WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2022

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF CANADA)

B E T W E E N:

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF CANADA

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

TEAM #2022-09

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 There is no debate, we must protect the planet from the existential threat of climate change. The effects of climate change have no boundaries. The systemic risk we are facing is one that no individual person or jurisdiction can deal with. Canadians need swift and coordinated actions to contain the rising levels of greenhouse gas ("GHG") emissions, the effects of which permeate across political or geographical boundaries. The gravity of the climate crisis requires individual consumers and businesses to rapidly change their GHG dependent behaviour. The Supreme Court of Canada ("SCC") recognized these facts in stating "the only way to address the threat of climate change is to reduce [GHG] emissions."

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at para 2 [*SCC Reference*].

2 Parliament took bold but careful steps to design a statue that forms the lynchpin of a national emissions reduction plan while respecting the division of powers under our constitution. The *Greenhouse Gas Pollution Pricing Act* (the "*Act*") establishes a national minimum benchmark which is an important tool to solve this complex challenge. The *Act* ensures that a minimum price stringency on GHG emissions applies across the nation. It binds all provinces in a collective effort to lower GHG emissions. It preserves provincial freedom to apply their full jurisdiction to regulate GHG emitting activities while guiding provinces towards the achievement of a national target.

Greenhouse Gas Pollution Pricing Act, SC 2018, c 12 [*GGPPA*].

3 Putting a price on GHG emissions makes polluting activities more expensive for consumers and businesses. There is broad consensus that pricing GHG emissions is integral to reducing this pollution. Setting a minimum pricing standard for GHG emissions ensures the national efforts of reduction would not be undercut by provinces that price the GHG emissions at a lower rate. The failure of one province causes serious harm to all of the provinces.

4 The *Act* was validly enacted under Parliament's jurisdiction to legislate for the peace, order and good government ("POGG") under s. 91 of the *Constitution Act, 1867* to address a

matter of national concern. The *Act* meets legal tests for the national concern branch under POGG. Also, the *Act* does not offend federalism in light of the circumstances of climate change.

> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

5 The fuel charge under Part 1 of the *Act* are validly regulatory charges. It is imposed on listed provinces that do not meet the national benchmark. The purpose of the *Act* is to modify behaviour by charging for GHG emitting fuels. The charges incentivize innovation and behavioural changes necessary for reducing GHG emissions. Revenue from the fuel charge go back to the province from which it was collected. There is no clearer indication that the *Act* is revenue neutral, with the sole intention to regulate. The fuel charge represent the regulatory purpose of the *Act* and serve as a sufficient connection to the scheme.

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

6 Several facts from the Appellants' factum were omitted or required further clarification.

(i) Canada's efforts to combat rising GHG emissions

7 Canadians face an urgent and existential threat with climate change caused byrising levels of GHG emissions. Human activities to burn fossil fuels have released an unprecedented level of these emissions, trapping excessive amounts of heat from the sun within the atmosphere and warming the planet. Catastrophic effects of climate change include extreme weather, rising sea levels, and disappearing Arctic ice. In Canada, the Arctic, coastal zones, and Indigenous territories face heightened impacts.

> *SCC Reference, supra* para 1 at paras 7, 9.
> *References re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 16-17 [*SKCA Reference*].
> *References re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at paras 66 [*ABCA Reference*].
> *References re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at paras 7, 10 [*ONCA Reference*].

8 Uneven efforts among the provinces to manage GHG emissions levels have resulted in unequal effects across the country. Although GHG emissions decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Yukon between 2005 and 2016, these collective efforts were mostly offset by increases from Alberta and Saskatchewan. Alberta, Saskatchewan, and Ontario accounted for approximately 71% of the country's total GHG emissions in 2016. Notably, the temperature in the Canadian Arctic

increased nearly 3 times more than the global average. Overall, the nation's GHG emissions decreased by merely 3.8% between 2005 and 2016.

SCC Reference, supra para 1 at paras 11, 185.

9 Canada has ongoing commitments to contribute to the global efforts to reduce GHG emissions. Particularly, Canada has committed to international treaties including multiple *United Nations Framework Convention on Climate Change* ("*UNFCC*") agreements such as *Kyoto Protocol* (1997) and *Copenhagen Accord* (2009). Most recently, Canada agreed to the *Paris Agreement* in 2015. Before the *Paris Agreement* was ratified, First Ministers from all provinces and territories met and adopted the *Vancouver Declaration on clean growth and climate change* ("*Vancouver Declaration*"). Pursuant to the *Vancouver Declaration*, First Ministers committed to implementing GHG mitigation policies to meet the 2030 national target of 30% reduction below 2005 levels of emissions.

SCC Reference, supra para 1 at paras 13, 14.

10 Consensus among international bodies such as the World Bank, the Organization for Economic Cooperation and Development, and the International Monetary Fund recognize GHG pricing is "integral" to lowering GHG emissions..

SCC Reference, supra para 1 at para 170.

11 There is also consensus domestically that GHG pricing is "integral" to reducing GHG emissions. The joint Federal-Provincial-Territorial working group called the Carbon Pricing Working Group explored different GHG pricing mechanism and design options. Under consensus, the Carbon Pricing Working Group produced the Final Report which stated many experts regard GHG pricing as a "necessary policy tool for efficiently reducing GHG emission."

SCC Reference, supra para 1 at paras 28, 169.

12 Under the *Pan-Canadian Approach to Pricing Carbon Pollution* ("*Pan-Canadian Approach*") in October 2016, the federal government drafted a benchmark price to target specific GHG emissions. This benchmark price was designed to gradually increase to discourage emissions generating activities. The initial rate of $10 per tonne would start in 2018, then rise annually by $10 to reach $50 per tonne by 2022. Revenues would remain in the respective

provinces. The *Pan-Canadian Approach* also contained a federal backstop to implement the benchmark pricing for any province that requests it or fails to develop their own system to meet the benchmark.

SKCA Reference, supra para 7 at para 239.
SCC Reference, supra para 1 at paras 17, 18.

13 By February 2018, all the provinces except Saskatchewan adopted the *Pan-Canadian Framework*. Starting in late 2018 however, Ontario, Alberta, and Manitoba withdrew their support. In July 2018, the newly elected provincial government announced Ontario's withdrawal from the national carbon price program, revoked its cap-and-trade regulations, and cancelled programs co-funded by the federal government. On May 30, 2019, the newly elected provincial government repealed Alberta's provincial carbon tax..

SCC Reference, supra para 1 at paras 18, 19.
ONCA Reference, supra para 7 at para 31.
ABCA Reference, supra para 7 at paras 482-486.

(ii) The Greenhouse Gas Pollution Pricing Act

14 The *Act* received royal assent on June 21, 2018, and came into force on the same day. It is designed to achieve Canada's national targets under the *Paris Agreement.*

SCC Reference, supra para 1 at paras 22, 25.

15 The preamble of the *Act* expresses Parliament's objective of establishing stringent pricing mechanism to incentivize behavioural change. The preamble also stresses the need to create a federal GHG pricing system to ensure GHG pricing applies broadly in the country.

16 Part 1 of the *Act* establishes fuel charge to apply to 22 carbon-based fuels that release GHG emissions. The types of fuel to be charged and the applicable charge rates are listed in Schedule 2. Producers, distributors and importers are required to pay the fuel charge for the fuel they supply. It is anticipated the fuel charge will reach the consumer through higher fuel prices. The fuel charge regime operates as a backstop to ensure GHG pricing schemes are sufficiently stringent throughout the nation. Part 1 is applicable to the listed provinces in Part 1 of Schedule 1. Listed provinces are provinces that opt into the federal pricing system or listed by the Governor in Council. Meanwhile, provinces are free to implement their own pricing system.

GGPPA, supra para 2, ss 17(2), 166(2), Part 2 Schedule 2.
SCC Reference, *supra* para 1 at para 30.

17 To carry out Part 1, the *Act* provides the Governor in Council administrative authority to ensure GHG pricing is stringent throughout the country. The Governor in Council takes into "primary" consideration, the stringency of the existing provincial pricing mechanism for GHG emissions, and updates the provinces named in the listed provinces. Also, the Governor in Council makes regulations to update the list of relevant fuels and charge rates.

GGPPA, supra para 2, ss 166(1)(a), s166(2), 166(3), 166(4), 168(2), 168(3)(a).

18 The amount collected from the fuel charge is returned to the jurisdiction where it was collected. Approximately 90 percent of the funds are distributed in the form of "Climate Action Incentive" to the province or other prescribed persons with the balance allocated to public entities such as schools, hospitals, municipalities, not for profit organizations, Indigenous communities, and small and medium sized businesses.

GGPPA, supra para 2, s165(2).
SCC Reference, supra para 1 at para 31.

19 Part 2 incentivizes covered facilities to operate under prescribed GHG emissions limits through an output-based emissions pricing system ("OBPS"). It applies to those provinces that are listed under Part 2 of Schedule 1. Facilities in question must either be designated or approved by the Minister of Environment ("the Minister") to be deemed a covered facility. Each covered facility must report its GHG emissions in every compliance period.

GGPPA, supra para 2, ss 171-173.
Output-Based Pricing System Regulations, SOR/2019-266 [*Regulations*].

20 The OBPS in Part 2 motivates covered facilities to operate within their GHG emissions limit. Emissions limits are generally based on the covered facilities' industrial activities and the output-based emissions standards of each activity per unit of product. If its GHG emissions exceed the applicable emissions limit within a compliance period, the covered facility must pay for the excess emissions charge according to the regular rates. The rates start at $10 per tonne in 2018, then rise by $10 per tonne, up to $50 per tonne in 2022. Further, the covered facility will be charged at an increased rate if it makes no payment or only partial payment by the regular-rate compensation deadline. Revenues collected from excess emissions charge payments are then

redistributed to the respective province, or specified persons in the regulations, or a combination of both. On the other hand, the covered facility will be rewarded with surplus credits of GHG emissions if it emitted less than its limit during the compliance period.

SCC Reference, supra para 1 at para 34.
Regulations, supra para 19.
GGPPA, supra para 2, ss 174(3), 174(4), 175, 188, Part 4 Schedule 4.

21 Part 3 allows the Governor in Council to make regulations on how provincial laws in correspondence to GHG missions relate to certain federal jurisdictions. Part 4 requires the Minister to prepare an annual report on the administration of the *Act*.

SCC Reference, supra para 1 at para 26.

(iii) Procedural history

22 The Ontario Court of Appeal ("ONCA") ruled the *Act* was constitutional. The 4-1 majority by Chief Justice Strathy and concurring reasons by Justice Hoy held that the *Act* was constitutionally valid under the national concern branch of POGG. Further, ONCA held that because the levy was connected to a regulatory scheme, therefore the levy's purpose was constitutionally valid. The lone dissent by Justice Huscroff opined that Parts 1 and 2 of the *Act* were not valid under the national concern branch of POGG.

ONCA Reference, supra para 7 at paras 2-3, 139, 154, 163, 190, 238.

23 Saskatchewan Court of Appeal ("SKCA") made a similar ruling. The 3-2 majority penned by Chief Justice Richards declared the *Act* was not unconstitutional either in whole or in part. It was validly enacted within federal jurisdiction under the national concern branch of POGG. The majority concluded the levies imposed by the *Act* are regulatory charges. In the event the charges could be characterized as a tax, they do not infringe s. 53 of the *Constitution Act, 1867*. The dissenting judges held the *Act* was unconstitutional because it did not meet the *Crown Zellerbach* test. The dissent accepted the levies under Part 1 to be a tax that violated s. 53, and therefore rendered unconstitutional due to the delegation of taxing authority.

SKCA Reference, supra para 7 at paras 80-89, 111, 162-163, 210, 266-273, 358-360, 475.
Constitution Act, supra para 4, s 53.

24 The majority in the Alberta Court of Appeal ("ABCA") held the *Act* was unconstitutional. However, the dissent by Justice Feehan defended the *Act* as wholly constitutional under the national concern branch of POGG.

ABCA Reference, supra para 7 at paras 21, 1055.

25 By a 6-3 majority, the Supreme Court of Canada ("SCC") held the *Act* was constitutional. Writing for the majority, Chief Justice Wagner held the *Act* was constitutionally enacted under the national concern branch of POGG. The majority's ruling concurred with the Courts of Appeal in Saskatchewan and Ontario, and with the dissent by Feehan J. The majority held the fuel charge was a regulatory charge imposed to advance the *Act's* purpose to reduce GHG emissions. Justices Brown and Rowe dissented from the majority's decision. In particular, both Justices found that Parliament lacked the authority to enact the *Act* under POGG. Justice Côté dissented only in part. While Côté J agreed with the Chief Justice's formulation of the national concern branch, Côté J found the *Act* was unconstitutional in part.

SCC Reference, supra para 1 at paras 192, 207, 219, 221-225, 304, 594.

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

26 The issues on appeal are as follows:

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

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

27 The Appellants submit the *Act* is *ultra vires* Parliament as a matter of national concern. Further, the Appellants submit the fuel charge under Part 1 is also *ultra vires* Parliament as regulatory charge or tax.

Appellant Factum at paras 10, 49.

28 The Respondent submits the *Act* is *intra vires* Parliament as a matter of national concern under POGG. As well, the Respondent submits the fuel charge under Part 1 of the *Act* is *intra vires* Parliament as a valid regulatory charge. In the alternative, the Respondent submits the fuel charge is *intra vires* Parliament as a valid tax.

PART III -- ARGUMENT

A. ISSUE 1: The Act is Intra Vires Parliament as a Matter of National Concern

29 The Respondent disagrees with the Appellants on their pith and substance characterization of the *Act*, the applications of "singleness, distinctive and indivisibility" criteria and the provincial ability test, and the scale of impact on federalism. Below, the Respondent will address these disagreements in their respective order.

(i) Characterization: The Act addresses a matter of national concern

(a) Reducing GHG emissions is a national concern

30 The subject matter under the national concern branch of POGG must have a national character. Wagner CJ held that the national concern doctrine "applies only to matters that transcend the provinces owing to their inherently national character." Precedents buttress this view. A national concern is a "general concern to the Dominion", where uniformity of legislation is needed to deal with the concern (*Russell*), that is "unquestionably of Canadian interest and importance" (*Local Prohibition Reference*).

> *SCC Reference, supra* para 1 at para 110.
> *Russell v R*, (1881-82) LR 7 App Cas 829 at para 25, CR [8] AC 502 [*Russell*].
> *Attorney-General for Ontario v Attorney-General for the Dominion*, [1896] AC 348 (PC) at 360 [*Local Prohibition Reference*].

31 Evidence shows the matter of reducing GHG emissions transcends provincial borders. First, Canada is bound by multiple international treaties including the *Paris Agreement* to lower GHG emissions. By virtue of these treaties, Canada has national targets to adhere to. Second, many human activities across Canada contribute to the national levels of GHG emissions. No province can exempt itself from adding to the aggregate national GHG emissions. Third, the accumulation of GHG emissions in the atmosphere causes harm to all Canadians. While some effects like disappearing Arctic ice occur in certain territories, the country as a whole has

experienced rising temperatures and extreme weather. The above demonstrates the national nature of GHG emissions.

(b) The SCC characterized the true pith and substance of the Act

32 The SCC's pith and substance characterization correctly captured the subject matter of the *Act*. Reasons below support this conclusion. Wagner CJ held the pith and substance of the *Act* is "establishing minimum national standards of GHG price stringency to reduce GHG emissions." First, the preamble of the *Act* states the *Act's* purpose of imposing a federal GHG pricing that applies across Canada. Second, the *Act* is in line with international and domestic consensus that a benchmark GHG pricing scheme incentivizes behavioural change. The preamble recognizes GHG emissions pricing is a core element of the *Pan-Canadian Framework*. Lastly, the *Act* is not about general GHG emissions or economic regulations; it is about setting a minimum price for GHG emissions. Parts 1 and 2 are benchmark pricing schemes targeting specific GHG emissions and emitters. They describe the specific fuels that apply, the rates that emitters must pay, and where the revenue redistributes. The legal effect is to require fuel producers, distributors, and importers to pay for specific types of GHG emissions and to exempt covered facilities that can adhere to OBPS limits.

SCC Reference, supra para 1 at para 80.

33 The SCC's approach to the pith and substance analysis follows precedents. The pith and substance articulates the objective of the *Act* which is "to reduce GHG emissions", and the legislative means which is "establishing minimum national standards of GHG price stringency." The SCC's recurring approach to the pith and substance analysis involve assessing two aspects when determining the pith and substance of a matter: (1) the overarching objective; and (2) the legislative means to achieve the objective. In *Crown Zellerbach*, the overarching objective of the impugned provision was "controlling marine pollution", and the means was "controlling the dumping of substances into the sea." In *Munro*, the overarching objective of the *National Capital Act* was "ensuring that the nature and character of the seat of the Government of Canada may be in accordance with its national significance", and means was "development, conservation and improvement of the National Capital Region." In *Ward*, the essential concern of the s. 27 prohibition on selling blueback and whitecoats seals was "curtailing the commercial hunting of

whitecoats and bluebacks seals [legislative means] for the economic protection of the fisheries resource [overarching objective]."

> *SCC Reference, supra* para 1 at para 54, 66.
> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 25 BCLR (2d) 145 [*Crown Zellerbach*].
> *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753 [*Munro*].
> *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 28 [*Ward*].

34 Characterizing different parts of the *Act* defeats the goal of determining the most important characteristic of the law. Courts should determine the pith and substance of the legislation as a whole rather than in parts (*Morgentaler*). The determination involves the entire legislation because the pith and substance is "the dominant or most important characteristic of the challenged law (*FOTORS*). Establishing different pith and substances for different parts of the same legislation goes against this established precedent.

> *R v Morgentaler*, [1993] 3 SCR 463 at para 28, 107 DLR (4th) 537 [*Morgentaler*].
> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 62, 88 DLR (4th) 1 [*FOTORS*].

(ii) Classification: The Act follows the jurisprudence of Parliament's peace, order, and good government to address a matter of national concern

(a) The Act fulfils the criteria of "singleness, distinctiveness, and indivisibility"

35 The SCC's application of the "singleness, distinctiveness, and indivisibility" criteria from *Crown Zellerbach* follows other judicial application of the criteria. By finding "a specific and identifiable matter that is qualitatively different from matters of provincial concern", the legislation in question fulfills the "singleness, distinctiveness and indivisibility" criteria. *Crown Zellerbach* and *Hydro-Quebec* revealed that the courts were really assessing whether the matter is distinguishable through scientific considerations. Since *Crown Zellerbach*, there has been limited precedent in this area other than *Hydro-Quebec*. In both cases, the application of this criteria did not involve satisfying each element separately.

> *SCC Reference, supra* para 1 at para 146.

36 In *Crown Zellerbach*, Justice Le Dain for the majority applied the criteria in the following manner. Marine pollution met distinctiveness because it was "clearly treated by the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter* as a distinct and separate form of water pollution having its own characteristics and

scientific considerations" (*Crown Zellerbach*). Note in the above, Le Dain J referenced "scientific considerations' ' and used the language "distinct and separate". Singleness or Indivisibility was met because "the differences in composition and action of marine water and freshwater, has its own characteristics and scientific considerations that distinguish it from fresh water pollution" (*Crown Zellerbach*). In other words, the pollution of marine water was sufficiently distinguished from pollution of fresh water, therefore it met singleness or indivisibility. Similarly in *Hydro-Quebec*, La Forest J for the majority did not elaborate on how ss. 34 and 35 of the *Canadian Environmental Protection Act* failed each element of the criteria. Instead, the impugned provisions failed the criteria because of its broad definition on "toxic substance" under ss. 11 and 3.

> *Crown Zellerbach*, *supra* para 33 at paras 38-39.
> *R v Hydro-Québec*, [1997] 3 SCR 213 at paras 72, 75, 151 DLR (4th) 32 [*Hydro-Québec*].

37 Scientists have proven that GHG emissions are a group of gases with scientifically identifiable parts that are different from other air molecule particles. Similar to marine pollution, GHG emissions are "a precisely identifiable form of pollution" that can be scientifically differentiated from other forms of air pollutants. Therefore, GHG emissions have characteristics that distinguish themselves as a specific and identifiable matter. Further, no provincial heads of power mentions GHG emissions as a group nor as individual gases. Since GHG emissions are specific and identifiable matter qualitatively different from provincial matters, GHG emissions meet the "singleness, distinctiveness, and indivisibility" criteria.

> *SCC Reference, supra* para 1 at para 194.

(b) The Act remedies provincial inability to maintain and enforce a minimum national GHG pricing scheme

38 The provincial inability test is by far the most important element of the national concern doctrine (*Labatt*). In addition, it is "one of the indicia" of singleness or indivisibility (*Crown Zellerbach*). Provincial inability is an effective test because it filters out matters that are outside of the national concern branch of POGG. For example, the regulation of the beer brewing process was not a matter that transcends provincial authorities (*Labatt*). Also, the inability for one province to provide substance addiction treatment facilities would not endanger the ability of

another province (*Schneider*). Provincial inability to maintain and enforce a national GHG pricing scheme distinguishes the *Act* from these cases.

> *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914 at 945-946, 110 DLR (3d) 594 [*Labatt*].
> *Crown Zellerbach, supra* para 33 at para 35.
> *Schneider v The Queen*, [1982] 2 SCR 112, 139 DLR (3d) 417 [*Schneider*].

39 Without a federal law to bind them, provinces have no realistic ability to prevent their GHG pricing schemes from being undermined by less stringent GHG pricing schemes in other provinces. Possessing the ability to enact a similar GHG pricing scheme is insufficient. Recall, the provinces that generated the most GHG emissions either never signed on to the *Pan-Canadian Framework* or withdrew their support as soon as new provincial governments were elected. Meanwhile, other provinces have no constitutional authority to force resistant provinces to comply. This is because provinces lack the constitutional power to manage the GHG emissions outside of their provincial jurisdiction. Only a federal statute has the constitutional authority to call all provinces into a minimum level of action.

40 Maintaining and enforcing a minimum national GHG pricing scheme are crucial because provinces have no ability to block GHG emissions that cross over their provincial borders. This phenomenon is evident in the fact that while the majority of national GHG emissions between 2005 and 2016 were generated by inland provinces, other parts of the country experienced heightened effects.

(iii) Parliament understood the Act must preserve the balance of power between federal and provincial governments

(a) The Act poses minimal impact on provincial jurisdiction

41 The *Act* respects federalism within the context of an unprecedented climate change crisis. For the *Act* to be constitutional, the scale of impact to the balance of power between the federal and provincial governments must be acceptable. That said, the Court should consider the scale of impact in light of the climate change circumstances. The majority rulings of the SCC and ONCA, as well as the dissent in ABCA correctly found the scale of impact as minimal and limited.

> *SCC Reference, supra* para 1 at paras 196, 205.

ONCA Reference, supra at para 7 at para 133.
ABCA Reference, supra at para 7 at para 1009.

42 The nature of the national concern of GHG emissions defines the *Act's* infringements. Specifically, the infringement occurs if the provinces wish to opt-out of any fuel charge under Parts 1 or 2. It also occurs if the provinces wish to apply a charge lower than the standards under the *Act*. While these restrictions appear to limit provinces, in effect they do not severely impact provinces. This is because revenue from Parts 1 and 2 are remitted to respective jurisdiction. In turn, provinces may reimburse carbon-dependent industries and consumers, encourage innovation and choices in low-carbon alternatives, or a combination of both. As such, the severity of impact is dictated by provincial decisions on where to direct remitted revenue. With fiscal and policy planning, provinces may adequately mitigate the transitory discomfort of fuel charge while working towards the national goal of GHG emissions reduction. The Respondent advises the Court to resist *in terroram* arguments that leads to an assumption of federal overreach without evidence to substantiate it. The *Act* is not a prelude to a federal takeover on most economic regulation by virtue of how economical activities give rise to GHG emissions.

(b) Overlapping jurisdiction may be constitutionally valid

43 The "environment" is not expressly classified as either a federal or provincial heads of power under the *Constitution Act, 1867*. Courts have long accepted concurrent jurisdiction from both levels of the government on a number of environmental subject matters. Meanwhile, overlapping jurisdiction on the same matter do not automatically present a constitutional conundrum. The double aspect doctrine has supplanted the "watertight compartment" metaphor in constitutional law. Under the double aspect doctrine, valid federal and provincial laws may concurrently govern the same subject matter without impinging on federalism. A double aspect scenario arises when both federal and provincial laws direct at the "same fact situation" (SCC Reference). In *Desgagnés Transport*, both federal and provincial laws validly applied to a contract dispute on the purchase of a replacement part for a commercial ship. The Appellants' assertion that federal environmental statutes must be limited to areas of federal jurisdiction in order to prevent jurisdictional overreach is misguided.

Constitution Act, supra para 4.
SCC Reference, supra para 1 at paras 94, 129.
Desgagnés Transport Inc v Wärtsilä Canada Inc, 2019 SCC 58 at para 5 [*Desgagnés Transport*].

Appellant factum at para 16.

44 The same fact situation overlaps here because GHG pricing schemes are governed by both the *Act* and applicable provincial laws. However, the *Act* is the backstop by setting a minimum charge in the provinces where it applies. In turn, provinces are free to enact legislation more stringent than the federal minimum standards. For instance, they may levy an additional charge on select goods and services to drive down GHG emissions by slashing consumer demand. To further depress demand, they may levy an additional charge on any of the 22 types of fuel. Also, the provinces may legislate the means to achieve the minimum standard. For example, the provinces may limit or prohibit certain industrial activities that generate GHG emission. They may employ cap-and-trade systems to ease industries into lowering their GHG emissions. To make a drastic change, they may shut down power generation plants that burn on fossil fuel. The backstop nature of the Act enables both levels of government to legislate by virture of double aspect doctrine. The provinces retain their authority to legislate in relaton to GHG emissions.

(c) Specific responses to the Appellant's factum

45 The *Act* is analogous to cases where Parliament enacted federal statues under the national concern of POGG without establishing a new head of federal power. In *Multiple Access Ltd v McCutcheon*, similar provincial and federal provisions relating to insider trading were justified under POGG. In *Crown Zellerbach*, even though marine pollution fell within federal jurisdiction by virtue of POGG, provinces continued to regulate pollutions discharged into the ocean such as pollutions from coastal cities. Finally in *Munro*, Parliament had jurisdiction over the National Capital Region, but the City of Ottawa continued to govern municipal planning and development under provincially delegated authority. The above demonstrates federal statutes validly enacted under the national concern of POGG do not create new federal head of power. The Respondent advises the Court to resist red herring arguments that suggest the *Act* requires some nexus to a federal head of power.

Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161 at p 191, 138 DLR (3d) 1 [*Multiple Access*].
Crown Zellerbach, supra para 33 at para 38.
SCC Reference, supra para 1 at para 127.

46 Contrary to the Appellants' assertion that the Governor in Council has "near unfettered discretion" to amend the *Act*, its authority is sufficiently circumscribed. As the primary factor, the Governor in Council must consider the stringency of the GHG emissions pricing system currently in place for the provinces. To this date, not all the provinces are subject to both Parts 1 and 2 of the *Act*. This shows the Governor in Council employs the primary factor in its consideration. While the Governor in Council may amend regulations under Part 1, the *Act* describes the amendment scope which are regulations in relation to the fuel charge system, modifying the listed types of fuel and applicable rates of charge in Schedule 2, or definitions and words expressed under Part 1 of the *Act*, Part 1 of Schedule 1, or in Schedule 2. These powers are necessary to ensure the *Act* is flexible enough to address any rising GHG emissions under the existing list as well as unlisted GHG emissions that pose a new threat. Under Part 2, regulations to amend definitions for the covered facility and methods to report GHG emissions are integral to the operations of the OBPS. Like any other public authority, the Governor in Council's decision is also subject to judicial review. The evidence demonstrates Parliament is mindful of the scope of amendment power that the Governor in Council has. These are not the hallmarks of unfettered discretion.

Appellant factum at para 27.
GGPPA, supra para 2, ss 166(3), 166(4), 168(2), 168(3), 192.

B. ISSUE 2: Fuel charge under Part 1 is also *ultra vires* Parliament as regulatory charge or tax

47 The SCC, ONCA, SKCA correctly held that the fuel charge imposed under Part 1 of the *Act* is a valid regulatory charge.

SCC Reference, supra para 1 at paras 41, 214, 219.

iii) The Fuel Charge Imposed Under Part 1 of the Act are Valid Regulatory Charges and Cannot be Characterized as a Tax

48 The parties agree on the legal test developed in *Westbank First Nation v British Columbia Hydro and Power Authority,* [1999] 3 SCR 134 to determine if a levy is a regulatory charge as opposed to a tax. The two step identification process first requires the court to establish the existence of a regulatory scheme. If a scheme is established, the second step is to determine whether there is a relationship between the scheme and the charge.

SCC Reference, supra para 1 at paras 213-219.
Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 at para 44, 176 DLR (4th) 276 [*Westbank*].

49 Fundamentally, distinguishing a tax from a regulatory charge first requires a court to identify the primary purpose of the levy. This is necessary due to charges and taxes sharing common elements such that they are both (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose. For a regulatory charge to exist, despite having elements of a tax, it must be connected to a regulatory scheme thereby serving a regulatory purpose.

SCC Reference, supra para 1 at paras 41, 214, 219.
SKCA Reference, supra para 7 at paras 80-89.
Westbank, *supra* para 48 at para 44.
620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7 at paras 25-27 [*Connaught*].

50 To be a tax, the primary purpose must be to raise revenue for general purposes. Unlike a tax, the purpose here is to impose regulatory charges intended to alter behaviour relating to GHG emissions. The *Act*'s disinterest in the generation of revenue was highlighted by Wagner CJ, quoting Richard CJS for the SKCA majority observed the Act could "fulfill its objectives without raising a cent."

SCC Reference, supra para 1 at para 41, 214, 219.
SKCA Reference, supra para 7 at para 76.
Westbank, *supra* para 48 at para 44.

51 The Appellants' assertion, at paragraph 39 of their factum, that the SCC failed to consider the fuel charge should be characterized as a tax is unfounded. The application of the Westbank regulatory analysis clearly contemplates the possibility of a tax to exist. By conducting a regulatory analysis, the SCC considered the potential tax elements and purposes of the fuel charge. As has been repeatedly held by the Supreme Court, the test to determine if a government levy is a regulatory charge as opposed to a tax requires the court to characterize the primary purpose of the levy.

Appellant Factum at paras 39.

52 In the event the Court finds the charges to be taxes, the Respondent submits that the *Act* does not contravene s. 53 of the Constitution. The Appellants submit s. 53, which upholds the principle of democratic accountability by imposing no taxation without representation is

offended for two reasons. First, they claim that the *Act* provides no clear and unambiguous delegation of the power to tax and secondly, that there is overbreadth in the delegation of lawmaking power.

53 The SCC was not concerned with the constitutional validity of the *Act* under s. 53 because they held charges were found to be valid, this assertion is contradictory to the majorities holding in the ONCA and SKCA.

iv) *The fuel charge does not offend the principle of democratic accountability*

54 The Appellants are concerned with the grave overextension of power provided to the Governor in Council in Part 1 of the *Act* arguing this unfettered power goes beyond the acceptable delegation of administering details and mechanism but permits sweeping law-making power. This concern is unfounded; the delegated powers are constrained by the language set out in the *Act*. This language is clear and unambiguous in s. 166 of the *Act*. In fact, the discretion of the Governor in Council is confined and limiting. The power only applies when a Province does not implement GHG reduction emissions policy that meets the federal standard – meaning there is a possibility that no power can be exercised. Moreover, under administrative law, any authority exercised must be done in consideration of the purpose and object of the *Act*. The Governor in Council is constrained from making changes that do not promote the pricing of GHG emissions for the purposes of reducing emissions to meet national and international obligations.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

55 The Respondent does not seek costs and requests that no costs be awarded against the Respondent.

PART V -- ORDER SOUGHT

56 The Respondent asks the Court to advise that the *Act* as a whole is validly enacted under Parliament's jurisdiction to legislate for the peace, order, and good government of Canada to address a matter of national concern...

57 The Respondent asks the Court to advise that the fuel charge under Part 1 of the *Act* is a validly enacted regulatory charge under Parliament's jurisdiction. In the alternative, the fuel charge under Part 1 of the *Act* is a validly enacted tax under Parliament's jurisdiction.

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

[redacted]

[redacted]

Counsel for the Respondent
Attorney General of Canada

PART VI -- TABLE OF AUTHORITIES

A. Jurisprudence	Paragraph No.
620 Connaught Ltd. v. Canada (Attorney General), 2008 SCC 7.	49
Attorney-General for Ontario v Attorney-General for the Dominion, [1896] AC 348 (PC).	30
Desgagnés Transport Inc v Wärtsilä Canada Inc, 2019 SCC 58.	43
Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3, 88 DLR (4th) 1.	34
Labatt Breweries of Canada Ltd v Attorney General of Canada, [1980] 1 SCR 914, 110 DLR (3d) 594.	38
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161 at p 191, 138 DLR (3d) 1.	45
Munro v National Capital Commission, [1966] SCR 663, 57 DLR (2d) 753.	33
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401, 25 BCLR (2d) 145.	33, 36, 38, 45
R v Hydro-Québec, [1997] 3 SCR 213, 151 DLR (4th) 32.	36
R v Morgentaler, [1993] 3 SCR 463, 107 DLR (4th) 537.	34
References re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74.	7, 13, 24, 41,
References re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544.	7, 13, 22, 41,
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.	1, 7-14, 16, 18, 20, 21, 25, 30, 32, 33, 35, 37,

	41, 43, 45, 47-50
References re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40.	7, 12, 23, 49, 50
Russell v R, (1881-82) LR 7 App Cas 829, CR [8] AC 502.	30
Schneider v The Queen, [1982] 2 SCR 112, 139 DLR (3d) 417.	38
Ward v Canada (Attorney General), 2002 SCC 17.	33
Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134, 176 DLR (4th) 276.	44, 49, 50

B. Legislation	**Paragraph No.**
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12.	2, 16-20, 46
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.	4, 23, 43
Output-Based Pricing System Regulations, SOR/2019-266.	19-20

PART VII -- LEGISLATION AT ISSUE (Optional)

[Insert the provisions of any statute, regulation, rule, ordinance or by-law directly at issue]

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

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TEAM #2022-09

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Document #: 2016903