricing schemes fall short of the criteria laid out in the *Act,* in the eyes of the Governor in Council. A critical aspect of the *Act* is the sweeping discretion afforded to the Governor in Council to set the terms for provincial climate legislation. For instance, the Governor in Council has nearly unfettered discretion to amend Part 1 of the *Act* through the power to make regulations, to list or delist provinces, and to prescribe anything that is to be prescribed or determine by regulation (e.g., anything related to the fuel charge system). The Governor in Council has similarly unobstructed powers for Part 2 of the Act, with the ability to list and delist provinces, to add or delete listed GHGs, and to amend schedules in an assortment of ways (e.g., amending excess emissions charges). In effect, the *Act*'s minimum standards are set by the Governor in Council, not the *Act* itself.

(ii) Procedural History

7 The *GGPPA*'s constitutional validity has been challenged in provincial appellate courts by the Attorneys General of Ontario, Saskatchewan, and Alberta. The Ontario Court of Appeal ("ONCA") and the Saskatchewan Court of Appeal ("SKCA") both found the *Act* to be constitutional. Both courts characterized the pith and substance of the *Act* as falling within Parliament's jurisdiction to legislate on matters of national concern under the POGG clause. Further, the ONCA and SKCA determined that the charges imposed by the *Act* were regulatory charges, not taxes. Despite the ONCA and SKCA rulings, the Alberta Court of Appeal ("ABCA") found the *Act* to be unconstitutional. Specifically, the Court held that the *Act* was *ultra vires* Parliament's POGG powers and the regulation of GHG emissions instead rests squarely within provincial jurisdiction.

8 These three decisions were then appealed to the Supreme Court of Canada ("SCC"), which found the *GGPPA* to be constitutional. In the 6-3 decision, the SCC maintained that the *Act* was valid under federal POGG power, holding that its pith and substance was to establish minimum national standards of GHG price stringency to reduce GHG emissions. This issue was the primary issue deliberated through the 400-page decision, but the Court also considered the

issue of the validity of the *Act*'s imposed charges. In eight paragraphs of analysis, the SCC held that the charges imposed under the *Act* are valid regulatory charges.

PART II -- QUESTIONS IN ISSUE

9 The questions in issue on this appeal are as follows:

(i) 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?

(ii) Is the fuel charge under Part 1 of the *Act* intra vires Parliament as a valid regulatory charge or tax?

PART III -- ARGUMENT

A. ISSUE 1: The *GGPPA* is *Ultra Vires* Parliament as a Matter of National Concern

10 To uphold the *GGPPA* as constitutional under the national concern branch of POGG would destabilize the division of powers and undermine provincial efforts to respond to climate change. The *Act*'s paternalistic supervision over market-based regulation of GHGs is irreconcilable with decades of constitutional environmental jurisprudence grounded in principles of cooperation and subsidiarity. The Appellants submit the subject-matter of the *Act* is wholly *intra vires* the provincial legislatures.

(i) Characterization: The Pith and Substance of the *GGPPA*

11 The "pith and substance", or "leading feature" of the *GGPPA,* is to be found by examining the purpose and effects of the law (*Morgentaler*). The market-based mechanisms in the *GGPPA* are premised on the theory that by raising the costs of producing and consuming GHG-intensive products, market actors will be incentivized to shift to reduce their consumption and seek out alternatives. Cap-and-trade systems and carbon taxes aim to achieve indirectly through economic pressures what "command-and-control" regulation achieves directly by setting standards and prohibitions.

R v Morgentaler, [1993] 3 SCR 463 at para 27 [*Morgentaler*].

12 The *GGPPA* aims to incentivize reduction of GHG emissions through two distinct market-based mechanisms. Given these differences, we agree with Brown J that Parts 1 and 2

ought to be characterized separately: The pith and substance of Part 1 is to reduce GHG emissions by raising the cost of fossil fuels. The pith and substance of Part 2 is to reduce industrial emissions by creating activity-specific emission caps based on emissions intensity, maintaining economic competitiveness and minimizing carbon leakage.

GGPPA Reference, *supra* para 1 at para 340.

13 The characterization offered by the SCC majority obscures the *Act*'s structure and impacts. To describe the *Act*'s subject matter as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" is imprecise. First, the pith and substance is stated at an inappropriate level of abstraction. As noted by Brown J, the term "setting prices" conflates the two distinct market mechanisms in Parts 1 and 2. Second, characterizing a matter through means which only the federal government is to undertake is tautological. A matter wholly within provincial jurisdiction cannot be "transformed" into a matter of national concern simply by legislating "minimum national standards". To do so, in Brown J's words, "short circuits" the pith and substance analysis and would fundamentally erode the exclusive jurisdiction of the provinces under s 92.

GGPPA Reference, *supra* para 1 at paras 18, 356–59.

(ii) The *GGPPA* is an outlier in Canadian environmental constitutional jurisprudence

14 The broad scope of the *GGPPA* stands at odds with a tradition of carefully crafted environmental legislation that respects the balance of federal and provincial powers. In recognition of the overlap between environmental issues and provincial economic and resource development, the application of federal environmental legislation has been restricted to areas of exclusive federal jurisdiction or filling narrow gaps in environmental protection. The *GGPPA* has no connection to any federal heads of power, and yet, the *Act* dictates the terms of key climate policy and its economic implications to all provinces, always.

15 The SCC has long acknowledged the unique challenge of reconciling environmental legislation within the division of powers. In *Friends of the Oldman River Society,* LaForest J noted that the environment is a "diffuse" subject matter. He went on to cite the *Report of the National Taskforce on Environment and Economy,* which states:

> [E]nvironmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also

> affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

This expansive view makes "the environment" a challenging matter to allocate between provincial and federal powers "without considerable overlap and uncertainty" (*Oldman River*). To grant federal jurisdiction over "environmental management" would risk granting power for much of provincial jurisdiction on key matters of natural resource management, economic development, and planning.

> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at paras 93–94, 47 [*Oldman River*].

16 By limiting the scope of federal environmental statutes to areas of federal jurisdiction, concerns of federal overreach into provincial areas are allayed. Ever since *Fowler* and *Northwest Falling*, the Supreme Court has consistently held that environmental management by the federal government requires some nexus to a federal head of power. For instance, LaForest J in *Oldman River* held federal environmental assessment and approval of a provincial dam was necessary for the limited purpose of analyzing impacts on navigable waters, an area of federal jurisdiction. Similarly, the federal *Impact Assessment Act* is narrowly focused on addressing possible impacts of projects within provinces on matters of federal jurisdiction, such as federal lands, navigable waters, and fisheries.

> *Fowler v The Queen*, [1980] 2 SCR 213 [*Fowler*].
> *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292 [*Northwest Falling*].
> *Oldman River*, *supra* para 15 at paras 103–06.
> *Impact Assessment Act*, SC 2019, c 28 [*IAA*].

17 Where federal environmental law intersects with provincial jurisdiction, the scope of overlap must be carefully defined, especially in the POGG context. In *Hydro-Quebec,* LaForest J repeated his warning from *Crown Zellerbach* that "the subject of environmental protection was all-pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada." To date, the only environmental issue found within the national concern branch of POGG is marine pollution. Marine pollution is a geographically discrete issue with clear connections to federal heads of power (e.g., fisheries and navigable waters), alleviating much of the concerns around the POGG power and environmental issues. In contrast, market-based regulation of

GHGs shares many characteristics with pollution control discussed in *Hydro-Quebec*: both the *Canadian Environmental Protection Act* and the *GGPPA* operate on a broad national scale, without a particular connection to federal heads of power. The health, economic, and environmental impacts of both issues affect provincial and federal jurisdiction indiscriminately. To avoid upsetting the balance of federalism, broader environmental regulation, such as toxic pollution control at issue in *Hydro-Quebec,* is more appropriately justified as an exercise of the criminal law power.

R v Hydro-Quebec, [1997] 2 SCR 213 at para 115 [*Hydro-Quebec*].

18 The "backstop" mechanism of the *GGPPA* may be contrasted with the narrower "gap-filling" provisions of the *Species at Risk Act.* In general, *SARA* protections only apply on federal lands and to migratory birds (e.g., s 58(1)). Unlike in the *GGPPA*, the threshold under *SARA* to make an order which interferes with provincial lands is high. For example, under s 61(4), a critical habitat protection order must be granted on non-federal lands if the Minister of the Environment determines that no effective protection exists within federal or provincial laws, after consultation with provincial or territorial ministers. This narrow intrusion into provincial power has been justified by the Federal Court of Appeal as an exercise of the criminal law power (*Candiac*). The discretion granted to the Governor in Council to list a province under the *GGPPA* is much broader, despite the disruptive impacts of that decision on the entire province. While a project designation under the *IAA* or protection order under *SARA* impacts small pockets of provincial activity, listing a province under the *GGPPA* has an immediate effect on large swaths of the economy.

Species at Risk Act, SC 2002, c 29, at ss 58(1), 61(4) [*SARA*].
Groupe Maison Candiac Inc v Canada (Attorney General) 2020 FCA 88 [*Candiac*].
IAA, *supra* para 16.

(iii) Classification: The National Concern Branch of POGG

(a) *Market-based regulation of GHG emissions is within exclusive provincial jurisdiction*

19 The high threshold required to find a matter coming within the national concern branch of the federal peace, order, and good government power under s 91 is proportionate to the potential disruptive impacts on the balance of federalism: "Where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency

doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects" (*Crown Zellerbach*). As discussed above, this concern is particularly salient in the environmental and climate context, owing to the diffuse and overlapping effects of climate legislation upon social and economic life.

R v Crown Zellerbach Ltd, [1988] 1 SCR 401 at para 34 [*Crown Zellerbach*].

20 The key gatekeeping mechanism for POGG is listed in the text of s 91 itself: Only matters "not coming within the classes of subjects by this Act exclusively assigned to the Legislatures of the Provinces" may be assigned under the federal residuary POGG power (*Constitution Act*). This interpretation is supported by LaForest J's general approach to assigning an environmental issue to a head of power: looking "first at the catalogue of powers in the *Constitution Act, 1867*, and considering how they may be employed to meet or avoid environmental concerns" (*Oldman River*). As established above, the "backstop" application of the *GGPPA* is premised on the provinces having jurisdiction to enact the same or similar schemes as those in the *Act*. Because provinces possess the ability to enact similar market-based mechanisms to reduce GHGs, the matter cannot be assigned to the federal government under the national concern branch of POGG.

Constitution Act, *supra* para 3 at s 91.
Oldman River, supra para 15 at para 95.

(b) *The subject matter of the* GGPPA *does not satisfy the* Crown Zellerbach *criteria*

21 In the alternative, a consideration of the National Concern test elaborated in *Crown Zellerbach* reveals the matter does not possess a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern." The majority's reliance on the "provincial inability test" to supply these characteristics is unsupported in law and overlooks key context regarding extra-provincial harm.

Crown Zellerbach, *supra* para 19 at para 33.

22 Like marine pollution, the impacts of GHG-driven climate change are well-understood forms of environmental harm. However, GHG emissions lack the unique qualities that made marine pollution a matter of "national concern" under POGG. First, GHG emissions have no significant nexus to areas of federal jurisdiction. The majority in *Crown Zellerbach* noted that marine pollution had predominantly extra-provincial character and was closely linked to federal

heads of power. In oral argument, the Attorney General of Canada argued these connections indicated that "the scope that should be assigned to federal jurisdiction under the peace, order and good government power to regulate the dumping of substances for the prevention of marine pollution" (*Crown Zellerbach*). The key characteristic which made marine pollution a "single, distinct, indivisible" matter was the inability to distinguish between provincial and federal marine waters. As LeDain J emphasized, "This, and not simply the possibility or likelihood of the movement of pollutants across that line, is what constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances." Because marine pollution did not cleanly fit within any federal heads of power, the federal government had to rely on POGG as a last resort.

> *Crown Zellerbach*, *supra* para 19 at paras 17, 37–38.

23 In contrast, the emission of GHGs can be readily tied to sources within provincial borders. Carbon accounting is now well-understood and accepted in practice (e.g., *GHG Protocol*). A cap-and-trade system like Part 2 depends on reliable carbon accounting by industrial emitters. There is no question that GHG emissions are divisible at their source between federal and provincial governments, which is the scale at which the *Act* and its regulations will operate. National GHG emissions are an aggregate of provincial emissions. Therefore, like the containment of inflation, reducing national GHG emissions is "an aggregate of several subjects some of which form a substantial part of provincial jurisdiction" (*Anti-Inflation*).

> Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard,* Revised Edition (Geneva, 2004) [*GHG Protocol*].
> *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 358, 9 NR 541 [*Anti-Inflation*].

24 The crux of the majority's analysis of the *Act* rests on the "provincial inability" test outlined in *Crown Zellerbach*:

> In determining whether a matter has those characteristics and that it is clearly distinguished from matters of provincial concern in this sense, it is relevant to consider the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the matter's intra-provincial aspects. The utility of the "provincial inability" test lies in assisting in determining whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view.

The majority is right to draw attention to the harms that unmitigated emissions in one province can pose to the country as a whole. However, it cannot be assumed that setting a price on carbon

will result in lower emissions and prevent these harms. A meta-review of empirical studies published from 2000–2020 suggests that carbon pricing schemes have little bearing on emissions levels when compared to direct mitigation policies, such as phasing out coal-fired power plants (Green). For example, overall emissions reductions in the European Union Emissions Trading System, the oldest cap-and-trade system, range from only 0–1.5% yearly (Green). Another study found that British Columbia's carbon tax has not produced a statistically significant reduction in emissions (Pretis). The harm resulting from "provincial inability" to implement a carbon price that meets the minimum national standard is largely speculative.

> *Crown Zellerbach*, *supra* para 19 at para 35.
> Jessica Green, "Does carbon pricing reduce emissions? A review of ex-post analyses" (2021) 16:4 Enviro Res Letters at 2, 10, online: *IOP Science* <https://doi.org/10.1088/1748-9326/abdae9>.
> Felix Pretis, "Does a Carbon Tax Reduce CO2 Emissions? Evidence from British Columbia" (February 8, 2019), online: *Social Science Research Network* <https://dx.doi.org/10.2139/ssrn.3329512>.

25 Even if we accept that emissions may increase nationally if a "rogue province" fails to set an appropriate price, "provincial inability" alone cannot be the basis for finding the matter is of national concern. To paraphrase LeDain J, indivisibility is not simply a function of the possibility or likelihood of the movement of pollutants across provincial lines (*Crown Zellerbach*). The provincial inability test may help highlight the singleness, distinctiveness, and indivisibility of a matter, but it is not a substitute for the full analysis.

> *Crown Zellerbach*, *supra* para 19 at para 38.

(c) *The* GGPPA*'s impacts on provincial jurisdiction are far-reaching and severe*

26 To characterize the *Act* solely in terms of "pricing" misconstrues the complex structure of the fuel charge, rebate system, and cap and trade regulation. In provinces where the *Act* applies, the impacts of a fuel charge are felt across all sectors of the economy by businesses and consumers alike in the form of increased prices and expenses. Administering a cap-and-trade system is highly complex, requiring oversight of allocating, exchanging, and exempting the trade of carbon credits. These systems are designed not as a blunt instrument to reduce emissions, but to find balance between nudging towards climate-friendly incentives and maintaining economic business-as-usual. These concerns strike at the heart of provincial autonomy and diversity.

27 The mechanisms in the *GGPPA* are no less intrusive onto provincial jurisdiction than direct regulation of provincial industry by the executive. To argue, as the majority does, that

pricing is "a distinct and limited regulatory mechanism" underestimates the sweeping impact of these instruments across industries, and particularly on consumers who ultimately pick up the increased cost. Provincial "flexibility" to design equivalent or more stringent schemes, obscures the many conditions and caveats imposed on provinces by the executive. Through the *Act*, the federal government alone sets the terms of provincial market-based climate policy by updating and elaborating on dozens of highly detailed benchmarks. As noted by Côté J, the Governor in Council has near unfettered discretion to amend and make regulations under Part 1 of the *Act* (ss 166, 168). Part 2 grants the executive the same regulatory and amending power, along with the ability to effectively engage in national industrial policy by setting standards on an industry-by-industry basis, interfering with provincial rights to steer economic development (ss 172(1), 192). The discretion to subject provinces to the *GGPPA* scheme is limited only by "taking into account, as a primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions (ss 166(3), 189(2))." The ambiguity of this clause offers little comfort that discretion will be constrained.

GGPPA, *supra* para 1 at ss 166, 168, 172, 192.
GGPPA Reference, *supra* para 1 at paras 211, 229–35.

B. ISSUE 2: The Part 1 Fuel Charges are *Ultra Vires* Parliament

28 Part 1 of the *GGPPA* is the illusion of climate policy: it demonstrates the continued unsuccessful marriage of wand-waving economic theories with the complex Canadian political landscape. The SCC has noted that provinces can and have taken significant action to address climate change. However, it is accepted that carbon pricing mechanisms are not automatically environmentally effective, and as such, are faulty and overly aspirational (*The Way Forward*). In the attempt to brute force *this* specific carbon pricing system onto some provinces, it can be clearly established the fuel charges under Part 1 of the *GGPPA* ("fuel charges") are invalid.

GGPPA Reference, *supra* para 1 at para 7, 23–24.
Canada's Ecosfiscal Commission, "The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions" (April 2015) at IV, online (pdf): *Ecofiscal* <https://ecofiscal.ca/wp-content/uploads/2015/04/Ecofiscal-Commission-Report-The-Way-Forward-April-2015.pdf> [*The Way Forward*].

29 The Appellants submit the collective position the fuel charges under Part 1 of the *GGPPA* are constitutionally invalid and therefore *ultra vires* Parliament, no matter the characterization. In

the *GGPPA Reference*, the SCC found that the fuel charges are regulatory charges used to advance its regulatory purpose. Respectfully, this finding is incorrect.

GGPPA Reference, *supra* para 1 at paras 212–219.

(i) The fuel charges have the attributes of a taxation scheme

30 The Supreme Court failed to consider the argument that the fuel charges should be characterized as a tax. The Court previously outlined in *Connaught*, "In the context of whether something is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative." The analysis therefore requires distilling the charge's dominant purpose from its incidental features. *Connaught* went on to adopt the two-stage approach from *Westbank*: consider (1) whether the charge has the attributes of a tax, and (2) whether the charge is connected to a regulatory scheme. If the fuel charges have the attributes of a tax and are "unconnected to any form of a regulatory scheme", they are a tax (*Westbank*).

Connaught, *supra* para 4 at paras 17, 25, 27.
Westbank, *supra* para 4 at para 43.

31 The fuel charges have the attributes of a tax. There are four *Lawson* tax analysis factors to consider, looking at whether the charge in question is: (1) enforceable by law, (2) imposed under the authority of the legislature, (3) levied by a public body, and (4) intended for a public purpose (*Eurig Estate*, *Connaught*). First, the fuel charges are clearly enforceable by law, with legal requirements to pay, powers of enforcement, and penalties (ss 71(3), 84–164). Second, the fuel charges are imposed under the authority of the legislature, as they purport to be imposed pursuant to an act of Parliament. Third, the fuel charges are levied by a public body and not a private entity, specifically the Minister of National Revenue and the Canada Revenue Agency (ss 3, 93). Fourth, it is certain that the fuel charges have been implemented for a public purpose, with the broad, idealistic goal of mitigating GHG emissions through a carbon pricing mechanism. On these four factors, the fuel charges easily have the characteristics of a tax; it is understood that these characteristics will likely apply to most government charges (*Connaught*).

Lawson, *supra* para 4 at 363.
Eurig Estate (Re), [1998] 2 SCR 565 at para 15, 231 NR 55 [*Eurig Estate*].
Connaught, *supra* para 4 at paras 22–23.
GGPPA, *supra* para 1, ss 3, 71(3), 84–164.

(ii) A relevant regulatory scheme does not exist

32 The fuel charges fail the second stage of the *Connaught* analysis, as a regulatory scheme does not exist. This second stage addresses whether there is a connection between the charge and a relevant regulatory scheme. To do so, the Court must first identify the *existence* a valid, relevant regulatory scheme. If such a scheme exists, the question of connectivity between the charge and the scheme is later addressed. To identify a relevant scheme, the following indicia are considered, as outlined in *Westbank*: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose that seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; and (4) whether there is 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. These are only factors to consider, in that not all factors are required, and that this list is not exhaustive.

> *Connaught*, *supra* para 4 at paras 25–27.
> *Westbank*, *supra* para 4 at paras 44, 24.

33 The first indicium, a complete, complex, and detailed code of regulation, should not be included as part of the regulatory scheme identification analysis. The Appellants concede that the *Act*, in its broadest sense, might satisfy this indicium (*Saskatchewan Reference*). Further, they confirm that as Parts 1 and 2 of the *Act* should not have one pith and substance; Part 1 could stand on its own as a complete, complex, and detailed code of regulation. However, this first indicium cannot act on its own to confirm a regulatory scheme. If that were the case, then it would logically follow that no charge levied by the government could ever be a tax. This is indicator is too easily met, analogous to how the first step in the *General Motors* test for Parliamentary jurisdiction over trade and commerce is self-serving: "the impugned legislation must be part of a general regulatory scheme." For federal legislation, this is nearly impossible to fail, as is the case here in the regulatory scheme identification analysis. As such, this indicium should not weigh heavily on the Court's consideration.

> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 278 [*Saskatchewan Reference*].
> *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 661, 1989 CanLII 133 (SCC) [*General Motors*].

34 The second regulatory scheme indicium of "a regulatory purpose that seeks to affect some behaviour" is not met. In looking at Part 1 alone, as noted in the POGG assessment above, its pith and substance is the reduction of GHG emissions by raising the cost of fuel. Narrowing in

on the *purpose*, Part 1 aims to impose a charge on fuels based on their CO_2e content (*Saskatchewan Reference*). The imposition of the fuel charges is the primary purpose of Part 1, rather than an incidental effect. It is only incidental that some individual consumers may potentially change their behaviour because of these fuel charges. The second indicium is not met.

Saskatchewan Reference, *supra* para 33 at para 308.

35 In the alternative, if this Court finds that the regulatory purpose of Part 1 *does* attempt to change behaviour, the second indicium is still not met. Indeed, Part 1 of the *Act* imposes a charge on fuels under the optimistic assumption that the rate passed on to consumers will be enough to change individual Canadians' behaviours so that they limit their GHG-emissions intensive activities. This ancillary way of attempting to change behaviour at the micro level is clunky and ineffective. As Ottenbreit and Caldwell JA asserted, though there is economic evidence that levies of this nature can sometimes force behavioural changes at the consumer level, this is only true when there is a *sufficient* impact on the consumer's bottom line (*Saskatchewan Reference*). In economic terms, this means there is low price-elasticity of demand for these fuels—a change in demand is not easily impacted by a change in price. At \$50/tonne CO_2e in 2022, the set fuel charges will not make a sufficient impact in such a way that GHG emissions are reduced.

Saskatchewan Reference, *supra* para 33 at para 309.

36 Even still, if this Court should find the regulatory purpose of Part 1 attempts to change behaviour and does so in an effective way, this second indicium does nothing to help distinguish between taxation and regulatory schemes; it should be taken lightly by the Court. Specifically, governments use some taxes in the very same way, in having regulatory purposes that seek to change behaviour. Excise taxes (also known as sin taxes or Pigouvian taxes), are a primary example, like those within the federal *Excise Tax Act*. These taxes have the aim of imposing a charge on goods deemed harmful to society to indirectly change behaviour in the direction of decreased consumption. This is analogous to the fuel charges here, in attempting to change individual consumptive behaviour. From this, the second indicium does not help to draw a distinction between a tax and regulatory scheme.

Saskatchewan Reference, *supra* para 33 at paras 309–12.
Excise Tax Act, RSC 1985, c E-15.

37 The third indicium for identifying the existence of a regulatory scheme—the presence of actual or properly estimated costs of the regulation—is by and large inapplicable to this analysis.

Connaught is a recent example where there was proper estimation of costs (e.g., forecasted operational expenditures of Jasper National Park). In contrast, here the fuel charges themselves are the scheme, which Brown J noted is an acceptable alternative to the proper estimation of costs (*GGPPA Reference*). However, use of this statement in *Westbank* traces specifically back to the 1922 "*Johnnie Walker*" case, which outlined that like customs duties, other charges may "proscribe, prohibit, or lend preferences to certain conduct with the view of changing individual behaviour" (*Westbank* at para 29, summarizing Anglin J at p 387 in *Johnnie Walker*). In the *GGPPA Reference*, the majority noted that *Connaught* explicitly left unanswered the question of "[w]hether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct." The majority addressed this question, but only in the context of the *nexus* step of the analysis. If this Court takes the opportunity to finally assess the third *Westbank* indicium in light of the *Johnnie Walker* statement, the Appellants insist the Court recall *Johnnie Walker* was decided a century ago. Since then, there has been a marked shift toward the widespread use of tax expenditures by governments, that is *taxes* used to achieve policy objectives (e.g., affecting behaviour with excise taxes). Modern day taxation schemes are not as simple as they once were.

> *Connaught*, *supra* para 4 at paras 32, 48.
> *Westbank*, *supra* para 4 at paras 29, 32.
> *GGPPA Reference*, *supra* para 1 at paras 407, 215.
> *The Attorney-General of the Province of British Columbia v The Attorney General for Canada*, 64 SCR 377 at 387, 1922 CanLII 47 (SCC) [*Johnnie Walker*].

38 The fourth indicium investigates the existence of a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation or benefits from it. This indicium is used to determine the *relevance* of the scheme by requiring the Court to consider the sufficiency of the relationship between the regulatory scheme and the person paying the charge, as well as whether that relationship is direct or indirect (*Connaught*). In Part 1 of the *Act*, the people paying the charge are fuel producers and distributors in backstop jurisdictions—in this sense, they are the "person being regulated". However, these producers and distributors are not, in the free market Canadian economy, the person who causes the need for the regulation. Rather, it is the individual consumer who has been saddled with the blame of GHG-emitting activities; the individual Canadian has caused the need for the scheme. If the target is to modify the behaviour of the consumers, as is claimed, then they should be the persons being directly regulated.

Connaught, *supra* para 4 at para 35.

39 As noted under the second indicium analysis above, there is admittedly logic to the argument that there is *some* connection between charging the fuel producers and fuel distributors and having them pass that charge onto the individual consumer to affect behaviour. However, this connection is neither sufficient nor direct. It is not sufficient, as it does not do enough to impact individual change to reduce GHG emissions; it is not direct, as it impacts the price of fuel at a level removed from the individual consumer. If this fourth relevancy indicium were to be met solely on the grounds that there is a distant possibility of *some* individual behaviour change, a dangerous precedent could be set. Governments would be able to raise funds for general purposes with allegedly non-tax fees on any number activities without requiring legislative authorization. This would vest inappropriate levels of power in the executive, offending the principle of no taxation without representation, enshrined in s 53 of the *Constitution Act*.

Reference re GGPPA, *supra* para 1 (Factum of the Appellant Attorney General of Ontario at paras 97–98).
Constitution Act, *supra* para 3, s 53.

40 In sum, the Appellants submit that in assessing the primary purpose of Part 1 of the *GGPPA*, a relevant regulatory scheme is unidentifiable, leaving the fuel charges to tend towards a tax. Though there is a detailed code of regulation, the first indicium is self-serving and too easily met. Second, as the purpose of Part 1 is to implement a fuel charge, any unlikely behaviour change is an incidental effect. The third indicium points towards the fact that the fuel charges *are* the scheme, but the indicium is generally inapplicable since nothing has been said by the SCC as to how the interpretation of a charge *being* the scheme fits within the regulatory charge identification analysis. Finally, the relevancy factor fails because the relationship between the regulation (the fuel charge) and the person being regulated (individual Canadians) is neither sufficient nor direct.

(iii) Even if a regulatory scheme exists, a nexus is not established

41 After having determined that there exists no relevant regulatory scheme, it follows that the fuel charges cannot be connected to a relevant regulatory scheme since no such thing exists. This addresses the next stage: whether the charge is connected to a relevant regulatory scheme (*Westbank*, *Connaught*). However, if this Court finds that a regulatory scheme does exist, the

Appellants briefly address how a sufficient nexus cannot be established between such a scheme and the fuel charges in Part 1 of the *GGPPA*.

> *Westbank*, *supra* para 4 at 44.
> *Connaught*, *supra* para 4 at paras 25–27.

42 There is confusion in the jurisprudence on this connection stage when the charges themselves have a regulatory purpose. In the *GGPPA Reference*, Brown J easily agreed that the fuel charges are *not* connected to a regulatory scheme, instead noting, "regulatory charges *need not always* be connected to a broader scheme." Brown J's analysis differed slightly from the majority's, concluding that there *is* a sufficient nexus between the fuel charges and the scheme, but using similar reasoning, "[…] the nexus between the scheme and the levy inheres in the charge itself." The lack of consistency in interpreting this stage of the test presents confusion but is clarified with the reasoning above through the relevant regulatory scheme identification.

> *GGPPA Reference*, *supra* para 1 at paras 407, 216.

43 As to not repeat the arguments above, the relevant reasoning is only quickly referenced. Generally, the use of the argument the "regulatory charge is the scheme" dates to the 1922 *Johnnie Walker* decision. This is a significant concern since the taxation context has distinctively changed over the past century, with a widespread increase in government use of tax expenditures to achieve policy goals (e.g., excise taxes to affect behaviour). Stating that the "regulatory charge is the scheme" is enough to establish the nexus requirement may use flawed reasoning, as it does nothing to distinguish a regulatory scheme from a taxation scheme in the modern context.

44 Since the requirement of a connection between the fuel charges and the regulatory scheme is not met, the fuel charges in Part 1 of the *GGPPA* are therefore a taxation scheme and so are not *intra vires* Parliament as a valid regulatory scheme.

(iv) The taxation scheme found is not constitutionally valid

45 The taxation scheme in Part 1 of the *Act* is not constitutionally valid; it is *ultra vires* Parliament. Unfortunately, the SCC majority and dissenting opinions skipped this issue based on their findings of a regulatory scheme rather than a tax. Here, the Appellants focus on the grave concern of overextension of power to the Governor in Council in Part 1 of the *Act*. "No taxation without representation" is a central principle of parliamentary democracies enshrined in s 53 of the *Constitution Act*: "Bills for appropriating any Part of the Public Revenue, or for imposing any

Tax or Impost, shall originate in the House of Commons." This provision limits Parliament's power to tax under s 91(3) of the *Constitution Act*; taxation powers cannot arise incidentally in delegated legislation (*Eurig Estate*).

> *Constitution Act*, *supra* para 3, ss 53, 91(3).
> *Eurig Estate*, *supra* para 31 at para 32.

46 There are two primary explanations as to why the charges offend s 53 of the *Constitution Act*: (1) there is no clear and unambiguous delegation of the power to tax, and (2) there is overbreadth in the delegation of law-making power. The Supreme Court has set out the requirements for constitutional delegation of taxation power: "The delegation of the imposition of a tax is constitutional if express and unambiguous language is used in making the delegation" (*OECTA*). Additionally, Hogg outlined, "it should not be possible for the taxing power (apart from details and mechanism) to be delegated."

> *Ontario English Catholic Teachers' Assn v Ontario (Attorney General)*, 2001 SCC 15 at para 74 [*OECTA*].
> Peter W Hogg, "Can the Taxing Power Be Delegated?" (2002), 16 SCLR (2d) 305 at 309.

47 First, Part 1 of the *Act* fails to clarify an express and unambiguous delegation of Parliament's taxing authority. If the scheme is a valid tax, then Parliament must expressly outline in the statute that the authority to tax has been delegated to uphold Parliament's exclusive law-making power in s 91(3). This is not demonstrated anywhere in the *GGPPA*. Though the Governor in Council is authorized to levy the fuel charges, there is no clear and unambiguous language delegating the power to tax.

> *Constitution Act*, *supra* para 3, s 91(3).

48 Second, Part 1 of the *Act* is constitutionally invalid as a tax on the basis that the executive branch reaches too far into the legislative branch's jurisdiction. The powers delegated by the *GGPPA* go far beyond solely "details and mechanism", giving sweeping law-making power to the Governor in Council. Generally, this includes the creation of regulations, amending rate schedules, and the power to redefine terms. Most critical is s 166 of the *GGPPA*, which states, "The Governor in Council may make regulations (a) prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation." Subsection 166(2) continues, "at levels that the Governor in Council considers appropriate." Among others, these broad and unconstrained powers vested in the executive most certainly violate the principle of "no taxation without representation"; this is much more than "details and mechanism".

> *GGPPA*, *supra* para 1, s 166.

49 On these two reasons, the Appellants submit that as a taxation scheme, the fuel charges in Part 1 of the *GGPPA* violate s 53 and so are *ultra vires* Parliament as a valid tax. This is in addition to the finding that the fuel charges are *ultra vires* Parliament as a valid regulatory charge. The fuel charges of Part 1 of the *GGPPA* are likely unconstitutional.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

50 The Appellants are not seeking costs of this appeal.

PART V -- ORDER SOUGHT

51 The Appellants submit that that its appeal be allowed, and this Court answer the two questions as follows. First, the *GGPPA* as a whole is not *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. Second, the fuel charges under Part 1 of the *GGPPA* are not *intra vires* Parliament as a valid regulatory charge or tax.

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

[redacted]

[redacted]

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

PART VI -- TABLE OF AUTHORITIES

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PART VII -- LEGISLATION AT ISSUE

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 53, 91, 92.

Money Votes; Royal Assent
Appropriation and Tax Bills
53 Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

VI. Distribution of Legislative Powers
Powers of the Parliament

Legislative Authority of Parliament of Canada
91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures
Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
(b) Lines of Steam Ships between the Province and any British or Foreign Country:
(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, ss 166, 168, 172, 192.

Regulations
166 (1) The Governor in Council may make regulations

(a) prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation;

(b) requiring any person to provide any information, including the person's name, address, registration number or any information relating to Part 2 that may be required to comply with this Part, to any class of persons required to make a return containing that information;

(c) requiring any person to provide the Minister with the person's Social Insurance Number;

(d) requiring any class of persons to make returns respecting any class of information required in connection with the administration or enforcement of this Part;

(e) distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things; and

(f) generally to carry out the purposes and provisions of this Part.

Amendments to Part 1 of Schedule 1
(2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1, including by adding, deleting, varying or replacing any item or table.
Factors
(3) In making a regulation under subsection (2), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.
Amendments to Schedule 2
(4) The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.
Effect
(5) A regulation made under this Part is to have effect from the date it is published in the *Canada Gazette* or at such time thereafter as may be specified in the regulation, unless the regulation provides otherwise and

(a) has a non-tightening effect only;

(b) corrects an ambiguous or deficient enactment that was not in accordance with the objects of this Part;
(c) is consequential on an amendment to this Part that is applicable before the date the regulation is published in the *Canada Gazette*;
(d) is in respect of rules described in paragraph 168(2)(f); or
(e) gives effect to a public announcement, in which case the regulation must not, except if any of paragraphs (a) to (d) apply, have effect before the date the announcement was made.

Definition of *fuel charge system*
168 (1) In this section, *fuel charge system* means the system under this Part, Part 1 of Schedule 1 and Schedule 2 providing for the payment and collection of charges levied under this Part and of amounts paid as or on account of charges under this Part and the provisions of this Part relating to charges under this Part or to rebates in respect of any such charges, or any such amounts, paid or deemed to be paid.
Fuel charge system regulations
(2) The Governor in Council may make regulations, in relation to the fuel charge system,
(a) prescribing rules in respect of whether, how and when the fuel charge system applies and rules in respect of other aspects relating to the application of that system, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;
(b) prescribing rules in respect of whether, how and when a change in a rate, set out in any table in Schedule 2 for a type of fuel and for a province or area, applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to such a fuel or province or area, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;
(c) prescribing rules in respect of whether, how and when a change to the provinces or areas listed in Part 1 of Schedule 1 or referenced in Schedule 2 applies and rules in respect of a change to another parameter affecting the application of the fuel charge system in relation to a province or area or to a type of fuel, including rules deeming, in specified circumstances and for specified purposes, the status of anything to be different than what it would otherwise be, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported and accounted for and when any period begins and ends;
(d) if an amount is to be determined in prescribed manner in relation to the fuel charge system, specifying the circumstances or conditions under which the manner applies;
(e) providing for rebates, adjustments or credits in respect of the fuel charge system;

(f) providing for rules allowing persons, which elect to have those rules apply, to have the provisions of this Part apply in a manner different from the manner in which those provisions would otherwise apply, including when an amount under this Part became due or was paid, when fuel or a substance, material or thing was delivered, how and when an amount under this Part is required to be reported or accounted for and when any period begins and ends;
(g) specifying circumstances and any terms or conditions that must be met for the payment of rebates in respect of the fuel charge system;
(h) prescribing amounts and rates to be used to determine any rebate, adjustment or credit that relates to, or is affected by, the fuel charge system, excluding amounts that would otherwise be included in determining any such rebate, adjustment or credit, and specifying circumstances under which any such rebate, adjustment or credit must not be paid or made;
(i) respecting information that must be included by a specified person in a written agreement or other document in respect of specified fuel or a specified substance, material or thing and prescribing charge-related consequences in respect of such fuel, substance, material or thing, and penalties, for failing to do so or for providing incorrect information;
(j) deeming, in specified circumstances, a specified amount of charge to be payable by a specified person, or a specified person to have paid a specified amount of charge, for specified purposes, as a consequence of holding fuel at a specified time;
(k) prescribing compliance measures, including anti-avoidance rules; and
(l) generally to effect the transition to, and implementation of, that system in respect of fuel or a substance, material, or thing and in respect of a province or area.

Fuel charge system regulations — general

(3) For the purpose of facilitating the implementation, application, administration and enforcement of the fuel charge system, the Governor in Council may make regulations

(a) adapting or modifying any provision of this Part, Part 1 of Schedule 1 or Schedule 2;
(b) defining, for the purposes of this Part, Part 1 of Schedule 1 or Schedule 2, or any provision of this Part, Part 1 of Schedule 1 or Schedule 2, words or expressions used in this Part, Part 1 of Schedule 1 or Schedule 2 including words or expressions defined in a provision of this Part, Part 1 of Schedule 1 or Schedule 2; and
(c) providing that a provision of this Part, Part 1 of Schedule 1 or Schedule 2, or a part of such a provision, does not apply.

Conflict

(4) If a regulation made under this Part in respect of the fuel charge system states that it applies despite any provision of this Part, in the event of a conflict between the regulation and this Part, the regulation prevails to the extent of the conflict.

Designation of facility as covered facility

172 (1) On request by a person that is responsible for a facility that is located in a province or area that is set out in Part 2 of Schedule 1, the Minister may, in accordance with the regulations, designate the facility as a covered facility. The request must include the information specified by the Minister and be made in the time and manner specified by the Minister.

Application for registration

(2) If the Minister designates a facility as a covered facility, the request under subsection (1) is deemed to be an application for registration under subsection 171(1) and the Minister must register the covered facility.

Cancellation of designation

(3) The Minister may, in accordance with the regulations, cancel the designation of a covered facility.

Regulations

192 The Governor in Council may make regulations for the purposes of this Division, including regulations

(a) defining *facility*;

(b) respecting covered facilities, including the circumstances under which they cease to be covered facilities;

(c) allowing for the determination of the persons that are responsible for a facility or covered facility;

(d) respecting designations and cancellations of designations under section 172;

(e) respecting compliance periods and the associated regular-rate compensation deadlines and increased-rate compensation deadlines;

(f) respecting the reports and verifications referred to in section 173 and subsections 176(2) and 177(2);

(g) respecting greenhouse gas emissions limits referred to in sections 173 to 175, subsection 178(1), section 182 and subsection 183(1);

(h) respecting the quantification of greenhouse gases that are emitted by a facility;

(i) respecting the circumstances under which greenhouse gases are deemed to have been emitted by a facility;

(j) respecting the methods, including sampling methods, and equipment that are to be used to gather information on greenhouse gas emissions and activities related to those emissions;

(k) respecting the compensation referred to in sections 174 and 178;

(l) respecting compliance units, including transfers of compliance units, the circumstances under which transfers of compliance units are prohibited and the recognition of units or credits issued by a person other than the Minister as compliance units;

(m) respecting the tracking system referred to in section 185 and the accounts in that system;

(n) providing for user fees;

(o) respecting the rounding of numbers;

(p) respecting the retention of records referred to in section 187; and

(q) respecting the correction or updating of information that has been provided under this Division.

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

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

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

TEAM #2022-05

[redacted]

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