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 #2022-07

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

PART I -- OVERVIEW AND STATEMENT OF FACTS

1 This appeal concerns the constitutional divisions of power as set out in ss. 91 and 92 of the *Constitution Act.* At issue is whether (1) the federal government has the constitutional authority to enact the *Greenhouse Gas Pollution Pricing Act* under the national concern branch of the peace, order, and good government ("POGG") power, and (2) if the charge imposed under Part 1 of the *Act* is a valid regulatory charge or tax.

> *Constitution Act, 1867,* (UK) 30 & 31 Victoria, c 3 (*"Constitution Act"*).
> *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186 ("*GGPPA"* or "*Act*").

2 The *GGPPA* allows the federal government to impose greenhouse gas ("GHG") pricing mechanisms onto provinces. The applicability of the *GGPPA* is not triggered by the amount of GHGs a province emits, but rather when a province fails to implement a GHG pricing mechanism that satisfies the Governor in Council's discretionary standards.

A. Overview of the Appellants' Position

3 The appellants submit the *GGPPA* as a whole is *ultra vires* Parliament's jurisdiction to legislate under the national concern branch of POGG for following reasons:

(a) Properly characterized, the pith and substance of the *Act* cannot include reference to a "minimum national standard", as its inclusion predetermines the outcome of the national concern analysis. The correct pith and substance of the *Act* is the application of GHG pricing mechanisms to reduce GHG emissions. This characterization falls within provincial jurisdiction under ss. 92(10), 92(13), 92(16), and 92A and therefore the residual POGG power is not engaged.

(b) Even if the pith and substance of the *GGPPA* does not fall entirely under provincial jurisdiction such that the national concern branch is engaged and the national concern test should be applied, the application of GHG pricing mechanisms to reduce GHG emissions is not a valid matter of national concern and recognizing a new branch of federal jurisdiction over it would irreconcilably intrude on provincial jurisdiction.

(c) Alternatively, the appellants submit that the fuel charge under Part 1 of the *Act* is *ultra vires* Parliament as both a regulatory charge and a tax. Part 1 does not establish a regulatory scheme, and therefore the charge created under Part 1 is a tax. The tax violates the constitutional principle of no taxation without representation pursuant to s. 53 of the *Constitution Act*.

Constitution Act, supra para 1 at ss 53, 92(10), 93(13), 92(16), 92(A)

B. Statement of Facts

(i) Background

4 Prior to the *GGPPA,* all provinces had undertaken, and continue to take, significant action to address climate change. Not every province plans to implement a GHG pricing system. However, implementing GHG pricing mechanisms has not directly corresponded with a reduction in GHG emissions. For example, BC has had a GHG pricing system in place since 2008. However, between 2008-2018, Ontario reduced its GHG emissions significantly more than BC, despite not having pricing measures in place. It follows that while carbon pricing is an effective mechanism to reduce GHG emissions, it is not the only effective strategy.

Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 ("*Reasons"*) (Factum of the Canadian Taxpayer's Federation at para 19).

(ii) The *GGPPA*

5 Part 1 of the *GGPPA* applies a charge to fuels that are produced, delivered, or used in a listed province, brought into a listed province from elsewhere in Canada, and imported into a listed province. Part 1 of Schedule 1 lists the provinces to which Part 1 applies. Schedule 2 lists the fuels to which Part 1 applies, and their applicable rates. Part 1 gives the Governor in Council wide-ranging powers to make regulations and provides that in the event of a conflict between a regulation and the *Act*, the regulation prevails.

GGPPA, supra para 1 at Part 1, Schedule 1, Schedule 2.

6 Part 2 establishes an output-based pricing system ("OBPS"), which applies to a "covered facility" in a listed province. Covered facilities are exempt from the Part 1 fuel charge but must conform to an annual GHG emission limit based on prescribed industry standards. Covered facilities with excess emissions are subject to a charge per excess unit of GHGs. Covered facilities that emit less than their emission limit are rewarded with surplus credits that can be sold to other covered facilities or applied to future excess emissions. As in Part 1, Part 2 gives the Governor in Council broad discretion to prescribe standards and make regulations.

GGPPA, supra para 1 at Part 2.

(iii) Judicial History

7 The constitutionality of the *GGPPA* was challenged in references brought before three appellate courts followed by appeals that were heard together at the Supreme Court of Canada ("SCC"):

- The majority from the Saskatchewan Court of Appeal upheld the *GGPPA* as *intra vires* Parliament with two justices in dissent;
- The majority from the Ontario Court of Appeal upheld the *Act* as *intra vires* Parliament, with one justice concurring and one in dissent;
- In the Alberta Court of Appeal, the majority held the *GGPPA* to be unconstitutional, with one justice concurring, and one in dissent.

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 (*"SKCA Reference"*).
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 (*"ONCA Reference"*).
Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74.

8 The majority at the SCC (Wagner C.J., and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ., the "majority") found the *GGPPA* to be *intra vires* Parliament under the national concern branch of POGG, characterizing the pith and substance as "minimum national standards of GHG price stringency to reduce GHG emissions". The majority also found the charges under Part 1 of the *Act* to be valid regulatory charges.

Reasons, supra para 4 at para 80.

9 Côté J. dissented in part, agreeing with the majority's reformulation and application of the national concern test, but finding the *GGPPA* unconstitutional because it confers excessively broad discretion to the Governor in Council, in violation of the constitutional principles of Parliamentary sovereignty, rule of law, and separation of powers.

Reasons, supra para 4.

10 Brown and Rowe JJ. dissented separately, both finding the *GGPPA ultra vires* Parliament, and rejecting the majority's reformulation of the national concern test. Both took issue with the majority's inclusion of "minimum national standards" in the pith and substance characterization, finding that the term "adds nothing to the pith and substance" other than allowing Canada to circumscribe the national concern test.

Reasons, supra para 4.

PART II -- QUESTIONS IN ISSUE

11 The following questions are at issue in this appeal:

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

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

PART III -- ARGUMENT

A. The Proper Characterization of the *GGPPA*

(i) Introduction

12 To determine whether a federal statute is *intra vires* Parliament, the court must first identify the legislation's pith and substance (the characterization step), and second, determine which head of federal or provincial power it falls under in ss. 91 or 92 of the *Constitution Act* (the classification step) (*Morgentaler*). When a plausible case is presented that the applicable head of power is the national concern branch of Canada's residual POGG power, the national concern test must be applied.

> *Constitution Act, supra* para 1 at ss 91, 92.
> *R v Morgentaler,* [1993] 3 SCR 463 at 481, 1993 CanLII 74 (SCC) (*"Morgentaler").*

13 The two steps of characterization and classification should be distinct, lest the pith and substance analysis become "blurred and overly oriented towards results" (*Chatterjee*). Results-orientated characterizations impede upon the structure of the long-standing pith and substance methodology, creating a circular process in which courts are free to craft their own characterization of the matter to fit under a particular head of power, with purpose and effect falling to the wayside (*ONCA Reference*). To fully appreciate the purpose and effects of a law, "characterization that is overly influenced by classification" should be avoided (*GNDA Reference*).

> *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 (*"Chatterjee"*) at para 16.
> *ONCA Reference, supra* para 7 at para 224.
> *Reference Re Genetic Non-Discrimination Act*, 2020 SCC 17 (*"GNDA Reference"*) at para 31.

14 The goal is to characterize the matter as precisely as possible (*AHRA Reference*), with a view of "*facilitating the subject matter's classification* among the classes of subjects described in ss. 91 and 92 so far as necessary to resolve the case" (*Reasons*). The court's goal is to "capture the

law's essential character in terms that are as precise as the law will allow", lest it become impossible to classify or impede on both federal and provincial powers (*GNDA Reference*).

> *Reference re Assisted Human Reproduction Act,* 2010 SCC 61 *("AHRA Reference")* at para 190.
> *Reasons*, *supra* para 4 at para 320.
> *GNDA Reference, supra* para 13 at paras 31-32.

(ii) The Majority's Characterization was not Distinct and Dictated the Outcome of Classification

15 The majority characterized the pith and substance of the *GGPPA* as "establish[ing] minimum national standards of GHG price stringency to reduce GHG emissions". The use of the term "minimum national standards" is highly problematic because it effectively dictates the result of the classification analysis. "Minimum national standards" ensures that the *Act* cannot fall under a provincial head of power because only federally enacted standards can be "national", i.e., applying nationwide and "minimum", i.e., paramount over any lower provincial standard.

> *Reasons*, *supra* para 4 at paras 80, 357.

16 An act characterized as implementing a national standard will invariably abbreviate and skew any meaningful application of the national concern test in the classification stage. A characterization that presupposes its own jurisdiction ignores the jurisprudential history in which the national concern test was formed. In past cases, matters of national concern were framed broadly – as "aeronautics" (*Johannesson*), "atomic energy" (*Ontario Hydro*), and "marine pollution" (*Crown Zellerbach*). None of these matters include a specific legislative means, much less an enacting branch of government. As a result, the national concern test was designed to determine whether a proposed matter *could only be effectively addressed by federal Parliament.* It was not designed to determine whether Parliament could gain exclusive jurisdiction *to legislate about legislation* pertaining to a matter.

> *Johannesson v Municipality of West St Paul,* [1952] 1 SCR 292, 1951 CanLII 55 (SCC) (*"Johannesson"*).
> *Ontario Hydro v Ontario (Labour Relations Board),* [1993] 2 SCR 327, 1993 CanLII 72 (SCC), (*"Ontario Hydro"*).
> *R. v. Crown Zellerbach Canada Ltd.,* [1988] 1 SCR 401, 1988 CanLII 63 (SCC) ("*Crown Zellerbach*" cited to CanLII).

17 The national concern test, discussed below, is therefore vulnerable to matters of national concern that are framed strategically. Such matters can be conjured out of thin air; Canada can argue that Parliament's ability to legislate a "backstop" concerning virtually anything has transformed into a matter of national concern (*Reasons*). As the majority's reasons make clear, it

is far easier to satisfy the requirements of singleness, distinctiveness, and indivisibility where the matter includes legislative means that only federal Parliament can achieve. Allowing Canada to erode provincial spheres of influence piece-by-piece by constitutionalizing Parliamentary legislation risks disrupting the "respective bargaining positions of the two levels of government" and "overturn[ing] the balance between federal and provincial subjects of primary legislative powers" (Lederman).

Reasons, *supra* para 4 at para 359.
W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can Bar Rev* 597 at 616.

18 While the appellants acknowledge that legislative means have on occasion formed a necessary part of an act's pith and substance (*Ward*), the court should not allow such characterizations to enter a federalism analysis where the legislative means presuppose the conclusion of the analysis itself (*Chatterjee*). In this case, the majority characterized the pith and substance of the *GGPPA* as "minimum national standards of price stringency to reduce GHG emissions" which then became the matter of national concern for the purposes of the national concern test (*Reasons*). The majority's characterization includes a legislative means (price stringency), *and* a jurisdictional conclusion (minimum national standards).

Ward v Canada (Attorney General), 2002 SCC 17 ("*Ward"*) at para 17.
Chatterjee, supra para 13 at para 16.
Reasons, supra para 4 at paras 80, 114.

(iii) Minimum National Standards Does Not Accurately Describe Part 2 of the *Act*

19 The majority claimed that "minimum national standards" is an essential part of the character of the *Act*, as it gives "expression to the national backstop of the *GGPPA*" (*Reasons*). However, the description of the *Act* as a unified national backstop is inaccurate. While Part 1 of the *GGPPA* imposes a minimum national price on *prescribed* fuels, there is no application of a minimum standard in Part 2. The OBPS relates only to covered facilities that "[meet] the criteria set out in the regulations for that province or area; or [are] designated by the Minister under subsection 172(1)" (*GGPPA*). Therefore, Part 2 of the *GGPPA* creates a standard that is neither minimum nor national. It is entirely dependent on the regulatory discretion of the Governor in Council, both regarding the designation of covered facilities and the varying OBPS standards imposed on their industrial activity (*GGPPA*). This scheme enables the Governor in Council to place inconsistent and varying standards on the cost per tonne of industrial GHG emissions.

Reasons, *supra* para 4 at paras 81, 339.

GGPPA, supra para 1 at ss 169, 172(1), 192(b)(g).

20 The *GGPPA* may impact certain provinces and industries disproportionately, entirely at the discretion of the Governor in Council. Effectively, some industries will be permitted to emit GHGs at a lower cost than others. Part 2 of the *Act* does not establish "minimum national standards" but variable emissions standards on an industry-by-industry basis. Therefore, the use of "minimum national standards" fails to accurately describe the *Act's* legal effects.

Reasons, *supra* para 4 at paras 337-339.

(iv) The Reference to Stringency is Inaccurate

21 Removing "minimum national standards" from the majority's characterization leaves us with: "GHG price stringency to reduce GHG emissions". This characterization is imprecise and does not accurately describe the purpose and effect of the *Act*. While the majority's characterization of the *GGPPA* captures the subject of the legislation—the reduction of GHG emissions—the word "stringency" fails to adequately characterize the legislative means and legal effects of the *Act.*

22 Sections 166(2) and 189(1) of the *GGPPA* authorize the Governor in Council to amend Schedule 1, which lists the provinces where the *Act's* pricing scheme applies. The *Act* requires that "the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions" when acting under ss. 166(2) and 189(1). However, the *Act* does not define "stringency", leaving any determination of "stringency" to the discretion of the Governor in Council. The absence of a definition of stringency creates ambiguity regarding "how the legislation affects the rights and liabilities of those subject to its terms" (*Morgentaler*), because the meaning of "stringency" is eminently variable.

GGPPA, supra para 1 at ss 166(2), 189(1).
Morgentaler, supra para 12 at 482.

23 Without "minimum national standards" and "pricing stringency" all that remains of the majority's characterization is "reducing GHG emissions", which is overly broad and does not allow for classification.

(v) The Correct Pith and Substance of the *GGPPA*

24 The pith and substance of the *GGPPA* is best expressed as: <u>the application of GHG pricing mechanisms to reduce GHG emissions</u>. This characterization captures the purpose and effect of the *GGPPA* and is sufficiently precise as to allow for classification.

25 The overarching purpose of the *GGPPA* is to reduce GHG emissions. This purpose is evident in the preamble of the *Act*, which identifies GHG emissions as the core mischief the *Act* seeks to confront.

GGPPA, supra para 1 at Preamble.

26 The *Act*'s legal effect is the application of GHG pricing mechanisms in every province. "Pricing mechanisms" accurately describe Part 1 and Part 2 of the *GGPPA*, which outline specific pricing mechanisms that may be applied in the provinces. The *Act* itself *applies* to all provinces at all times, but it is only when a province is listed in the *Act* that the specific pricing mechanisms detailed in the *Act* apply. In essence, the *GGPPA* requires that provinces price GHG emissions themselves in a manner that pleases the Governor in Council, or the *Act* will do so for them.

27 "The application of GHG pricing mechanisms to reduce GHG emissions" captures the purpose and effect of the *GGPPA.* The *Act* is concerned with the application of a specific type of legislative mechanism (GHG pricing mechanisms), to achieve an outcome (the reduction of GHG emissions). The *Act* achieves this purpose by ensuring that pricing mechanisms apply in all provinces at all times.

B. The Classification Analysis Must Respect the Residual Nature of POGG

28 The national concern branch of POGG is a residual power that may only be applied to matters that cannot be sufficiently addressed under the enumerated heads of power (Lysyk). The majority correctly identifies this requirement, endorsing Professor Hogg's description of the POGG power as "residuary in its relationship to the provincial heads of power" (*Reasons*). However, likely due to the inclusion of "minimum national standards" in the characterization step, the classification approach undertaken by the majority does not give effect to the residual nature of POGG.

K. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), 57 *Can. Bar Rev.* 531 at 539.
Reasons, supra para 4 at para 89 citing Peter Hogg, *Constitutional Law of Canada*, vol. 1, 5th ed. Supp. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 1) at 17-1 to 17-2.

29 The national concern power grants federal jurisdiction over matters which have a national dimension that transcends the bounds of provincial jurisdiction (*Crown Zellerbach*). To identify such matters, a classification analysis must first consider whether the matter, as characterized by the pith and substance analysis, could be addressed under an enumerated head of power. Considering ss. 91 and 92 *prior* to the application of the national concern test guards against

"unwarranted and artificial expansion of federal jurisdiction" and is aligned with the preservation of provincial autonomy (*Reasons*). This is not a step of the national concern test itself, but rather a prerequisite that preserves the underlying principles of federalism and gives effect to the residual nature of the POGG power. If a matter falls squarely within a federal or provincial head of power, there is no need to identify new matters over which the federal government exercises "plenary jurisdiction" (*Crown Zellerbach*).

> *Crown Zellerbach, supra* para 16 at para 34.
> *Reasons, supra* para 4 at para 532.

30 Despite purporting to accept the residual nature of POGG, the majority later identifies "a jurisprudential barrier" to this approach, namely that in *Crown Zellerbach,* Le Dain J. did not first consider whether "marine pollution" could be addressed under an enumerated head of power (*Reasons*). The appellants submit that no such jurisprudential barrier exists; marine pollution was, by definition, a matter which existed in a jurisdictional gray area that could not be legislated under either provincial or federal jurisdiction. *Crown Zellerbach* demonstrates that an inquiry into ss. 91 or 92 is unnecessary where the proposed matter is acknowledged to exist in an area that spans provincial and federal jurisdiction.

> *Reasons, supra* para 4 at para 139.
> *Crown Zellerbach*, supra para 16.

31 In cases since *Crown Zellerbach,* the Court has found it necessary to consider enumerated powers prior to applying the national concern doctrine. In *Oldman River,* the Court held that a legislative solution could "more readily be found by looking first at the catalogue of powers in the *Constitution Act*". The Court took a similar approach in *Hydro-Quebec,* finding the application of the national concern doctrine unnecessary because the provisions at issue were *intra vires* Parliament under s. 91(27). In accordance with this approach, we first review the *GGPPA* with reference to the relevant enumerated heads of power.

> *Friends of the Oldman River Society v. Canada* (*Minister of Transport*), [1992] 1 SCR 3 at 65, 1992 CanLII 110 (SCC) (*"Oldman River"*).
> *R v Hydro-Quebec,* [1997] 3 SCR 213*,* 1997 CanLII 318 (SCC) at para 110 (*"Hydro-Quebec"*).

(i) The Matter can be Sufficiently Addressed via Provincial Legislation

32 A consideration of potential heads of power for the matter (the application of GHG pricing mechanisms to reduce GHG emissions) is a meaningful exercise if this court accepts that properly

characterized, the pith and substance of the *GGPPA* does not include the conclusory concept of a "minimum national standard".

33 The appellants submit that ss. 92(10), (13), (16) of the *Constitution Act* enable the provinces to enact GHG pricing mechanisms that apply to fuels and industry-based emissions. Additionally, s. 92A of the *Constitution Act* fortifies the provinces' legislative authority over non-renewable resources, which are subject to pricing mechanisms under Part 2 of the *Act.*

Constitution Act, supra para 1 at ss 92(10), (13), (16), and 92A.

34 Prior to the enactment of the *GGPPA*, several provinces had already enacted valid GHG pricing schemes, and the *Act* itself is *premised* on such ability. The imposition of the *GGPPA* simply required *all* provinces to have GHG pricing schemes, in a form which satisfies the federal government. However, policy desirability has no bearing on classification analysis, which must be undertaken in a way that prioritizes constitutionality over federal desirability.

R v Comeau, 2018 SCC 15 at para 83.

35 Upon finding that the subject matter of the statute falls squarely within provincial jurisdiction, it is unnecessary to proceed to the national concern test.

Hydro-Quebec, supra para 31 at para 110.

36 In the alternative, if the national concern test is to be applied, the appellants say that its proper application does not support federal jurisdiction for the *GGPPA* under the POGG national concern power.

C. The POGG National Concern Test

37 The majority's reasons describe what can only be understood as a reformulated version of the national concern test from *Crown Zellerbach*. The majority's test is a "three-step process", comprised of a threshold question, a two-stage inquiry into the "singleness, distinctiveness, and indivisibility" of the matter, and a balancing of the "intrusion on provincial autonomy against the impact on other interests that will be affected if federal jurisdiction is not granted".

Reasons, supra para 4.

38 As Brown and Rowe JJ. described in their dissenting reasons, the majority's reformulation dilutes the national concern test and lessens its value as a tool for moderating federalism disputes. Applying the more exigent national concern test from *Crown Zellerbach,* the dissenting justices reached a different result than the majority. The appellants agree. However, for the purposes of this appeal, the appellants submit that where the proposed "matter" of national concern is properly

characterized, even the majority's diluted formation of the test will nonetheless lead to a conclusion that the *Act* is *ultra vires* Parliament.

(i) The Matter is of Concern to Canada as a Whole

39 In *Crown Zellerbach,* the Court began its analysis by considering whether the matter in question was "of concern to Canada as a whole". The threshold question posed by the majority goes beyond the *Crown Zellerbach* formulation, asking whether the matter is both "national, and a concern" and "of genuine national importance" – but the appellants accept that under either formulation, "the application of GHG pricing mechanisms to reduce GHG emissions" would meet the threshold test.

> *Crown Zellerbach, supra* para 16 at para 37.
> *Reasons, supra* para 4 at para 143 citing *ONCA Reference, supra* para 7 at para 106 and *SKCA Reference, supra* para 7 at para 146.

(ii) The Matter is not Single, Distinct, or Indivisible

40 The next stage of the test is an inquiry into the "singleness, distinctiveness, and indivisibility" of the matter. The majority preferred an approach based on two principles, informed by three factors each, stating that the phrase "singleness, distinctiveness, and indivisibility...does not amount to a readily applicable legal test."

> *Reasons, supra* para 4 at para 146.

41 The first principle the majority identified is whether the matter is "a specific and identifiable matter that is qualitatively different from matters of provincial concern". To inform this principle, the majority looked to the following factors: the extra-provincial and international nature of the matter, the existence of any international agreements, and whether the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces.

> *Reasons, supra* para 4 at para 143.

42 The proposed matter, properly characterized, is not "specific and identifiable". Virtually "any goal can be achieved through a pricing mechanism", and almost every action, whether it be constructing new infrastructure, growing food, or producing energy, emits GHGs (Hunter). As La Forest J. described in his dissenting reasons in *Crown Zellerbach,* "environmental pollution alone [i.e. as a subject matter of legislative authority] is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable" (*Crown Zellerbach*). La Forest J.'s cautionary words are directly applicable in this case. The behaviours

that produce emissions, and the pricing mechanisms that could be applied to them, cannot be defined as to have "sufficient consistence to retain the bounds of form".

> Josh Hunter "Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern" (2021), 100 *SCLR* (2d) 59 at para 52.
> *Crown Zellerbach, supra* para 16 at para 70.

43 Nor is the matter "qualitatively different from matters of provincial concern". While climate change is an international matter, the application of GHG pricing mechanisms to reduce GHG emissions is provincial in nature. It can be accomplished by provincial legislation enacted under ss. 92(10), (13), (16), and 92A.

> *Reasons, supra* para 4 at para 150.

44 A matter is not qualitatively different from matters of provincial concern if it is an aggregate of provincial matters (*Anti-Inflation*). The application of pricing mechanisms to reduce GHG emissions, as proposed by the *Act*, is a divisible aggregate of matters falling under provincial jurisdiction; GHG emissions are measured at their source and classified by industry. GHG pricing mechanisms are then applied to the behaviours responsible for emitting GHGs. It follows that the efficacy of GHG pricing measures depends on a regulator's ability to *divide* GHGs by source. Identifying the source of GHG emissions does not suffer from the same inherent difficulties that made marine pollution qualitatively different from matters of provincial concern in *Crown Zellerbach.*

> *Re: Anti-Inflation Act,* [1976] 2 SCR 373, 1976 CanLII 16 (SCC) at 458.
> *Crown Zellerbach, supra* para 16 at para 38.

45 International law in this case is non-determinative. International agreements concerning climate change do not mandate one distinct approach to achieving a national emissions reduction.

> *Reasons, supra* para 4, at para 149.

46 The majority asserted that the federal Parliament has a distinct role in regulating a separate aspect of the matter, namely "minimum national standards". The appellants submit that this separate aspect is purely artificial and ignores the nature of federal jurisdiction. Canada is not proposing to regulate a *different aspect* of pricing mechanisms, it is regulating the *same aspect* of pricing mechanisms from a federal perspective, by universally requiring that pricing mechanisms come into existence in a form that satisfies the federal government.

> *Reasons, supra* para 4 at para 129.

47 The second principle identified by the majority is provincial inability.

Reasons, supra para 4 at para 145.

48 In *Crown Zellerbach,* provincial inability was treated as an inquiry into "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the *intra-provincial* aspects of the matter". The Court held that provincial inability would only exist where "a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of federal Parliament".

49 To assess whether provincial inability exists, the majority looked to the fourth and fifth indicia from the *General Motors* test, adding a third requirement; provincial inability will only be satisfied if "a province's failure to deal with the matter [has] grave extra-provincial consequences."

Reasons, supra para 4 at paras 152-53.

50 The provincial inability test from *General Motors* is easier to satisfy than the test from *Crown Zellerbach*. As Brown J. pointed out, the *General Motors* test "focusses on the prospect of a *legislative scheme* not working unless it is national in scope. By contrast, the test for provincial inability under the national concern doctrine is firmly focussed on the *nature of the problem* as being one which cannot be overcome without national action."

Reasons, supra para 4 at para 422 [emphasis added].

51 Applying either test for provincial inability to the properly characterized matter, there is no provincial inability in this case. A failure to apply GHG pricing mechanisms in one province does not prevent any other province from applying GHG pricing mechanisms to reduce GHG emissions. A failure to cooperatively implement GHG pricing mechanisms has no necessary relationship with a failure to meet national emissions targets.

52 The majority's finding of provincial inability hinges to a large degree on the fact that "the provinces...are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions". This "constitutional" concept of provincial inability stems from the majority's improper characterization of the matter in question.

Reasons, supra para 4 at para 182.

53 The majority also pointed to carbon leakage as an indication of provincial inability, stating that it "could undermine the efficacy of GHG pricing everywhere". The appellants accept that carbon leakage makes uniform legislative treatment *desirable* but carbon leakage is not *fatal* to the efficacy of any unilaterally enacted pricing scheme. In other words, it does not place *a significant aspect* of the matter beyond the power of the provinces, acting alone or together. As Brown J.

correctly stated, any evidence that carbon leakage threatens the efficacy of GHG pricing is "equivocal at best" and "in most sectors and for most provincial economic activity", carbon leakage poses an insignificant concern to the efficacy of GHG pricing mechanisms. Even if a national scheme *improves* the efficacy of GHG pricing mechanisms, a mere improvement does not satisfy the test for provincial inability.

Reasons, supra para 4 at paras 183, 385.

54 The majority's reasons inaccurately equated shortcomings in a GHG pricing scheme with an inability to address climate change itself. There is no link between a lack of cooperation, and a failure to address climate change such that grave extra-provincial harms materialize. It is uncontested that every province has committed to reduce GHG emissions. To make such a connection would require the court to delve into the policy desirability of GHG pricing compared to the virtually infinite alternative methods by which emissions can be reduced. Such speculative policy comparisons have no place in a federalism analysis. It is crucial to recall that climate change is not the proposed matter of national concern.

55 Nor does a failure of one province to price GHGs lead to systemic risks that threaten GHG pricing mechanisms in their entirety. In the 2011 and 2018 *Securities Reference* cases, "systemic-risks" that increased the likelihood of a "domino-effect" were deemed to be outside the constitutional competency of the provinces. The risks posed to GHG pricing mechanisms by political inability are not "systemic", nor do they risk a "domino-effect" that would make independently enacted GHG pricing schemes, or any other emissions reduction scheme, doomed to fail.

Reference re Securities Act, 2011 SCC 66.
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48.

56 Even if provincial inability exists due to the possibility of non-cooperation, it is a "necessary but not sufficient" indicia of singleness, distinctiveness, and indivisibility. As Le Dain J. cautioned in *Crown Zellerbach,* provincial inability must not "provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem." To find otherwise would sound the death knell for federalism as we know it.

Crown Zellerbach, supra para 16 at paras 74 [emphasis added], 34.

(iii) The Scale of Impact on Provincial Jurisdiction is Irreconcilable

57 Even if the proposed matter was sufficiently single, distinct, and indivisible, the final step in the national concern test requires the court to consider the scale of impact on provincial jurisdiction. The majority described this step as asking "whether the matter's scale of impact...is acceptable having regard to the impact on the interests that will be affected if Parliament is unable to constitutionally address the matter at a national level." In *Crown Zellerbach,* the impact on provincial jurisdiction was not reconciled against "interests that will be affected", but rather "the fundamental distribution of legislative power under the Constitution".

> *Reasons, supra* para 4 at para 196.
> *Crown Zellerbach, supra* para 16 at para 33.

58 The majority downplayed the *Act's* impact on provincial jurisdiction, aided by their emphasis of its "backstop" nature. However, granting federal jurisdiction has a significant impact on a wide array of provincial activities as functionally grants "plenary" jurisdiction over any activity that creates GHG emissions.

59 There are few limitations on the Governor in Council's discretion to modify the standards by which provincial GHG pricing schemes are assessed. The *Act* itself does not prescribe what provinces must do to avoid the application of the *Act's* pricing schemes. This results in uncertainty regarding the sufficiency provincial of pricing schemes.

60 It is only when the Governor in Council deems provincial measures as sufficiently "stringent" that the provinces are permitted to retain jurisdiction over GHG pricing mechanisms. This is a flawed, supervisory understanding of federalism that only allows provincial autonomy to exist where the Governor in Council deems appropriate (*Reasons*). It is precisely because GHG pricing mechanisms are such a potent tool that the removal of jurisdiction over such measures has such a drastic scale of impact on provincial autonomy (Cyr).

> *Reasons, supra* para 4 at paras 358, 455.
> H. Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014), 23 *Const. Forum* 20, at 21-22.

61 For example, the *GGPPA* neutralized a provincial GHG reduction scheme that, based on provincial considerations, exempted SaskPower from Saskatchewan's *Management and Reduction of Greenhouse Gasses Act.* The Governor in Council opted to make Part 2 of the *GGPPA* applicable to SaskPower nonetheless. As a result, SaskPower was subject to an OBPS under Part 2 of the *Act* that resulted in significantly higher operational costs, rendering SaskPower

unable to both decarbonize its energy production while also fulfilling its mandate to provide affordable and competitive power generation. This is just one example of how federal jurisdiction over a powerful emissions reductions tool removed any degree of certainty that Saskatchewan had with respect to a previously enacted GHG emissions reduction scheme.

Reasons, supra para 4, (Factum of the Attorney General of Saskatchewan at para 81, 110).

62 In conclusion, the *GGPPA* has a drastic impact on provincial jurisdiction. It limits provinces' ability to enact province specific GHG reduction schemes and has a wide-reaching impact on any activity that produces GHG emissions, despite such activities falling under provincial jurisdiction.

63 Based on the above submissions, the appellants submit the *GGPPA* is *ultra vires* Parliament under the national concern branch of POGG.

D. The Charge is Not a Valid Regulatory Charge

64 A government levy that bears all the characteristics of a tax may nonetheless be a valid regulatory charge if it is connected to a regulatory scheme. Determining if a levy is connected to a regulatory scheme requires: (1) identifying a regulatory scheme; and (2) establishing a connection between the charge and the scheme.

Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134, 1999 CanLII 655 (SCC) (*"Westbank"*) at paras 43-44.

(i) Part 1 Does Not Create a Regulatory Scheme

65 *Westbank* outlined a non-exhaustive list of factors to consider when identifying a regulatory scheme:

> (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated...
>
> *Westbank, supra* para 64 at para 24.

66 A regulatory scheme does not need to meet all of these factors. However, in expanding on factor (2) the SCC held that "a regulatory scheme usually 'delineates certain required or prohibited conduct'... In sum, a regulatory scheme must 'regulate' in some specific way and for some specific purpose."

Westbank, supra para 64 at para 26 [emphasis added].

67 Part 1 of the *GGPPA* does not delineate certain required or prohibited conduct, nor does Part 1 regulate in a "specific way" for a "specific purpose". It simply creates a charge, the amount

of which is variable and determined by the Governor in Council, levied against wide-ranging economic activity and delivered into Canada's general revenue.

68 The majority all but acknowledged this effect when describing that Part 1 of the *GGPPA,*

> … does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor does it tell industries how they are to operate in order to reduce their GHG emissions. Instead, all the *GGPPA* does is to require persons to pay for engaging in specified activities that result in the emission of GHGs.

Reasons, supra para 4 at para 71 [emphasis added].

69 The charge is imposed directly on fuel producers, distributors, and importers, under the assumption that they will pass it onto consumers in the form of higher fuel costs. Therefore, the "specified activities" the majority refers to are remarkably broad, attaching to any activity that uses fuel for any reason. Because Part 1 of the *GGPPA* only requires persons to pay a fuel charge, and the fuel charge itself is so wide ranging and uncertain, it cannot be classified as "regulatory" in the way *Westbank* contemplates.

Westbank, supra para 64.

70 The charge created in Part 1 of the *GGPPA* can modify fuel purchasing behaviour, however, that cannot in itself render Part 1 regulatory in nature. Ottenbriet and Caldwell JJA, in dissent (the "Saskatchewan Minority") correctly noted that the possibility of behaviour modification is unhelpful in determining whether a levy is a tax or regulatory charge. Both regulatory charges *and* taxes (e.g., excise taxes) can be used as tools for behaviour modification. Something more is required for legislation that simply creates a charge on economic activity to be distinguished from a tax.

SKCA Reference, *supra* para 7 at para 309.

71 In contrast, Part 2 directly regulates the reduction of GHG emissions by *rewarding* listed facilities with surplus credits when they emit below their emissions limit and *penalizing* them with charges if they exceed it. The charge created under Part 2 is analogous to a deposit-refund charge on bottles, which imposes a charge that can only be recouped if the subject recycles their bottles, which serves the regulatory purpose.

Cape Breton Beverages Ltd v Nova Scotia (Attorney General), [1997] NSJ No 108, 144 DLR (4th) 536.

72 On the basis of the above, the appellants submit that Part 1 does not establish a regulatory scheme, and therefore must be understood as creating a tax.

E. The Charge is an Unconstitutional Tax

73 Parliament has broad authority to enact tax legislation under s. 91(3) of the *Constitution Act.* Section 91(3) is, however, limited by s. 53 of the *Constitution Act.* In its current form, the charge violates s. 53 by allowing the Governor in Council to impose a tax on its own accord.

Constitution Act, supra para 1 at ss 53, 91(3).

74 Section 53 of the *Constitution Act* codifies the principle of no taxation without representation, by mandating all bills imposing any tax originate in the House of Commons. According to that principle, "individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated and determine how it should be spent" (*Westbank*). This principle prohibits the setting of taxes by any entity aside from the elected legislature (*Eurig*).

Constitution Act, supra para 1 at s 53.
Westbank, supra para 64 at para 19.
Reference re Eurig Estate, [1998] 2 SCR 565, 1998 CanLII 801 (SCC) (*"Eurig"*) at paras 30-32.

(i) The Charge Allows the Governor in Council to Impose a Tax on its Own Accord

75 The Governor in Council is granted extraordinarily broad powers under the *GGPPA,* effectively allowing it to impose a tax on its own accord.

76 Division 8 of Part 1 defines the Governor in Council's regulation making powers. Section 166 sets out the Governor in Council's general ability to make regulations, including:

> **166(1) ...**
> (a) Prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation …
> (4) The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part…

Sections 168(2) and 168(3) provide the Governor in Council with the ability "to make and amend regulations in relation to the fuel charge system, its application, and its implementation".

GGPPA, supra para 1 at ss 3, 166(1) [emphasis added], 166(4).
Reasons, *supra* para 4 at para 230.

77 The Governor in Council's powers under ss. 166(1)(a), 166(4), 168(2), and 168(3) are not limited by the text of the *GGPPA,* and the Governor in Council is not required to consider the regulatory purpose of the *Act* when making regulations under these provisions. Further, section 168(4) provides that in the event of a conflict between a regulation made under Part 1, and the *Act* itself, the regulation prevails; this effectively allows the Governor in Council to amend the

enabling *Act* and is known as a "Henry VIII clause". This results in the Governor in Council having unfettered discretion to determine what fuels will be subject to the charge, and at what price.

GGPPA, supra para 1 at ss 166(1)(a), 166(4), 168(2), 168(3), 168(4).

78 While the majority asserts that Henry VIII clauses have previously been upheld by the SCC as constitutional, the Court has not considered such a clause in a taxation context. Employed in a tax context, such a clause would surely violate section 53 as it would enable the executive branch to impose a new tax on its own accord.

Reasons, *supra* para 4 at para 85.

79 While the majority was satisfied that the misuse of these broad powers by the executive branch would be constrained by being subject to judicial review, the appellants submit that Côté J. was correct in her dissenting reasons in stating that the broad delegation of power in the *GGPPA* provides no "meaningful limits that can be enforced through judicial review". This is because there are few, if any, benchmarks within the *Act* which a reviewing court could use to inform their determination of reasonableness.

Reasons, supra para 4 at para 276.

80 In any event, the availability of judicial review does not eliminate the constitutional issues posed by allowing Parliament to delegate their tax making authority to the Governor in Council, with no explicit limits on the exercise of such discretion.

81 Properly construed Part 1 is not a regulatory scheme and is instead a tax. In its current form the tax violates s. 53 and must be struck down.

82 The appellants reiterate that this appeal is not a matter of preventing Parliament from addressing climate change, but rather preserving fundamental principles of Canadian federalism and democracy.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

83 The appellants do not seek costs and submit that no costs be awarded against them.

PART V -- ORDER SOUGHT

84 The appellants request that their appeal be allowed, and this Court answer the reference questions as follows: "Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act* are unconstitutional in their entirety."

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

[redacted]
Name of Counsel

[redacted]
Name of Counsel

[redacted]
Name of Counsel

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

PART VI -- TABLE OF AUTHORITIES

Case Law		**Paragraph No.**
1	*Cape Breton Beverages Ltd v Nova Scotia (Attorney General)*, [1997] NSJ No 108, 144 DLR (4th) 536.	71
2	*Chatterjee v Ontario (Attorney General),* 2009 SCC 19.	13, 18
3	*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, 1992 CanLII 110 (SCC).	31
4	*Johannesson v Municipality of West St Paul,* [1952] 1 SCR 292, 1951 CanLII 55 (SCC).	16
5	*Ontario Hydro v Ontario (Labour Relations Board),* [1993] 2 SCR 327, 1993 CanLII 72 (SCC).	16
6	*Re: Anti-Inflation Act,* [1976] 2 SCR 373, 1976 CanLII 16 (SCC).	44
7	*Reference re Assisted Human Reproduction Act,* 2010 SCC 61.	14
8	*Reference re Eurig Estate,* [1998] 2 SCR 565, 1998 CanLII 801 (SCC).	74
9	*Reference re Genetic Non-Discrimination Act,* 2020 SCC 17.	13, 14
10	*Reference re Greenhouse Gas Pollution Pricing Act,* 2020 ABCA 74.	7
11	*Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544.	7
12	*Reference re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11.	4, 8, 9, 10, 14, 15, 17, 18, 19, 20, 28, 29, 30, 37, 39, 40, 41, 43, 45, 46, 47 49, 50, 52, 53, 57, 60, 61, 68, 76, 78, 79
13	*Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40.	7, 39, 70
14	*R v Comeau,* 2018 SCC 15.	34
15	*R v Morgentaler,* [1993] 3 SCR 463, 1993 CanLII 74 (SCC).	12, 22
16	*Reference re Pan-Canadian Securities Regulation,* 2018 SCC 48.	55
17	*Reference re Securities Act,* 2011 SCC 66.	55
18	*R v Crown Zellerbach Canada Ltd,* [1988] 1 SCR, 1988 CanLII 63 (SCC).	16, 29, 30, 39, 42, 44, 56, 57
19	*R v Hydro-Québec,* [1997] 3 SCR 213, 1997 CanLII 318 (SCC).	31, 35
20	*Ward v Canada (Attorney General),* 2002 SCC 17.	18
21	*Westbank First Nation v British Columbia Hydro and Power Authority,* [1999] 3 SCR 134.	64, 66, 69, 74
Legislation		**Paragraph No.**
1	*Constitution Act, 1867,* (UK) 30 & 31 Victoria, c 3, ss. 53, 91, 92, 92(10), 92(13), 92(16), 92A	1, 3, 12, 31, 33, 73, 74
2	*Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186	1, 5, 6, 19, 22, 25, 76, 77

	Preamble **Part 1, ss 3-168** 3 "rate" 3 "tax" 166(1) 166(1)(a) 166(2) 166(4) 168(2) 168(3) 168(4) **Part 2, ss 169-261** 169 "covered facility" 172(1) 189(1) 192(b) 192(g) Schedule 1 Schedule 2	
Secondary Sources		**Paragraph No.**
1	H. Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014), 23 *Const Forum* 20, at 21-22.	60
2	Josh Hunter "Saving the Planet Doesn't Mean You Can't Save the Federation: Greenhouse Gases Are Not a Matter of National Concern" (2021), 100 *SCLR* (2d) 59 at para 52.	42
3	W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can Bar Rev* 597 at 616.	17
4	K. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979), *57 Can. Bar Rev. 531.*	28

PART VII -- LEGISLATION AT ISSUE

Legislation		**Paragraph No.**
1	*Constitution Act, 1867,* (UK) 30 & 31 Victoria, c 3, ss. 53, 91, 92, 92(10), 92(13), 92(16), 92A	1, 3, 12, 31, 33, 73, 74
2	*Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12, s 186 **Preamble** **Part 1, ss 3-168** 3 "rate" 3 "tax" 166(1) 166(1)(a) 166(2) 166(4) 168(2) 168(3) 168(4) **Part 2, ss 169-261** 169 "covered facility" 172(1) 189(1) 192(b) 192(g) Schedule 1 Schedule 2	1, 5, 6, 19, 22, 25, 76, 77

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 #2022-07

[redacted]

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