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 # **2022-06**

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 reference provides this Honourable Court with an opportunity to acknowledge the dire threat that climate change poses, while reinforcing settled constitutional principles. Canada submits that the *GGPPA* is *intra vires* Parliament as a valid exercise of its power to "make laws for the peace, order, and good government of Canada" ("POGG") in relation to matters of national concern under s. 91 of the *Constitution*. A majority of the Supreme Court of Canada (SCC) (the "Majority") correctly stated and applied the test for matters of national concern. The Majority appropriately characterized the subject matter of the *GGPPA* as "establishing minimum national standards of [greenhouse gas, "GHG"] price stringency." The Majority then determined that this matter is one of national concern, a finding that respects the division of powers under ss. 91 and 92 of the *Constitution*.

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 (the "*GGPPA*" or the "*Act*").
> *Constitution Act, 1867*, (UK) 30 & 31 Victoria, c 3 ss 91, 92 [the *Constitution*].
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 57 [*Reasons*].

[2] Canada further submits that the fuel charges under Part 1 of the *Act* are valid regulatory charges, and are not taxes. Accordingly, Canada requests that this Court uphold the decision of the Majority.

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

[3] Except where otherwise stated, Canada generally agrees with the statement of facts set out by the appellants Ontario, Saskatchewan and Alberta (the "Appellants"). Canada adds that interjurisdictional cooperation has been and remains integral to the *GGPPA*, as emphasized by the Majority. Canada offers the following additional facts and clarifications that are relevant to the issues before this court.

> *Reasons*, *supra* para 1 at paras 15, 17, 20-22.

(I) Mechanisms of the *Act*

[4] The *GGPPA* establishes minimum national standards of GHG price stringency to reduce GHG emissions nationwide. The *Act*'s carbon pricing system is enabled by four Parts, four Schedules, and the ability of the Governor in Council ("GiC") to make regulations under the *Act* to further its purpose. Regulations made under Parts 1 and 2 of the *GGPPA* must be "[f]or the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada." Only Parts 1 and 2 of the *Act* and relevant Schedules are at issue in this appeal.

GGPPA, *supra* para 1 at ss 166(2), 189(1).

[5] The *GGPPA* does not apply automatically in all provinces and territories. Rather, it serves as a backstop that applies (in whole or part) to provinces and territories that do not meet minimum national standards of GHG price stringency. In this way, the *GGPPA* coordinates between jurisdictions, enabling provincial carbon pricing systems that reflect local circumstances while ensuring baseline pricing of GHG emissions throughout Canada.

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

[6] Canada's positions regarding the questions at issue in this appeal are as follows:

1. The *GGPPA* as a whole is *intra vires* Parliament as an exercise of Parliament's jurisdiction to legislate for POGG under s. 91 of the *Constitution Act, 1867* to address a matter of national concern.
2. The fuel charge under Part 1 of the *Act* is *intra vires* Parliament as a valid regulatory charge, and is not a tax.

PART III — ARGUMENT

A. *The Majority Accurately Characterized the* GGPPA

[7] Canada agrees that the constitutional validity analysis proceeds in two steps, namely, characterization of the impugned legislation's pith and substance, followed by classification of the law's subject matter under a federal or provincial head of power (*Morgentaler*). Canada also agrees that courts must apply the national concern test, articulated in *Crown Zellerbach*, to evaluate whether a matter falls within that branch of the federal POGG power. This was precisely the course followed by the Majority.

> *R v Morgentaler*, [1993] 3 SCR 463 at 481, 1993 CanLII 74 (SCC) [*Morgentaler*].
> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [*Crown Zellerbach*].

I. *The Majority's Characterization Is Distinct and Narrow*

[8] The Majority approach to characterization is thoroughly reasoned and methodologically correct. Reviewing the *Act*, the Majority concludes that its subject matter is best characterized as "establishing minimum national standards of GHG price stringency." This is a clear, concise, and accurate statement of the law's dominant purpose and its effects. Canada agrees that characterization should not be determined with reference to particular heads of legislative competence (*Chatterjee*). However, it is the Appellants who seek to "[dictate] the outcome of classification" at the characterization stage (Appellants' Factum). Their proposed characterization broadens and distorts the *Act*'s purpose and effects to prop up an untenable jurisdictional conclusion.

> *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 57 [*Reasons*].
> *Chatterjee v Ontario* (Attorney General), 2009 SCC 19 at para 16 [*Chatterjee*].
> Appellants' Factum at para 15.

[9] The text of the *GGPPA* and its regulations support the Majority's characterization. For example, under s. 166(3), "the stringency of provincial pricing mechanisms for [GHG] emissions" is *the primary factor* to be considered by the GiC in exercising its regulatory discretion. So too

under s. 189(2), when determining whether Part 2 of the *Act* applies to a given province. Thus, the *Act* is respectful of provincial jurisdiction, with its baseline standards of carbon price stringency operating as a backstop.

GGPPA, *supra* para 1 at ss 166(3), 189(2).

a. *Characterization and Classification Were Distinct in the Majority's Analysis*

[10] Contrary to the Appellants' assertion, the characterization analysis of the Majority did not prejudge the jurisdictional question. Rather, after a probing analysis of the *Act*'s purpose and effects, the Majority correctly concluded that the pith and substance of the GGPPA is the enactment of minimum national standards of GHG price stringency. This characterization makes no reference to any heads of power (the danger identified in *Chatterjee*). In reality, the Majority reasons canvass intrinsic and (with due caution) extrinsic evidence. The analysis then turns to the *Act*'s legal and practical effects, noting the dearth of accepted evidence relating to the latter. This is the path outlined in *Morgentaler*. The Majority necessarily includes reference to legislative means, because failure to do so would prevent characterization "in terms that are as precise as the law will allow" (*GNDA Reference*).

Reasons, *supra* para 1 at paras 58-79.
Chatterjee, *supra* para 8 at para 16.
Morgentaler, *supra* para 7 at 481.
Reference Re Genetic Non-Discrimination Act, 2020 SCC 17 at para 32 [*GNDA Reference*].

[11] The Appellants incorrectly assert that including the word "national" in a law's pith and substance amounts to a prejudgment or reviewable error. *Schneider*, and its interpretation by the Majority in this case, provides a complete answer to this argument. In *Schneider*, Dickson J (as he then was) acknowledged provincial jurisdiction over treatment of narcotics addiction notwithstanding parallel federal jurisdiction over "narcotics control" as a matter of national concern. Citing *Schneider*, the Majority reasons note that "where one province's failure to deal

with [a matter, e.g.] health care 'will not endanger the interests of another province', the national concern doctrine cannot apply." The Appellants make vague reference to Parliament seeking "to legislate a 'backstop' concerning virtually anything." However, the fact that they cannot identify any examples of such hypothetical abuse belies their concerns about the alleged erosion of the national concern test or an opening of any floodgates.

Schneider v The Queen, [1982] 2 SCR 112 at 131.
Reasons, *supra* para 1 at para 209.
Appellants' Factum at para 17.

[12] The Appellants also incorrectly state that "only federally enacted standards can be … 'minimum….'" This is based on a misapprehension of the operation of federal paramountcy. Indeed, in *Rothmans*, Saskatchewan successfully argued that it could set more stringent limits on tobacco advertising than the federal *Tobacco Act*. Major J notes that "imput[ing] to Parliament … an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy." There is no principled reason why the pith and substance of a provincial law could not be characterized as enacting minimum standards. In fact, such characterization may be vital to facilitating classification of that law's subject matter under a provincial head of power.

Appellants' Factum at para 15.
Rothmans, Benson & Hedges Inc v Saskatchewan [2005] 1 SCR 188 at paras 21, 23 [*Rothmans*].
Tobacco and Vaping Products Act, SC 1997, c 13.

b. *Characterization May Necessarily Include Legislative Means*

[13] The precedents cited by the Appellants support the conclusion that legislative means may be a vital component of the characterization analysis. Binnie J states this point succinctly in *Chatterjee*: in determining the subject matter of an impugned law, courts must determine not only "the essence of what the law does", but also "*how does it do it?*" Similarly, the Appellants acknowledge *Ward* as an obvious example of the inclusion of legislative means at the

characterization stage. Removing legislative means from the analytical framework would transform the characterization analysis into an abstract, facile, and unworkable exercise.

> *Chatterjee*, *supra* para 8 at para 16 [emphasis added].
> *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 17 [*Ward*].

[14] If anything, including legislative means at the characterization stage ensures that federal legislation is restricted to identified mechanisms, *limiting* potential jurisdictional overreach. Would the Appellants prefer an approach to characterization that would grant jurisdiction to achieve identified legislative ends by any and all means? This is precisely the sort of approach that would "erode provincial spheres of influence piece-by-piece" (Appellants' Factum). The SCC cautions as much, noting that "vague characterizations of the pith and substance of provisions … could lead … to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine" (*Re AHRA*). The Appellants implicitly reject this approach, as their preferred characterization specifically refers to "a specific type of legislative mechanism": "*application of GHG pricing mechanisms*…." This contradiction suggests that the Appellants are engaging in the sort of reverse-engineering of which they accuse the Majority.

> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 190 [*Re AHRA*].
> Appellants' Factum at paras 15, 24.

II. The Act's Flexibility Does Not Detract From Its Stringency

[15] The fact that a statute operates flexibly does not mean that its standards are not stringent, "minimum", or "national." The *GGPPA* provides the GiC necessary discretion to execute the policy objectives of Parliament as expressed in the *Act*. Enabling legislation may set "minimum" standards while facilitating responsiveness to the unique needs of various regions and industries. The *GGPPA* does exactly this. It allows for thoughtful, flexible application of GHG pricing within the framework of the Output-Based Pricing System, *itself* a regime of minimum national standards

of stringency. In this way, Parts 1 and 2 of the *Act* employ the same means: enacting minimum national standards of GHG price stringency.

> *Reasons*, *supra* para 1 at para 81.
> *GGPPA*, *supra* para 1 at s 189(1).

[16] The Appellants' argument rests on a mischaracterization of the phrase "minimum national standards" as employed by the Majority. Because the *GGPPA* does not impose what the Majority calls "a blunt unified national system" (that is, a single, inflexible carbon price baked into the *Act*'s crust), the Appellants say that it does not set minimum standards. However, this overlooks the backstop nature of the legislation (*Reasons*). Nothing in the plain meanings of the words "minimum" or "national" requires that all standards be *identical*. As the Majority states, the *Act* operates by the "imposition of the minimum national standards of *stringency*". This unifies Parts 1 and 2 of the *Act*.

> *Reasons*, *supra* para 1 at para 81 [emphasis added].

[17] In the apt words of the Appellants, the *Act* "ensur[es] that pricing mechanisms apply in all provinces at all times…." This is what is meant by "minimum national standards" of GHG price stringency. They are "minimum" and "national" in the sense that no province can decline to impose a price on GHGs. They are also "stringen[t]": all sectors and actors will know their rights and liabilities by reference to the *Act* and its subordinate legislation (which, as Brown J notes in his dissenting opinion, "can—and, here, *should*—be scrutinized to ascertain the true intent of the legislature"). Creating such a floor was a legitimate policy choice of Parliament.

> Appellants' Factum at para 27.
> *Morgentaler*, *supra* para 7 at 482.
> *Reasons*, *supra* para 1 at para 337.

[18] The Majority properly included "stringency" in their characterization. As the Appellants note, "policy desirability has no bearing on classification analysis." However, much of their argument invites the Court to opine on the *efficacy* and the *desirability* of federal policy. The *Act*

empowers the Executive to execute Parliament's purposes by Parliament's chosen means. This does not alter its essential character (i.e. its backstop role) or its legal and practical effects ("ensuring that [minimally acceptable] pricing mechanisms apply [nationally] at all times [i.e. in a stringent manner]…" [Appellants' Factum]). The mere fact of flexibility may go to the *Act*'s efficacy, but this has no bearing on its validity (*Firearms Reference*).

Appellants' Factum at paras 27, 34.
Reference re Firearms Act (Canada), 2000 SCC 31 at paras 12, 18, 57 [*Firearms Reference*].

B. *The* GGPPA *Satisfies the Test for Matters of National Concern as Clarified by the Majority*

[19] While "the test for finding that a matter is of national concern is an exacting one" (*Reasons*), the *GGPPA* satisfies its requirements. Canada agrees that *Crown Zellerbach* is the leading precedent for identifying matters of national concern. Its robust application by the Majority yields a result that is analytically sound and legally correct.

Reasons, *supra* para 1 at para 208.
Crown Zellerbach, *supra* para 7.

[20] The Majority's application of *Crown Zellerbach* represents at most an incremental development of the law. At no point did the majority "reformulat[e]" the test as the Appellants assert. Rather, their reasons—backed by thoughtful engagement with precedent—clarify and give meaning to what could otherwise be an unwieldy theoretical framework.

Appellants' Factum at para 37.

I. *The Matter is of Concern to Canada as a Whole*

[21] At the threshold stage, the Majority inquired into whether "the matter is of sufficient concern to Canada as a whole", noting that mere "importan[ce]" of a legislative field is insufficient to discharge this burden.

Reasons, *supra* para 1 at paras 142, 144.

[22] The Appellants concede that even their overbroad formulation of the *Act*'s pith and substance is a matter of concern to Canada as a whole. Canada would add that the enactment of minimum national standards of GHG price stringency is not only of national concern, but is of particular concern to those provinces and territories whose sovereign autonomy is threatened by climate change.

[23] Having crossed the threshold, the analysis turns to "singleness, distinctiveness and indivisibility."

II. *The Matter is Single, Distinctive, and Indivisible*

[24] Far from "reformulat[ing]" the test, the Majority structures the "singleness, distinctiveness, and indivisibility" analysis by reference to two principles arising from the jurisprudence. This elaboration introduces necessary doctrinal coherence. Citing *Crown Zellerbach*, the Majority identifies "[qualitative] differen[ce of a specific and identifiable subject matter] from matters of provincial concern" and "provincial inability to deal with the matter" as elements of singleness, distinctiveness and indivisibility.

> *Reasons*, *supra* para 1 at para 146.

A. *The Matter is Specific and Identifiable*

[25] The first principle identified by the Majority is that "federal jurisdiction may only be recognized over a specific and identifiable matter that is qualitatively different from matters of provincial concern." This is established by reference to (*inter alia*) the *Anti-Inflation Reference*, *Crown Zellerbach*, and *Hydro-Québec*.

> *Reasons*, *supra* para 1 at para 147-151.
> *Reference Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 458 [*Anti-Inflation Reference*].
> *Crown Zellerbach*, *supra* para 7 at para 37.
> *R v Hydro-Québec* [1997] 3 SCR 213 at paras 68, 74, 76 [*Hydro-Québec*].

[26] Here, as in past cases, there are "ascertainable and reasonable limits" on federal jurisdiction (*Reasons*). Thus, the Majority correctly determined that the subject of the *GGPPA* is a "specific and identifiable matter…." Case law clarifies what is meant by "lacking in specificity." The matter in the *Anti-Inflation Reference*, for example, was so broad that it would have given Parliament jurisdiction to enact virtually all manner of economic legislation notwithstanding its intraprovincial character and effects. Furthermore, in *Hydro-Québec,* La Forest J (for the majority) made the following observation: "a discrete area of environmental legislative power can fall within [the national concern] doctrine, provided it meets the criteria [identified in *Re: Anti-Inflation* and *Crown Zellerbach*]." Here, the national implementation of backstop carbon pricing is "a discrete area of environmental legislative power." It concerns a single substance that causes harm of a demonstrably interprovincial and international nature, and a discrete mechanism of legislative action. It is "a specific and identifiable matter."

Reasons, *supra* para 1 at para 146.
Anti-Inflation Reference, *supra* para 25.
Hydro-Québec, *supra* para 25 at para 115.

B. *The Matter is Qualitatively Different From Matters of Provincial Jurisdiction*

[27] The Majority also properly found that the *GGPPA* is "qualitatively different from matters of provincial concern." As the Majority correctly observes, "the instant case involves the distinctly federal role of setting national targets and stepping in to make up for an absence of provincial legislation or to supplement insufficient provincial legislation." No province or territory can do this. But the *Act* is not a blunt instrument: it cannot override well-crafted provincial carbon pricing regimes. Rather, its backstop role applies only to those provinces whose carbon pricing systems are nonexistent or insufficient to protect the rights of other provinces. The backstop nature of the legislation, disregarded by the Appellants, is an essential feature of the *Act*'s character, and qualitatively distinguishes the *Act* from provincial GHG pricing mechanisms.

Reasons, *supra* para 1 at para 180.

[28] Contrary to the Appellants' suggestion, the Majority's reference to general trade and commerce jurisprudence (namely *General Motors*) is limited and legitimate. The distinction between "a legislative scheme not working unless it is national in scope" and "the nature of the problem [requiring] national action" (*Reasons*) is semantic at best and artificial at worst. Enforcing such a distinction places courts in the position of assessing whether public policy decisions are "essential" or merely "desirable." Courts should not contradict accepted evidence with bare assertions that Parliament is passing legislation that is unnecessary to address an identified problem. This is a perversion of the validity analysis, which all parties agree *does not* inquire into the wisdom of an impugned law.

Reasons, *supra* para 1 at paras 385, 422 [emphasis omitted].
General Motors of Canada Ltd v City National Leasing [1989], 1 SCR 641 [*General Motors*].

[29] The Appellants also incorrectly assert that the subject matter of the *GGPPA* is "a divisible aggregate of matters falling under provincial jurisdiction" (Appellants' Factum). As the Majority notes, "interrelatedness" is not a necessary condition for establishing indivisibility. The fact that GHGs come from multiple sources does not mean they are not single, distinctive, and indivisible—they are certainly more distinct than marine pollution *simpliciter*, upheld as a matter of national concern in *Crown Zellerbach*. Moreover, limiting federal jurisdiction over GHGs to the application of backstop pricing mechanisms further constrains and distinguishes the exercise of federal power. In these ways, the *GGPPA* operates in a manner that is fundamentally different from provincial carbon pricing regimes.

Appellants' Factum at para 44.
Reasons, *supra* para 1 at para 159.
Crown Zellerbach, *supra* para 7.

[30] Attempts to apply the dissent in *Crown Zellerbach* to the instant case are also misplaced. The comments of La Forest J must be placed in their appropriate jurisprudential context, and in this regard, *Oldman River* is instructive. In distinguishing *Crown Zellerbach*, the majority opinion of La Forest J states:

> The majority [in *Crown Zellerbach*] simply decided that marine pollution was a matter of national concern because it was predominately extra-provincial and international in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to Parliament's residual power.

The same can be said of GHG emissions, and the enactment of minimum national standards of price stringency to reduce those emissions. In the instant case, as in *Crown Zellerbach*, the Majority did not carve out "the environment" as an exclusive sphere of federal authority, nor did Canada ask it to.

> *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 at 64 [*Oldman River*].
> *Crown Zellerbach*, *supra* para 7.

C. *Provincial Inability Supports the Application of the National Concern Doctrine*

[31] The second proposition identified by the Majority is that "federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter", a necessary condition of "singleness, distinctiveness and indivisibility." The Majority cites (*inter alia*) the *Local Prohibition Case*, *Schneider*, *Crown Zellerbach*, and *Ontario Hydro* for the proposition that "grave extraprovincial consequences" are required to establish provincial inability. Thus, the Majority applies settled precedent to elucidate established principles.

> *Reasons*, *supra* para 1 at paras 152-153.
> *Ontario (AG) v Canada (AG)*, [1896] UKPC 20, [1896] AC 348 at 362 [*Local Prohibition Case*].
> *Schneider*, *supra* para 11 at 131.
> *Crown Zellerbach*, *supra* para 25 at paras 31, 34.
> *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 2 SCR 327 at 379 [*Ontario Hydro*].

[32] The existence of provincial inability supports a finding of singleness, distinctiveness, and indivisibility in this case. Owing to the threat of carbon leakage (a threat acknowledged by

majorities of two appellate courts and the SCC), GHG pricing cannot be left to individual provinces. Such a system would create a race to the bottom, in which provinces would be incentivized to court heavy emitters by weakening or abolishing their GHG pricing mechanisms. Relegating carbon pricing to provincial discretion would place Canada's territories and smaller provinces at the mercy of the largest emitters. With respect, it is *this* threat to the Canadian federation that should concern the Court.

> *Reasons*, *supra* para 1 at paras 183, 186.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 155.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 120.

[33] The example of nuclear energy demonstrates the risks of eviscerating the POGG power in the manner the appellants propose. In *Ontario Hydro*, a majority of the SCC affirmed that regulation of nuclear power and its incidents is a matter of national concern. Theoretically, any province or territory *could* claim jurisdiction over nuclear reactors as a matter of property and civil rights (s. 92(13)) or electrical energy (s. 92A(1)(c)). The Appellants in the instant case suggest as much. But the risk of a "doomsday scenario" militated against this interpretation. Nevertheless, the Appellants' reasoning invites courts to reopen the question of jurisdiction over nuclear reactors. Following their reasoning to its conclusion, the mere fact that provinces *could* regulate nuclear power means that Parliament *cannot*.

> *Constitution*, *supra* para 1 at ss 92(13), 92A(1)(c).
> *Ontario Hydro*, *supra* para 31 at 379-380.

[34] Finally, the Majority determined that "the scale of impact of the proposed matter of national concern is reconcilable with the division of powers." The majority made this determination "in light of the jurisdictional consequences of accepting the proposed matter of national concern."

> *Reasons*, *supra* para 1 at paras 165, 196.

III. *The* GGPPA *Protects Provincial Sovereignty and Autonomy*

[35] If firmly-rooted principles of federalism are properly applied, it becomes clear that the impact of this legislation on provincial jurisdiction is insubstantial. As discussed above, the doctrine of federal paramountcy does not preclude the operation of more exacting provincial standards (*Rothmans*).

Rothmans, *supra* para 12.

[36] Moreover, the Majority correctly observes that "interjurisdictional immunity does not automatically apply to matters of national concern." *Multiple Access* demonstrates that courts may properly find a double aspect even where the federal POGG power is exercised. In this case, double aspect is *the very premise* of the legislation: there is no suggestion that Parliament seeks to occupy the field. Provinces are free to enact any number of measures to trap, recycle, mitigate, or punish GHG emissions. The only thing a province cannot do under the *Act* is decline to impose bare minimum standards of carbon price stringency. The purpose of constitutional review is not to vouchsafe the economic vitality of heavy polluters.

Reasons, *supra* para 1 at para 124.
Multiple Access Ltd. v McCutcheon, [1982] 2 SCR 161 [*Multiple Access*].

[37] More fundamentally, provincial autonomy must mean more than freedom from any federal law that a given province dislikes. Several comments of Wagner CJ demonstrate the stakes of this case for the provinces and their constitutional rights:

> [Climate change imposes] especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. … But in the absence of a federal law binding the provinces, there is nothing whatsoever to protect individual provinces or the country as a whole from the consequences of one province's decision, in exercising its authority, to take insufficient action to control GHGs, or to take no steps at all. … [T]he proposed federal matter in the instant case … would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

Reasons, *supra* para 1 at paras 187, 191, 195.

[38] Commitment to the rule of law unites the Canadian federation. But climate calamity, in addition to eroding the rule of law, erodes the very land over which provinces assert sovereignty. Communities in the Arctic, whose traditional ways of life may make a negligible contribution to Canada's total GHG emissions, are being asked to bear a burden foisted on them by large emitters in Canada's economic heartland. This is inequitable, and disrespects these territories' sovereign autonomy. The *GGPPA* is a means of remedying this unjust intrusion. Canada merely asks for an acknowledgment that enacting minimum national standards of GHG price stringency is of vital national concern to those regions whose very sovereignty is undermined by the unchecked emissions of their partners in confederation.

C. *The Residual Nature of POGG is No Obstacle to the* Act*'s Validity*

[39] The fact that the POGG power is residual in nature is not a barrier to the enactment of the *GGPPA* under the national concern branch. Barring the operation of the POGG power for any matter with a double aspect represents a novel and undesirable departure from established precedent.

[40] As the Majority correctly states, it is not necessary to exclude every possible provincial head of power before resorting to the national concern branch. A subject may become a matter of national concern notwithstanding its local or intraprovincial origins. The validity analysis does not proceed "by way of a two-step search for a jurisdictional vacuum; rather, [courts apply] the national concern test to identify matters of inherent national concern." Marine pollution (*Crown Zellerbach*), narcotics trafficking (*Schneider*), and uranium mining (*Ontario Hydro*) each have intraprovincial aspects and intraprovincial effects. But the intraprovincial origins of these matters have never barred the operation of the national concern doctrine. Nor should they now, as Parliament seeks to limit the interprovincial and international consequences of unrestrained GHG

emissions. Rather, the test articulated by the Majority in this case provides a principled basis for determining the extent and limits of the national concern branch.

Reasons, *supra* para 1 at paras 137-139.
Crown Zellerbach, *supra* para 7.
Schneider, *supra* para 11.
Ontario Hydro, *supra* para 31.

[41] The Appellants' attempt to shoehorn *Crown Zellerbach* into their reformulated approach to national concern is unsustainable. The Appellants write that "[marine pollution] existed in a jurisdictional gray area that could not be legislated" under an enumerated head of power. This is incorrect. Parliament could have enacted the impugned law under its criminal law power (s. 91(27)). The provinces could have passed parallel legislation under ss. 92(10), 92(13), 92(16), or 92A. Le Dain J did not consider whether marine pollution could be addressed under an enumerated power because such a treasure hunt for jurisdiction is precedentially and methodologically unsound.

Crown Zellerbach, *supra* para 7.
Constitution, *supra* para 1 at ss 91(27), 92(10), 92(13), 92(16), 92A.

[42] Subsequent POGG jurisprudence also contradicts the Appellants' position. In *Oldman River*, the applicability of enumerated heads of power was not found to altogether bar the operation of the POGG power. Rather, La Forest J observed that the law's matter "may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, *be justifiable under the residuary power in s. 91*." Moreover, in *Hydro-Québec*, the majority upheld *CEPA* under s. 91(27) because this was one of the heads of power *raised by the parties in the reference question*. This accords with the principle of judicial restraint, whose importance was acknowledged by the Majority in this case. Thus, proceeding in the manner suggested by the Appellants would be a revolutionary upending of settled law.

Oldman River, *supra* para 30 at 74 [emphasis added].
Hydro-Québec, *supra* para 25 at para 12.

Canadian Environmental Protection Act, SC 1999, c 33 [*CEPA*].
Reasons, *supra* para 1 at paras 114, 117.

[43] As the dissent of La Forest J in *Crown Zellerbach* makes clear, all orders of government have a role to play in protecting the environment. Canada submits that its authority to legislate in relation to matters of national concern extends to enacting the *GGPPA*, whose minimum national standards of GHG price stringency are vital to protecting the health of the environment and of our federation.

Crown Zellerbach, *supra* para 7.

D. *The Fuel Charge Under Part 1 of the* GGPPA *Is* Intra Vires *Parliament as a Valid Regulatory Charge*

[44] The Majority correctly upheld the fuel charges in Part 1 of the *GGPPA* as constitutionally valid regulatory charges. The fuel charges in Part 1 of the *Act* meet the test for a valid regulatory charge provided by a unanimous SCC in *Westbank*. The Majority summarized this test as follows: "To be a regulatory charge, as opposed to a tax, a government levy with the characteristics of a tax must be connected to a regulatory scheme." This analysis has two branches, as outlined in *Westbank* and unanimously affirmed in *Connaught*. The two branches are (1) the identification of a regulatory scheme and (2) a connection between that scheme and the regulatory charge at issue (the "*Westbank* analysis").

Reasons, *supra* para 1 at paras 219, 213.
Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 at para 44, 1999 CanLII 655 (SCC) [*Westbank*].
620 Connaught Ltd v Canada (Attorney General), 2008 SCC 7 [*Connaught*] at paras 25–27.

I. *Part 1 of the* GGPPA *Constitutes a Regulatory Scheme that Satisfies the First Branch of the* Westbank *Analysis*

[45] The Appellants incorrectly argue that Part 1 of the *GGPPA* does not create a regulatory scheme. Part 1 of the *GGPPA* creates a regulatory scheme based on the indicia outlined in

Westbank and affirmed in *Connaught*. The SCC in *Westbank* provided four, non-exhaustive indicia of a regulatory scheme to guide the first branch of the *Westbank* analysis. These indicia are: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (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.

Any of the indicia can satisfy a court that a regulatory scheme exists.

> Appellants' Factum, *supra* para 8 at s D(i).
> *Westbank*, *supra* para 44 at para 44.
> *Connaught*, *supra* para 44 at para 25.

[46] The existence of a regulatory scheme was not at issue in the SCC decision under appeal to this Court; the Attorney General of Ontario did not dispute that the *GGPPA* establishes a regulatory scheme at the SCC. However, the Appellants now jointly argue that Part 1 of the *Act* does not create a regulatory scheme based on the second *Westbank* indicium: the presence of "a regulatory purpose which seeks to affect some behaviour."

> *Reasons*, *supra* para 1 at para 214.
> Appellants' Factum, *supra* para 8 at s D(i)
> *Westbank*, *supra* para 44 at paras 24, 44.

[47] Contrary to the Appellant's submissions, the *GGPPA* has a clear "regulatory purpose which seeks to affect some behaviour," satisfying the second *Westbank* indicium. In fact, the *Act*'s Preamble confirms its focus on this regulatory purpose by mentioning "behavioural change" twice. The fuel charge in Part 1 of the *Act* is intended to affect behaviour through minimum standards of GHG price stringency to reduce GHG emissions. The Appellants concede this point, acknowledging that the fuel "charge created in Part 1 of the *GGPPA* can modify fuel purchasing behaviour."

> *GGPPA*, *supra* para 1 at Preamble.
> Appellants' Factum, *supra* para 8 at para 70.

A. *The Appellants Incorrectly Rely on a Narrow View of Regulatory Charge Models*

[48] Nevertheless, the Appellants incorrectly argue that Part 1 of the Act does not satisfy the second *Westbank* indicium based on arguments founded on a mistakenly narrow view of regulatory charge models.

[49] The Appellants offer an unfounded argument based on the SCC's judicial commentary in *Westbank*, where the Court noted "that a regulatory scheme *usually* 'delineates certain required or prohibited conduct.'" The Appellants note that "Part 1 of the *GGPPA* does not delineate certain required or prohibited conduct," but fail to acknowledge that "usually" does not mean "necessarily." The overarching concern of the second *Westbank* indicium is that the relevant regulatory scheme contains a means to advance its end, or regulatory purpose, by affecting behaviour.

> *Westbank*, *supra* para 44 at para 26 [emphasis added].
> Appellants' Factum, *supra* para 8 at paras 66–67.

[50] Prohibiting or mandating conduct are not the only means governments employ to advance their regulatory ends. The purpose of the fuel charge in Part 1 of the *GGPPA* is for the charge itself to affect behaviour by discouraging the use of carbon-based fuels to achieve the regulatory purpose of reducing GHG emissions. As the Majority correctly observed, "the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective." The fuel charge in Part 1 of the *Act* is akin to an example of a regulatory charge model provided in *Westbank*: "A per-tonne charge on landfill waste … levied to discourage the production of waste."

> *Reasons*, *supra* para 1 at para 216.
> *Westbank*, *supra* para 44 at para 29.

[51] The Appellants mistakenly attempt to differentiate Parts 1 and 2 of the *GGPPA* through a faulty analogy that disregards the SCC's clear guidance in *Westbank*. *Westbank* also provides the regulatory charge example of a deposit-refund bottle charge to encourage recycling. The

Appellants incorrectly argue that Part 2, unlike Part 1, aligns with this model of a regulatory charge and serves the *Act*'s regulatory purpose by affecting behaviour because relevant GHG emitters may be rewarded or penalized based on compliance with emissions limits. However, the SCC in *Westbank* was clear that *both* models of regulatory charges serve to advance the purpose of the relevant regulatory scheme.

Westbank, *supra* para 44 at para 29.

B. *The Appellants' Submissions Regarding Specificity Are Unfounded*

[52] In addition, the Appellants incorrectly argue that the second *Westbank* indicium is not met because Part 1 of the *GGPPA* does not satisfy the statement in *Westbank* that "a regulatory scheme must 'regulate' in some specific way and for some specific purpose." The Appellants mistakenly argue that Part 1 of the *GGPPA* lacks specificity because the activities implicated by the fuel charge "are remarkably broad, attaching to any activity that uses fuel for any reason."

Westbank, *supra* para 44 at para 26.
Appellants' Factum, *supra* para 8 at paras 66–69.

[53] Canada agrees that the activities that produce GHG emissions are broad and ubiquitous, which warrants minimum national standards to ensure a coordinated, nationwide approach to mitigation. However, Canada submits that Part 1 of the *GGPPA* clearly regulates in a specific way for a specific purpose. The "specific way," or means, is by imposing a fuel charge and the "specific purpose" is to discourage the use of carbon-based fuels (affecting behaviour) to advance the purpose of the *Act* and reduce GHG emissions.

C. *The Appellants Fail to Acknowledge the Remainder of the* Westbank *Indicia*

[54] The Appellants correctly acknowledge that the *Westbank* indicia are not a conjunctive test, yet fail to argue beyond the basis of the second indicium before ultimately labelling it as "unhelpful." In the Appellants view, this indicium does not helpfully delineate regulatory charges

from taxes because "[b]oth … can be used as tools for behaviour modification." The Appellants argue that "[s]omething more is required" to distinguish a regulatory charge from a tax, yet fail to clarify what would constitute "something more." Canada agrees that both regulatory charges and taxes can be used to affect behaviour. As the SCC noted in *Westbank*, "in today's regulatory environment, many charges will have elements of taxation and elements of regulation."

> Appellants' Factum, *supra* para 8 at para 70.
> *Westbank*, *supra* para 44 at para 30.

[55] It is beyond reasonable dispute that Part 1 of the *GGPPA* creates a regulatory scheme as per the four *Westbank* indicia. Canada has clearly established that the fuel charge in Part 1 of the *Act* satisfies the second *Westbank* indicium. Moreover, the *GGPPA* as a whole, including Part 1, constitutes a complete, complex and detailed code of regulation (the first *Westbank* indicium). Canada does not take a position with respect to the third *Westbank* indicium regarding costs of regulation because it was not at issue in the SCC decision on appeal to this Court. Canada therefore lacks the evidentiary basis to make submissions. Finally, the fuel charge in Part 1 of the *Act* meets the fourth *Westbank* indicium regarding the connection between the regulation and those it regulates. The regulated individuals and entities who use carbon-based fuels contribute to GHG emissions and the need for regulation to reduce these emissions.

> *Westbank*, *supra* para 44 at paras 24, 44.

[56] Canada submits that at least one, if not three, of the *Westbank* indicia are established. A regulatory scheme can be established without all four indicia. Part 1 of the *GGPPA* creates a regulatory scheme that satisfies the first branch of the *Westbank* analysis.

> *Westbank*, *supra* para 44 at paras, 24 44.

II. *The Fuel Charge Under Part 1 of the* GGPPA *Satisfies the Second Branch of the* Westbank *Analysis Through Its Connection to the Regulatory Scheme*

[57] The fuel charge under Part 1 of the Act also satisfies the second branch of the *Westbank* analysis: a connection between the established regulatory scheme and the regulatory charge. The Appellants do not state their position with respect to the second branch of the *Westbank* test, which the AG of ON disputed at the SCC. The Majority correctly held that a sufficient connection between a regulatory charge and a regulatory scheme does not require that revenues be used to advance the purpose of the regulatory scheme, or to cover its costs.

> *Westbank*, *supra* para 44 at para 44.
> *Reasons*, *supra* para 1 at paras 214, 216.

[58] A connection is established where the purpose of a regulatory charge is for the charge itself to influence behaviour (*Reasons*, *Westbank*, *Connaught*). The purpose of the fuel charge under Part 1 of the *GGPPA* is to affect behaviour by discouraging the use of carbon-based fuels to reduce GHG emissions. The Appellants acknowledge the fuel charge "can modify fuel purchasing behaviour," and "behavioural change" is referred to twice in the *Act*'s Preamble. The fuel charge under Part 1 of the *GGPPA* satisfies both branches of the *Westbank* analysis and is *intra vires* Parliament as a valid regulatory charge.

> *Reasons*, *supra* para 1 at paras 215-216.
> *Westbank*, *supra* para 44 at para 44.
> *Connaught*, *supra* para 44 at paras 20, 27.
> Appellants' Factum, *supra* para 8 at para 70.
> *GGPPA*, *supra* para 1 at Preamble.

E. *The Fuel Charge Under Part 1 of the* GGPPA *Does Not Raise Revenue for General Purposes and Is Not a Tax*

[59] The Majority correctly stated that the regulatory fuel charges under Part 1 of the *GGPPA* "cannot be characterized as taxes" and argument to the effect that they constitute disguised taxation is unsupportable. The Majority affirmed that *Westbank* governs when distinguishing between regulatory charges and taxes falling under s 53 of the *Constitution*. In addition to the four indicia

discussed above, the SCC in *Westbank* and *Connaught* stressed that taxes, unlike regulatory charges, have a primary purpose of raising general-purpose revenue.

Reasons, *supra* para 1 at para 219, 218.
Westbank, *supra* para 44 at para 30.
Connaught, *supra* para 44 at para 17.

[60] A primary purpose of raising general-purpose revenue cannot be attributed to the *GGPPA*. Any proceeds from the fuel charge under Part 1 of the *Act*, when not rebated, refunded, or otherwise remitted, are distributed back to the relevant province or to individuals or entities within it. Excess emission charge payments under Part 2 of the *Act* are likewise distributed. Rather than raise government revenue, the *GGPPA* has a clear regulatory purpose: to affect behaviour through minimum standards of GHG price stringency to reduce GHG emissions. The fuel charges under Part 1 of the *Act* are valid regulatory charges, not taxes, and s 53 therefore does not apply.

GGPPA, *supra* para 1 at ss 165(1)–(2), 188(1).

F. *The Appellants' Submissions Regarding Discretion and Judicial Review Are Unfounded*

[61] Notwithstanding that Part 1 of the *GGPPA* imposes valid regulatory charges, Canada will address the Appellants' submissions regarding discretionary powers and judicial review. The Appellants assert that the GiC's regulation-making powers under the *GGPPA* , such as under s 166(1), are "extraordinarily broad." The Appellants also impugn s 168(4), likening it to a "Henry VIII clause" that violates s 53 by granting "unfettered discretion" to the GiC with respect to fuel charges.

Appellants' Factum, *supra* para 8 at ss 75–78.

[62] First, s 53 applies to taxation and is not engaged by the *GGPPA*'s regulatory charges. Second, the Majority correctly noted that "the constitutionality of Henry VIII clauses is settled law." Although the Appellants argue that Henry VIII clauses have not been considered in the

taxation context, the *GGPPA* does not impose a tax nor engage s 53. Third, the Majority noted that judicial review would be available regardless if the discretion in the *Act* with respect to regulation-making powers were abused and reviewed the limits on its exercise within the *GGPPA*.

> *Reasons*, *supra* para 1 at paras 87, 73.
> Appellants' Factum, *supra* para 8 at 78.

[63] Nevertheless, the Appellants mistakenly argue that "the [GiC] is not required to consider the *regulatory purpose* of the *Act* when making regulations" under specified, impugned provisions." The Appellants further argue that the *Act* provides "few, if any, benchmarks … which a reviewing court could use to inform their determination of reasonableness." The Appellants not only concede that the *Act*'s purpose is regulatory, not to raise general-purpose revenue as a tax, but also demonstrate a misapprehension of judicial review.

> Appellants' Factum, *supra* para 8 at paras 77, 79 [emphasis added].

[64] The SCC provides comprehensive guidance for courts conducting reasonableness review in *Vavilov*. The ultimate question for courts to consider is whether the decision under review is reasonable, or "based on an internally coherent and rational chain of analysis and … justified in relation to the facts and the law that constrain the decision maker." The Appellants correctly note that the governing statutory scheme and the principles of statutory interpretation relevant to its application (e.g. the *Act*'s object and Parliament's intention) are central to reasonableness review.

> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] paras 85, 108, 117.
> Appellants' Factum, *supra* para 8 at paras 79, 77.

[65] However, the Appellants fail to acknowledge that administrative decision-makers are constrained by, and reviewing courts are informed by, (*inter alia*) other relevant statutory or common law; evidence; parties' submissions; past practice; and potential impacts (*Vavilov*). As the Majority stressed, discretion must be exercised "in accordance with the purpose for which it was given," otherwise the use of regulation-making power could be found to be *ultra vires* the Act.

The power to make regulations with respect to the regulatory fuel charges in Part 1 of the *GGPPA* is far from unfettered as the Appellants submit.

> *Vavilov*, *supra* para 64 at s IIIE.
> *Reasons*, *supra* para 1 at paras 73, 75.
> Appellants' Factum, *supra* para 8 at para 77.

PART IV — SUBMISSIONS IN SUPPORT OF COSTS

[64] Canada does not seek costs and requests that no costs be awarded against Canada.

PART V — ORDER SOUGHT

[65] Canada seeks this Court's dismissal of the appeal, thereby upholding the SCC's finding that the *GGPPA* is constitutional.

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

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[redacted]

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[redacted]

Counsel for the Respondent, Attorney General of Canada

PART VI — TABLE OF AUTHORITIES

Case Law		Paragraph No(s).
1	*620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7.	44, 45, 58, 59
2	*Chatterjee v Ontario (Attorney General)*, 2009 SCC 19.	8, 10, 13
3	*Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3.	30, 42
4	*General Motors of Canada Ltd v City National Leasing* [1989], 1 SCR 641.	28
5	*Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161.	36
6	*Ontario (AG) v Canada (AG)*, [1896] UKPC 20, [1896] AC 348.	31
7	*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 2 SCR 327.	31, 33, 40
8	*Re: Anti-Inflation Act*, [1976] 2 SCR 373.	25, 26
9	*Reference re Assisted Human Reproduction Act*, 2010 SCC 61.	14
10	*Reference re Firearms Act (Canada)*, 2000 SCC 31.	18
11	*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17.	10
12	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.	32
13	*Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.	1, 3, 8, 10, 11, 15, 16, 17, 19, 21, 24, 25, 26, 27, 28, 29, 31, 32, 34, 36, 37, 40, 42, 44, 46, 50, 57, 58, 59, 62, 65
14	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.	32
16	*R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.	7, 19, 25, 29, 30, 31, 40, 41, 43
17	*R v Hydro-Québec*, [1997] 3 SCR 213.	25, 26, 42
18	*R v Morgentaler*, [1993] 3 SCR 463, 1993 CanLII 74 (SCC).	7, 10, 17
19	*Rothmans, Benson & Hedges Inc v Saskatchewan* [2005] 1 SCR 188.	12, 35
20	*Schneider v The Queen*, [1982] 2 SCR 112	11, 31, 40
21	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.	64, 65
22	*Ward v Canada (Attorney General)*, 2002 SCC 17.	13

23	*Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134, 1999 CanLII 655 (SCC).	44, 45, 46, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59
Legislation		**Paragraph No(s).**
1	*Canadian Environmental Protection Act*, SC 1999, c 33.	42
2	*Constitution Act, 1867*, (UK) 30 & 31 Victoria, c 3.	1, 33, 41, 59, 60, 61, 62
3	*Tobacco and Vaping Products Act*, SC 1997, c 13, as it appeared on January 19, 2005.	12
4	*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.	1, 4, 9, 15, 47, 58, 60

PART VII — LEGISLATION AT ISSUE

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

IV. Legislative Power
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 …

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. …

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 …
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. …
13. Property and Civil Rights in the Province. …
16. Generally all Matters of a merely local or private Nature in the Province.

Laws respecting non-renewable natural resources, forestry resources and electrical energy
92A (1) In each province, the legislature may exclusively make laws in relation to
1. exploration for non-renewable natural resources in the province;

2. development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
3. development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Greenhouse Gas Pollution Pricing Act, SC 2018, c 12.

Preamble
… Whereas behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation is necessary for effective action against climate change;
Whereas the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change; …

Part 1
Definition of *net amount*
165 (1) In this section, ***net amount*** in respect of a province or area and a period fixed by the Minister means the charges levied by Her Majesty in right of Canada under this Part in respect of the province or area and that period less any amounts in respect of the charges that are rebated, refunded or remitted under this Part or any other Act of Parliament in that period.

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

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.

Conflict
168 (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.

Part 2
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

1. that province;
2. persons that are specified in the regulations or that meet criteria set out in the regulations; or
3. a combination of both.

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

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

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

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 # 2022-06

[redacted]

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Document # : 2016903