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 # 2022-08

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 This case is not about climate change and the existential threat it poses to Canada. It is about the federal government's unjustifiable intrusion into provincial jurisdiction by enacting the *Greenhouse Gas Pollution Pricing Act* (GGPPA or Act) to advance a policy choice that upsets the division of powers and imposes an invalid regulatory charge.

2 It is an undisputed fact that climate change will have significant impacts on Canada unless immediate action is taken to address it. Government intervention to reduce greenhouse gas (GHG) emissions is necessary to mitigate the effects of climate change. However, the grim reality of our current climate crisis does not give the federal government carte blanche to legislate in areas of exclusive provincial jurisdiction that are enumerated under section 92 of the *Constitution Act, 1867*.

3 The Supreme Court of Canada (SCC) erred by finding the GGPPA was constitutionally enacted using the national concern branch of the Peace, Order, and Good Government (POGG) power. First, it defined the pith and substance of the Act too narrowly and did not accurately capture the Act's true purpose and effects. In the alternative, the Court failed to consider the enumerated heads of power before proceeding to residual POGG power when classifying the Act. In the event that POGG does apply, the GGPPA does not meet the test to be considered valid as a matter of national concern because there is no provincial inability to regulate GHGs, and the matter is too multifaceted to meet the standard of singleness, distinctiveness and indivisibility.

4 The SCC also erred by finding the charges levied by the GGPPA are a valid regulatory charge. The levy imposed by Part 1 of the GGPPA is a regulatory charge that regulates matters under provincial jurisdiction and has an insufficient connection between the act and the regulatory purpose.

B. Statement of the Facts

5 There are many ways to promote the reduction of greenhouse gas (GHG) emissions. The provinces, territories, and federal government affirmed the importance of addressing climate change at the *Vancouver Declaration on Clean Growth and Climate Change* (*Vancouver Declaration*). This evolved into the 2016 *Pan-Canadian Framework on Clean Growth and*

Climate Change (*Pan-Canadian Framework*), which introduced a national Carbon pricing system that applied to provinces that did not meet the benchmark. This framework functioned through voluntary agreement between all involved to adhere to the scheme. All of Canada's provinces and territories have taken action to address climate change, including Alberta and Ontario, which are amongst the four provinces with Carbon pricing systems.

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at paras 7, 12, 23 [*SCC Reference*].

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 at para 24 [*Ontario Reference*].

Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA at paras 435, 439, 494 [*Alberta Reference]*.

6 Despite the existing consensual *Pan-Canadian Framework*, less than two years later the federal government unilaterally decided to implement a mandatory Carbon pricing backstop. The GGPPA came into force in 2018. The preamble recognises the importance of reducing GHG emissions and claims to incentivize behavioural change by implementing a federal backstop Carbon pricing system. If provinces meet the minimum national standards of price stringency, they may control their own pricing systems. If not, the Act's pricing system will apply.

SCC Reference at paras 25, 28.

7 The GGPPA contains two parts. The lists of fuels and provinces that the charges will apply to are prescribed by the Governor in Council (GIC), giving the GIC the ability to amend the primary legislation through regulation. Part 1 imposes a charge on fuels imported, produced, or distributed within a listed province. The revenues generated are returned to the province where revenues were collected. Part 2 implements an Output-Based Pricing System (OBPS) for large industrial facilities that are exempt from the fuel charge but must pay for GHG emissions that exceed an emissions limit.

SCC Reference at paras 25, 26, 30.

8 The stated goal is that producers, distributors, and importers bear the cost of the fuel charge. However, consumers will ultimately be affected by increased prices. For example, SaskPower estimates the average consumer will see a 5.1% increase on their electricity bill, indicating that companies are externalizing the cost.

Factum of Attorney General of Saskatchewan, SCC Appeal, dated October 16, 2019 at para 110 [Factum AG SK].

9 Both climate change and fuel levies resulting from the GGPPA place additional financial burdens on Indigenous communities. This is due to an increased cost of fuel and fresh produce, especially in Northern and remote communities.

> Assembly of First Nations, "Submission to the Standing Senate Committee on Energy, the Environment, and Natural Resources (ENEV): Impacts of the Greenhouse Gas Pollution Pricing Act (Bill C-74 - An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures) on First Nations" (2018) at 9-12, online (pdf): *Senate of Canada* <https://www.sencanada.ca/content/sen/committee/421/ENEV/Briefs/ENEV_C-74_AssemblyOfFirstNations_e.pdf> [Assembly of First Nations].

PART II -- QUESTIONS IN ISSUE

10 The questions at issue are:

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

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

11 The appellants submit the answer to both questions is no. Therefore, the appeal should be granted, and the decisions below set aside. The GGPPA should be declared *ultra vires*, unconstitutional, and of no force and effect pursuant to s. 52 of the Constitution. The order should take effect immediately as there is no possible amendment that could bring the Act into compliance.

PART III -- ARGUMENT

12 The appellants will proceed with their argument in four parts. First, we will demonstrate that the SCC's narrow definition of pith and substance is inappropriate because it does not accurately capture the Act's broad purpose and effects. Second, we will demonstrate the SCC erred by considering POGG, a residual power, without first considering the enumerated heads of power under section 92 when classifying the Act. Third, in the event that it is necessary to analyse the national concern branch of POGG, we will demonstrate that the SCC erred by finding the GGPPA meets the test established in *Crown Zellerbach*. Finally, we will establish that Part 1 of the Act is an invalid regulatory charge which violates the division of powers and is not sufficiently connected to the regulatory scheme.

A. Pith and Substance

(i) The SCC's Definition of Pith and Substance is Too Narrow

13 The SCC erred in their narrow conceptualization of the Act's pith and substance. By concluding the true subject matter of the GGPPA is "establishing minimum national standards of GHG price stringency to reduce GHG emissions", the majority did not adequately consider the broad scope of the Act's purpose and effects.

SCC Reference at para 80.

14 To determine whether a statute has been constitutionally enacted, the court must first determine the pith and substance of the impugned legislation, its true subject matter or "main thrust". This is done by examining the statute's purpose and its effects.

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 at para 86.

15 It is a mistake to define a statute so narrowly that it compromises accuracy. For example, in *Reference re Genetic Non-Discrimination Act* the SCC acknowledged that by focusing too narrowly on "insurance" with respect to genetic discrimination, the characterization did not accurately capture the broad purpose and effects of the Act in question.

Quebec (Attorney General) v. Canada (Attorney General), 2015 SCC 14 at para 29 [*Quebec (Attorney General)*].

Reference re Genetic Non-Discrimination Act, 2020 SCC 17 at para 62.

16 While the SCC majority notes "[t]he fact that Parliament's purpose can be stated at multiple levels of generality does not mean that the most general purpose is the true one," they incorrectly assume the reverse to be true. Precision cannot mean the narrowest possible definition is correct, especially when the definition hinges on the means to achieve that purpose.

SCC Reference at para 69.

17 Care must be taken to avoid confusing the law's purpose with the means chosen to achieve it. The SCC's pith and substance definition of the GGPPA incorrectly conflates the means of achieving the purpose (minimum national standards of price stringency) with the purpose itself (to reduce GHGs). They placed too much emphasis on "minimum national standards" and "pricing" mechanisms to achieve this purpose.

Quebec (Attorney General) at para 29, citing *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para 25.

(ii) The Purpose of the Act is to Reduce GHG Emissions to Mitigate Climate Change

18 A contextual analysis of the Act's purpose, as established via intrinsic and extrinsic evidence, and the legal and practical effects of the legislation, illustrates that the pith and substance of the GGPPA is the reduction of GHGs. A broader construction than the SCC's definition of the GGPPA's pith and substance is necessary to accurately account for its impact on provincial autonomy and to illustrate why it is *ultra vires* Parliament's jurisdiction.

> Natalie Chalifour et al., "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the Greenhouse Gas Pollution Pricing Act Appeals" (2020) 4-:2 Nat'l J. Const. L. 217 at 10.

19 An Act's purpose is determined by examining intrinsic evidence (purpose clauses, the preamble, or anything else within the four corners of the statute) and extrinsic evidence (Hansard or other materials from the legislative process).

> *Reference re Securities Act*, 2011 SCC 66 at para 64 [*Securities Reference*].
>
> *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para 27 [*Western Bank*].

20 Beginning with intrinsic evidence, the preamble of the GGPPA establishes that the Act's purpose is far reaching and encompasses more than just Carbon pricing. It states the government is "taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change".

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 at Preamble [*GGPPA*].

21 The long title of the Act also illustrates that the purpose is "to mitigate climate change…" which encompasses a much broader goal than the SCC's interpretation.

> *GGPPA* at Long Title.

22 As for extrinsic evidence, there is a broad policy context which illustrates the federal government's intention when creating the Act: to reduce GHG emissions to combat climate change. The relevant documents do not suggest pricing mechanisms are the sole method to achieve this end.

23 First, Canada and other nations that signed the *Paris Agreement* made "general international commitments to reduce GHG emissions." Under Article 4, countries agreed to implement "economy-wide absolute emission reduction targets." There is no reference to any mandatory Carbon-pricing mechanism implementation. The signing parties share a long-term vision of mitigating climate change and reducing GHG through various means.

> *Paris Agreement*, being an Annex to the Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December 2015--Addendum Part two: Action taken by the

Conference of the parties at its twenty-first session, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016) at articles 4, 10. [*Paris Agreement*].

24 Second, the *Vancouver Declaration* does not restrict reducing GHG emissions to Carbon pricing mechanisms only. The agreement states that a broad range of measures should be used and adapted to each province and territory's unique circumstance that considers the realities of Indigenous peoples and Arctic regions. These include alternative methods such as clean technologies, renewable energy, and enhancing Carbon sinks.

Canadian Intergovernmental Conference Secretariat, "Vancouver Declaration on Clean Growth and Climate Change" (Vancouver, 2016) at 3 [*Vancouver Declaration*].

25 The *Pan-Canadian Framework* and the *Working Group on Carbon Pricing Mechanisms Final Report* merely highlight the federal government's policy preference for Carbon pricing. The documents do not suggest carbon pricing is the only method available to reduce national GHG emissions.

Canada, Environment and Climate Change Canada, "Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy" (Gatineau: Environment and Climate Change Canada, 2016) [*Pan-Canadian Framework*].

Canada, Environment and Climate Change Canada, "Working Group on Carbon Pricing Mechanisms: Final Report" (Gatineau: Environment and Climate Change Canada, 2016) at 1 [*Working Group Final Report*].

26 The *Pan-Canadian Framework* notes that provinces should have flexibility to design policies that meet GHG emission reduction targets. Pricing Carbon pollution is only one of the four pillars of the framework. The *Working Group on Carbon Pricing Mechanisms Final Report* delineates different design options that are meant to consider existing and planned provincial carbon pricing schemes based on regional diversity.

Pan-Canadian Framework at Forward and 5.

Working Group Final Report at 1.

27 Contextually, the *Paris Agreement*, *Vancouver Declaration*, and policy documents all establish that carbon pricing is an available method for reducing GHG emissions. The GGPPA is borne out of this broader policy context. It implements a carbon pricing scheme for one purpose: to reduce GHG emissions to mitigate climate change.

(iii) The Legal Effects of the GGPPA

28 The SCC's conclusion that the primary legal effect of the GGPPA is to "create one GHG pricing scheme that prices GHG emissions in a manner that is consistent with what is done in the rest of the Canadian economy." In other words, it puts "a price on carbon pollution" in provinces

where the pricing schemes are not stringent enough. As will be described, such a definition is untenable. The legal effects of the Act are not just the creation of a Carbon pricing scheme. It also includes the unprecedented delegation of power to the GIC who determines the minimum national standard, what the price benchmark is, what a fuel is, what a GHG is, which facilities are covered by Part 2, and to whom the Act applies.

SCC Reference at para 71-72.

29 Part of the pith and substance analysis includes determining both the legal and practical effects of the impugned legislation. This flows from the statute's provisions, and any side effects resulting from its application.

Securities Reference at para 64; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 54 [*Kitkatla*].

30 The legal effects are ascertainable by asking "how the legislation… affects the rights and liabilities of those subject to its terms." In other words, the effects of applying the provisions of the Act.

Chatterjee v Ontario (Attorney General), 2009 SCC 19 at para 19, citing *R v Morgentaler* [1988] 1 SCR 30 at 482.

31 The legal effects of Part 1 are broad. It applies to all fuels, including any "substance, material, or thing" prescribed by the GIC, which is sold, consumed, produced, or imported into Canada. The GIC has far reaching discretion to amend Schedule 1 by changing the provinces to which the fuel charge applies and Schedule 2 by altering the fuel types to which the charge applies. The GGPPA allows the *executive* to amend *primary legislation* through *regulation*.

GGPPA at ss 3, 166(1)(a), 166(1)(e), 166(2), 166(4).

32 Under Part 2, any facility falling within the criteria prescribed by the GIC becomes a "covered facility" and is required to participate in the Output-Based Pricing System. This means covered facilities, most of which are ordinarily regulated almost exclusively under provincial jurisdiction, must acquire compliance certificates for GHG emissions. The GIC has broad discretion to add or delete a gas from Schedule 3, meaning they determine what a GHG is under the Act. The GIC also has the power to regulate what is defined as a facility and the circumstances under which they become, or cease to be, covered facilities.

GGPPA at ss 169, 190(1), 191, 192(a)-(b).

33 The GGPPA delegates near unfettered discretion to the GIC to legislate matters under provincial jurisdiction. It endows far-reaching discretionary powers to the GIC, which extend far beyond implementing a minimum national standard for GHG pricing to reduce GHGs. The legislation delegates power to the GIC to rewrite a law that affects nearly every aspect of our day-to-day lives and provincial industries and economies.

SCC Reference at para 223-224.

GGPPA at ss 166(1)(f); 166(2)-(3); 189(1)-(2).

34 Pursuant to section 168(4) of the Act, should a conflict arise between the statute and the regulations, "the regulation prevails to the extent of the conflict." This circumvents the legislative branch and vests in the executive the ability to amend the statute itself. Executive discretion under ss 166(2), 166(4), and 192 amount to unconstitutionally enacted "Henry VIII" clauses.

GGPPA at ss 168(4), 166(2), 166(4), and s 192.

SCC Reference at paras 231, 234.

35 Not only do these Henry VIII clauses give the executive authority over provincial jurisdiction, the GIC is given the power to effectively legislate in provincial jurisdiction. By adding provinces to the GGPPA under Schedule 1 and Schedule 2, the GIC effectively creates legislation for these provinces since price stringency and minimum national standards are not determined by Parliament, but through GIC regulation.

(iv) The Practical Effects of the GGPPA

36 In the pith and substance analysis, practical effects are the "side effects flow[ing] from the application of the statute which are not direct effects of the statute itself." The SCC majority decision incorrectly concluded that practical effects are not helpful because future economic consequences are difficult to ascertain. Their mistake was failing to consider other essential practical effects flowing from the legislation.

Kitkatla at para 54

SCC Reference at para 78.

37 First, provinces will be unable to regulate large swaths of their own economies. The Act effectively disallows provinces to manage their own resources on provincially owned lands. It

also inhibits alternative methods to reduce GHG emissions, such as investment in green technology.

Factum of the Attorney General of Alberta, SCC Appeal, dated 15 July 2020, at para 251.

38 Second, the SCC erred by failing to consider the practical effects the Act will have on Indigenous communities. The federal benchmark failed to incorporate First Nations' perspectives or ensure access to provincial funds, as described below. Under the federal backstop, direct exemptions are not available for Indigenous communities because the fuel levy imposed under Part 1 is a regulatory charge, not a tax. Indirect exemptions are sector-based rather than class-based, which disproportionately affects remote and fly-in communities who require fuel for aviation and diesel-generated electricity. Funds collected from these fuel charges are also not returned directly to the Indigenous communities or required to fund climate change initiatives.

Assembly of First Nations at 26-27.

Canada, Environment and Climate Change Canada, *2020 Expert Assessment of Carbon Pricing Systems: A Report Prepared by the Canadian Institute for Climate Choices*, Catalogue No En4-434/2021E-PDF (Gatineau: Environment and Climate Change Canada, 2021) at 82 [*Expert Assessment*].

39 The Assembly of First Nations' (AFN) submission to the Standing Senate Committee respecting the Impacts of the GGPPA on First Nations warned that the GGPPA's proposed Carbon pricing regime lacks "clear entry points for First Nations as governing authorities…to generate revenue from the proposed carbon levy". Carbon pricing places a disproportionate burden on Indigenous communities, particularly those in remote locations or those dependent on diesel generated electricity. AFN notes the absence of tailored exemptions for Indigenous communities and the need to include other forms of protection against the effects of climate change, such as infrastructure investment.

Assembly of First Nations at 2, 8-11.

40 Under provincial carbon schemes, there is greater flexibility to accommodate exemptions for affected Indigenous communities. For example, British Columbia established a number of exemptions for status First Nation people and bands governed by the *Indian Act* under its Carbon pricing scheme. This included an exemption for Carbon tax on fuel purchased for personal use on-reserve or on treaty lands. B.C. also introduced a low-income tax credit to off-set the impacts of price increases embedded in household items like food due to the Carbon pricing scheme.

Indian Act, RSC, 1985, c I-5.

Expert Assessment at 83.

B. Classification

41 The SCC erred when it by-passed the enumerated heads of power under ss. 91 and 92 of the Constitution and instead went directly to POGG at the classification stage. A correct application of classification analysis leads to the conclusion that POGG should not have been relied upon at all.

(i) POGG Should Not be Considered at the Classification Stage

42 Instead of first turning to the enumerated heads of power, the SCC erred by considering whether the GGPPA could be established under the national concern branch of POGG. As Justices Brown and Rowe note, this was incorrect "as a matter of constitutional methodology." Including "minimum national standards" in the definition of the Act's pith and substance does not create a direct route to the national concern branch of POGG. This upsets the divisions of powers and opens the floodgates for federal intrusion into provincial jurisdiction.

> *SCC Reference* at paras 341, 347, 480.
>
> *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at para 19.

43 After the character of the legislation has been determined, the second step of the analysis is to establish whether the law can be assigned to a head of power under section 91 or 92 of the Constitution. Reviewing courts must first complete the characterization and classification analyses before considering the national concern branch of POGG.

> *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para 15; *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 23, 110 [*Hydro-Quebec*].

44 POGG should not be considered alongside the enumerated heads of power under section 91 during the classification analysis. POGG is a residual power and only applies to "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". Logically, first looking at the explicitly enumerated powers under sections 91 and 92 is necessary in order to determine what is residual.

> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 at s 9 [*Constitution Act, 1867*].
>
> K. Lysyk, "The Constitutional Reform and the Introductory Clause of Section 9: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531.

45 Proceeding straight to POGG when classifying the Act greatly impacts the division of powers set out in section 91 and 92. Reducing GHG emissions clearly falls within provincial jurisdiction under section 92. In particular, provincial jurisdiction over property and civil rights

(s. 92(13)), local works and undertakings (s. 92(10)), and the management of non-renewable natural resources in the province (s. 92A).

SCC Reference at paras 341, 343, 346.

Constitution Act, 1867 at s 92.

46 Each province also has a residual power that grants authority over all matters of a local or private nature (s. 92(16)). Reducing GHGs falls squarely within existing heads of power under s. 92. Carbon emitting activities occur on provincially owned lands for the development of provincially owned resources. If GHG emitting activities are not captured by the enumerated heads under s. 92, they must fall within the provincial residuum. It is inappropriate for Parliament to immediately consider the POGG power, a residual federal power, in order to intrude into provincial jurisdiction when the provincial residual power would serve the same purpose.

Constitution Act, 1867 at s 92.

47 The environment is a broad matter that does not fall under either section 91 or 92 exclusively because it has both federal and provincial aspects. Legislative authority over far-reaching environmental matters, such as the reduction of GHG, therefore must "be linked to the appropriate head of power."

Friends of the Oldman River Society v Canada (Minister of Transport) [1992] 1 SCR 3 at paras 64, 67 [*Oldman River*]; *Hydro-Quebec* at paras 59, 112.

48 The bulk of GHG emissions is traceable to provincially regulated industries, meaning reduction of GHG falls squarely within provincial jurisdiction. In 2019, the industries that emit the most megatonnes of carbon dioxide are: oil and gas, transport, buildings, electricity, heavy industry, agriculture, and waste/other. Except for agriculture, which the provinces and federal government have concurrent power to legislate, most of these matters fall within enumerated provincial powers listed under section 92.

Canada, *National Inventory Report 1990–2019: Greenhouse Gas Sources and Sinks in Canada 2021*, Catalogue No En81-4E-PDF (Ottawa: Environment Canada, 2006-) at 10, 57 [National Inventory Report].

49 For example, oil and gas accounted for 26% of the national GHG total. In this sector, natural gas production and processing (7.2%), conventional oil production (3.4%), oil sands (11.4%) and petroleum refining (2.6%) all fall under the ss. 92A, 92(10), or 92(13) and squarely within provincial jurisdiction. Transport accounted for 25% of the national GHG total. In this

sector, the biggest emissions were from personal transportation including cars, trucks, and motorcycles (12.2%) which likewise fall under provincial jurisdiction pursuant to ss. 92(10). The smallest contributor in the transport sector was industrial aviation and marine transport (0.77%), which falls within federal jurisdiction under ss. 91(10), 91(12), and/or POGG. The significant separation in percentage amounts relating to GHG emissions and their jurisdictional source (provincial versus federal) illustrates why provinces are best positioned to reduce GHG emissions.

National Inventory Report at 10, 57.

50 Sources of GHG emissions can be traced back to the provincial lands, and any regulations to reduce GHGs would apply directly to lands and resources owned by the provinces. *St Catherine's Milling* establishes that, as a historical matter, the federal government cannot regulate matters in Ontario that infringe on natural resource development on provincial lands and provincial jurisdiction by virtue of ss. 92(5) and s. 109 of the Constitution and the *British North America Act*. Provincial jurisdiction over provincial lands pre-dates and is affirmed by the Constitution. Federal intrusion into resource development on Crown lands violates provincial jurisdiction and interferes with how provinces use, develop, and preserve their land, the undisputable source of provincial jurisdiction.

St. Catharine's Milling and Lumber Company v The Queen [1888] UKPC 70, [1888] 14 AC 46 (12 December 1888) at 601.

The British North America Act, 1867, SS 1867, c 3.

51 Under the *Constitution Act, 1930* the prairie provinces were placed in the same position as the original provinces at Confederation regarding land ownership under s. 109 of the Constitution. If the federal government intended to retain jurisdiction over provincial lands and provincial resources, the 1930 Act would not have been incorporated into the Constitution and the 92A amendment would not have passed. The GGPPA is an unconstitutional federal intrusion into provincial jurisdiction under s. 92 relating to provincially owned resources on provincially owned lands.

Constitution Act, 1930, 20-21 Geo. V, c. 26 (UK).

(ii) Regulating GHG Emissions is an Aggregate of Subjects Under Provincial Jurisdiction

52 In *Re: Anti-Inflation Act*, the SCC established that matters under POGG must be qualitatively distinct from provincial jurisdiction, not an "aggregate of several subjects some of which form a substantial part of provincial jurisdiction." To find otherwise means the new matter under s. 91 would be "lacking in specificity" and could be "so pervasive that it knows no bounds".

Re: Anti-Inflation Act [1976] 2 SCR 373 at 459 [*Anti-Inflation Reference*].

53 Adding a new matter of exclusive federal authority under POGG should be done only when the matter has "a degree of unity that [makes] it indivisible, an identity which makes it distinct from provincial matters." The national concern branch cannot be used to smother provincial powers or erode the division of power set out in the Constitution.

Anti-Inflation Reference at 458.

54 As noted above, "the environment" is too broad and amorphous to fall exclusively under section 91 or 92. The reduction of GHGs is likewise too broad to fall under a single head of power. There is "nothing that qualitatively separates [GHG] from matters the provinces can regulate." Reducing GHGs amounts to an aggregate of provincial subject matters of exclusive jurisdiction rendering it inappropriate for a new head of power under POGG because it can be regulated through various existing enumerated powers under s. 92.

Oldman River at 63-65; *Hydro-Quebec* at paras 64-79, 115-16.

Factum of the Attorney General of Ontario, SCC Appeal, dated 16 October 2019, at para 51 [Factum AG ON].

C. The GGPPA Fails to Qualify Under the National Concern Branch of POGG

55 Should POGG be necessary to consider, using the national concern branch is an unconstitutional violation of the divisions of powers and creates impermissible federal legislative and executive intrusion into provincial jurisdiction. The GGPPA does not meet the singleness, distinctiveness, and indivisibility test as established by *Crown Zellerbach*, especially because there is provincial ability to reduce GHGs.

(i) A Federal Carbon Pricing Backstop as a Matter of National Concern Violates the Division of Powers

56 Courts have rarely used national concern because of its potential to infringe upon provincial jurisdiction. Implementing national concern "inevitably raises profound issues respecting the federal structure of our Constitution."

> *Anti-Inflation Reference* at 458; *Hydro-Quebec* at para 110.

57 If a matter falls within POGG, it becomes a new enumerated power under s. 91 and parliament gains "exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects." This permanently displaces provincial jurisdiction to regulate in relation to that subject matter, and renders any provincial legislation relating to the same matter *ultra vires*.

> *Anti-Inflation Reference* at 461; *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para 34 [*Crown Zellerbach*].
>
> Guy Regimbald & Dwight Newman, Law of the Canadian Constitution, 2nd ed (Markham: LexisNexis, 2017) at 233-234.
>
> *Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC 23, [2016] 1 SCR 467 at para 5.

58 This reveals the central contradiction that operates within the GGPPA. The Act functions as a backstop and depends upon provincial ability to regulate and reduce GHG emissions. The Act is premised on provinces having jurisdiction to do what the Act is imposing. Therefore, minimum national standards for price stringency to reduce GHGs cannot be an exclusive matter for federal authority under POGG.

> *SCC Reference* at para 342.

(ii) Parliament Cannot Take Powers Constitutionally Granted Away from Provinces nor Unilaterally Establish Jurisdiction Where It Has None

59 Adding "minimum national standards of price stringency to reduce GHGs" to the list of enumerated powers under section 91 represents severe federal intrusion into provincial jurisdiction. Recognizing reducing GHG emissions as a matter under the national concern branch of POGG would allow the federal government exclusive and plenary power to regulate industry, transportation, and natural resources in ways that will deeply affect all Canadians. This is irreconcilable with the division of powers.

60 The Constitution can be amended, as established by the amending formulas laid out in the *Constitution Act, 1982*. Canada's historical practice requires tangible provincial inability and provincial consent to allow the federal government to legislate a matter previously under provincial jurisdiction. For example, the *Employment and Social Insurance Act* was unconstitutionally enacted in 1935 by the federal government under the national concern branch of POGG because it intruded upon s. 92(13) property and civil rights. Due to the Great Depression, provincial governments were not able to implement provincial unemployment programs. As a result, after provincial agreement, the Constitution was amended by adding unemployment insurance (2A) to section 91.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 38-49.

Reference re Legislative Jurisdiction of Parliament of Canada to Enact the Employment and Social Insurance Act (1935, c. 48), [1936] SCR 427, [1936] 3 DLR 644.

Constitution Act, 1940, 3-4 Geo. VI, c. 36 (UK).

61 The double aspect doctrine does not confer federal jurisdiction where it does not exist, and the SCC majority erred by stating it applies to the GGPPA. Provincial and federal governments both have jurisdiction over the environment, meaning the federal government cannot act in a way that unilaterally eviscerates provincial jurisdiction. The Act is premised on provincial governments and parliament being to create GHG pricing schemes. In other words, legislate on the *same matter*, not different *aspects* of a matter. The double aspect doctrine "allows for the concurrent application of both federal and provincial legislation, but it does not create concurrent jurisdiction over a matter." For it to apply, the federal government and provincial government must be doing something different.

Oldman River at para 65.

Securities Reference at para 66; *Western Bank* at para 30.

SCC Reference at paras 129, 375-377.

(iii) Reduction of Greenhouse Gasses Does Not Meet the Test for National Concern

(a) The Test for National Concern Branch is the *Crown Zellerbach* Test

62 The test to determine whether a matter falls under the national concern branch of POGG is established by *Crown Zellerbach*. The test states the matter "must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern." Provincial inability to implement their own legislation to address the matter should also be

considered. This includes "a scale of impact on provincial jurisdiction… reconcilable with the fundamental distribution of legislative power under the Constitution".

Crown Zellerbach at paras 3, 4.

(b) The GGPPA Does Not Meet the Singleness, Distinctiveness, and Indivisibility Inquiry

63 Framing the matter as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" fails to meet the requirements of singleness, distinctiveness, and indivisibility. Singleness and distinctiveness mean the matter should be distinct from provincial matters. Reducing GHG emissions is not distinct from matters within the provincial legislative authority under section 92. As mentioned above, this matter represents an aggregate of provincial powers and therefore fails to achieve the necessary singleness.

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 at para 475; *SCC Reference* at paras 370, 371, 593.

SCC Reference at paras 371, 580.

64 Indivisibility means the matter cannot be divided between the provinces and Parliament. This is also not met by the GGPPA. GHGs are divisible owing to their source: when fuel is purchased or industrial activity takes place, the physical location is evident, and the pollution caused can be linked to provincial industries.

Crown Zellerbach at 432.

SCC Reference at paras 380, 381.

(c) There is No Provincial Inability to Reduce GHG Emissions

65 Provincial inability is only one factor of national concern branch analysis, and it is not determinative. Where provinces can act to regulate a matter, there is no provincial inability. A province's decision whether to act together, or to act at all, is a question of policy. The SCC erred by conflating provincial inaction with provincial inability.

Ontario Reference at paras 228-32; *Saskatchewan Reference* at paras 439-40.

66 The SCC erroneously found that the GGPPA passed the provincial inability portion of the test by stating provinces are unable to establish minimum national standards. No province can enact national standards, so this expression of the pith and substance allows the federal government too much scope to intrude upon provincial jurisdiction. In this way, the SCC's interpretation of the GGPPA's pith and substance creates provincial inability. The SCC also

erred in determining that a failure to include one province in the scheme would jeopardize success in all of Canada. There are other policy options for reducing GHG emissions that do not relate to price stringency.

GGPPA ss 166(2)-(3), 189.

SCC Reference at paras 182, 183.

67 Unlike other matters of national concern, such as aeronautics, reducing GHGs is possible through provincial action. The backstop nature of the GGPPA shows that provinces can regulate GHGs through pricing and other means. The GGPPA illustrates federal overreach, not provincial inability.

Johannesson v Municipality of West St. Paul [1952] 1 SCR 292 at 318-19.

(d) The Scale of Impact is Not Reconcilable with the Division of Powers

68 The GGPPA's scale of impact is not reconcilable with the division of powers. GHGs are generated in a variety of ways, most of which are regulated under provincial heads of power. Allowing federal jurisdiction to regulate GHG emissions broadly would be a deep intrusion into provincial jurisdiction. The SCC claims that because the matter is narrowly constrained, provinces can enact their own legislation regarding emission limits, fuel charges, or other forms of GHG regulation. This is not possible under the current Act.

Saskatchewan Reference at para 128.

SCC Reference at para 199; *Ontario Reference* at para 134; *Saskatchewan Reference* at para 160.

69 Provinces should be free to address GHG emissions via non-pricing methods. The *Vancouver Declaration* pointed to the many ways that GHG emissions could be lowered without pricing schemes, including emission caps, and closing coal plants.

Vancouver Declaration at 3.

70 The GGPPA does not allow provinces to tailor exemptions. Saskatchewan implemented the *Management and Reduction of Greenhouse Gases Act* in 2018, which included an exemption for SaskPower and SaskEnergy. However, pursuant to s.171(4) of the GGPPA, those entities are now subject to Part 2 of the Act. This inflexibility impacts Crown owned and operated entities that operate on provincially owned land. The Act also does not allow for tailored exemptions for First Nations, despite many existing pricing regimes including such exemptions.

Management and Reduction of Greenhouse Gases Act, 2018, M-2.01.

GGPPA at ss 171(4).

Factum AG ON at para 53.

Expert Assessment at 83.

71 All levels of government must act in a way that promotes regional diversity. In *Orphan Well Association v Grant Thornton Limited*, the SCC utilized cooperative federalism to prevent federal paramountcy from overtaking provincial policies. Here, the SCC has done the opposite. The SCC uses "minimum national standards" to justify federal intrusion into provincial jurisdiction on the basis of cooperative federalism. This contradicts the Court's own established principle that cooperative federalism is meant to preserve, rather than infringe upon provincial autonomy.

Hydro-Quebec at para 116; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3 [*Spraytech*].

Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5 at paras 29-31.

72 Federal preference for a policy choice is not a sufficient reason to permit intrusion into exclusive provincial jurisdiction. Local needs and regional diversity are important in making such decisions. Our federal state is premised on the organizing principle of coordination, not subordination.

Securities Reference at para 71.

(iv) The Principle of Subsidiarity Should Apply

73 The principle of subsidiarity posits that law-making is best achieved by the level of government that is most effective and closest to citizens affected. The SCC endorsed the principle of subsidiarity, particularly for environmental protection, in *Spraytech* by allowing municipal governments to make laws relating to the use of pesticides. Subsidiarity is reflected in s. 92 of the Constitution, which gives provinces authority over "all matters of a merely local or private nature". This allows governments to respond to local needs and diversity. Here, the SCC erred by failing to recognize the GGPPA unnecessarily centralizes power in the federal government.

Spraytech at para 3.

Constitution Act, 1867 at ss 92(16).

74 The GGPPA inhibits the power and ability of local governments to develop and organize their economies that best addresses the concerns of citizens who are most affected. The Act

deprives provinces of the right to balance provincial economic development with environmental concerns. This includes other policy options for lowering emissions such as investments in solar energy and preventing deforestation. For example, provincially regulated utilities will have fewer resources for investment in green technology because of Carbon pricing. This will similarly impact all provincially regulated industry by way of federal overreach.

> Kai D Sheffield, "The Constitutionality of a Federal Emissions Trading Regime" (2014) 4:1 Western Journal of Legal Studies at 21.
>
> Factum AG SK at para 110.
>
> *Saskatchewan Reference* at para 458.

D. Part 1 of the GGPPA Implements an Invalid Regulatory Charge

75 The SCC erred in finding that the fuel levy is a valid regulatory charge, which allows the federal government to violate the Constitution by imposing charges on matters that fall under provincial jurisdiction. The fuel levy is an invalid regulatory charge. To determine whether the fuel levy is a valid regulatory charge, we will first examine the nature of the charges. Then, we will assess the constitutional issues that arise from instituting such a charge, proving that the levy is an invalid regulatory charge.

(i) The GGPPA Creates a Regulatory Charge

76 To determine the nature of the costs implemented by Part 1 of the GGPPA, the criteria from *Westbank First Nation v British Columbia Hydro and Power Authority* (*Westbank*) must be applied.

> *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*].
> *Saskatchewan Reference* at para 246.

77 The Westbank criteria establishes that a regulatory charge must (i) be a complete and detailed code of regulation, (ii) have a regulatory purpose with the goal of changing behaviour, (iii) include actual or properly estimated costs of regulation, and (iv) delineate a relationship between the regulation and the persons being regulated. Applying the criteria indicates that Part I qualifies as a regulatory scheme.

> *Westbank* at para 24.
>
> *Saskatchewan Reference* at para 246.

78 Part 1 of the GGPPA meets the first criteria, a detailed code of regulation, because the Act itself is extensive and detailed. The second criteria, a regulatory purpose with the goal of

changing behaviour, is met by the stated goal of behaviour modification as described in the Act's preamble.

Ontario Reference at para 151; *Saskatchewan Reference* at paras 84-85; *SCC Reference* at para 214.

Saskatchewan Reference paras 86-87.

GGPPA at preamble.

79 The third criteria, inclusion of actual or properly estimated costs of regulation, is met because the behavioural nature of the scheme means it is not limited to the costs of running the scheme. There is a relationship between the regulation and persons being regulated because those who emit GHGs pay for the cost of the pollution they create. Furthermore, the fuel levy because it raises money to fund a specific scheme, rather than for general purposes.

SCC Reference at para 216.

620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7 at para 20 [*Connaught*].

(ii) The Regulatory Charge Created by the GGPPA is Unconstitutional

80 The SCC erroneously found that the regulatory charge was valid. To be a valid regulatory charge and avoid contradicting s. 53, the GGPPA must both be regulating something under federal jurisdiction and have a nexus between the regulatory scheme and the revenue collected. That does not exist here.

Connaught at para 27.

81 For the GGPPA to be a valid regulatory charge, it cannot regulate things falling within provincial jurisdiction. However, as established above, the fuel charge applies to provincial matters which fall under the enumerated heads of power under s. 92 of the Constitution. This extensive intrusion into provincial jurisdiction is unacceptable under the division of powers. Furthermore, the GIC is able to define which provinces the charges apply to, furthering the jurisdictional issues by allowing the executive to amend primary legislation.

Constitution Act, 1867 at s 92.

SCC Reference at paras 71-72.

82 The SCC erred in finding that there was a sufficient nexus between the regulatory scheme and the revenue collected because the aim of the charge was regulatory. The significant disconnect between the behaviour supposedly impacted and the effect of the charge is striking. For example, *Westbank* suggests potential regulatory schemes include: "[a] per-tonne charge on

landfill waste may be levied to discourage the production of waste [and that a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles".

SCC Reference para 216.

Westbank at para 29.

83 The GGPPA is distinguishable from *Westbank* because the activities performed are not directly connected to the charges imposed. Even when the behaviour of the individual changes, systemic factors are the most determinative feature of the price they will ultimately pay. This includes the GHG emissions of power companies and shipping distances for necessary consumer products, which the individual cannot control. This is especially true in Northern and remote communities where fuel costs are high and there is little choice of products or fuel sources. Indigenous peoples often feel the biggest impact. Behaviour will not be modified by the Act as individuals find the costs unconnected to their behaviour.

SCC Reference paras 216, 215.

Assembly of First Nations at 8-12.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

84 The appellants do not seek costs and requests that no costs be awarded against them.

PART V -- ORDER SOUGHT

85 The appellants submit that the appeal should be allowed, and that the *Greenhouse Gas Pollution Pricing Act* be struck down in its entirety pursuant to s. 52 of the Constitution and be declared to be of no force or effect. The order should take effect immediately as there is no possible amendment that could bring the Act into compliance.

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

[redacted]

[redacted]

[redacted]

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

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PART VII -- LEGISLATION AT ISSUE

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

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 # 2022-08

[redacted]

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