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)

BETWEEN:

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 #2022-10

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 This appeal is not about whether climate change is occurring, whether it is caused by greenhouse gas (GHG) emissions, or whether action is required by both levels of government to reduce GHG emissions. All of these things are true. This appeal is about the importance of maintaining the division of powers in a federalist country like Canada. Allowing Parliament to take exclusive jurisdiction over the reduction of GHG emissions through the implementation of pricing mechanisms oversteps the bounds of cooperative federalism into supervisory federalism and completely tramples Canada's established division of powers.

2 The provinces have the constitutional authority to choose whether to implement carbon pricing, apply another GHG emission reduction scheme, or do absolutely nothing at all to reduce GHG emissions. Canada is, however, asserting that it can force the provinces to conform to a federal GHG emissions reducing framework via the application of "minimum national standards". Only where a matter is distinct from established heads of power should it be classified under Parliament's jurisdiction to legislate for the peace, order, and good government of Canada (POGG). This distinction does not exist in this case. Provincial jurisdiction over aspects of the reduction of GHG emissions plainly precludes the application of Parliament's residual POGG power.

> Peter W Hogg & Wade K Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021, release 3), ch 17 at 17:1 [Hogg].

3 Great caution must be exercised when assigning exclusive jurisdiction over a matter to the federal government by applying the national concern doctrine. The Supreme Court of Canada (the Supreme Court) has previously held that only matters which are distinct, or not boundless, can be placed under the national concern branch of POGG. The *Greenhouse Gas Pollution Pricing Act* (the *GGPPA*) does not meet this requirement since its dominant subject matter, the reduction of GHG emissions through the implementation of pricing mechanisms, is within the provinces' power to manage. This matter is also *intra vires* several enumerated provincial heads of power, making the scale of impact that the *GGPPA* has on provincial jurisdiction too great to reconcile with the principles of federalism.

Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 232 [Régimbald].
Re: Anti-Inflation Act, [1976] 2 SCR 373 at 458, 68 DLR (3d) 452 [*Anti-Inflation*].
Attorney General of Ontario v Attorney General of Canada (Local Prohibition), [1896] AC 348 at 361, [1896] 5 WLUK 30 [*Local Prohibition*].
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186 [*GGPPA*].
R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401 at 431–432, 49 DLR (4th) 161 [*Crown Zellerbach*].

4 It is therefore imperative that this Court follow precedent, overturn the decision of the Supreme Court in *References re Greenhouse Gas Pollution Pricing Act* (*References re GGPPA*), and find the *GGPPA ultra vires* Parliament's POGG power.

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 [*References re GGPPA*].

B. Statement of the Facts

5 It is undisputed that global climate change is occurring and that GHG-emitting human activities are a primary cause. GHG emissions emanate from almost every aspect of an individual's life. GHG emissions also result from every facet of "provincial industrial, economic and municipal activity…including construction, transportation, roadways, schools, hospitals, heating and cooling of buildings, generation of electrical power, farming, mining, and development of national resources." While Canada's federal and provincial governments have agreed to take a collaborative approach to combating the effects of GHG emissions, this endeavour must be achieved in a way that preserves the country's carefully calibrated division of powers.

Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 at para 4 [*ABCA Reference*].
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 21–36.
Canadian Intergovernmental Conference Secretariat, *Vancouver Declaration on clean growth and climate change* (March 2016), online: <https://scics.ca/en/product-produit/vancouver-declaration-on-clean-growth-and-climate-change/>.

6 Canada released the *Pan-Canadian Framework on Clean Growth and Climate Change* (*Pan-Canadian Framework*) in December of 2016 in response to international calls to address climate change. The *Pan-Canadian Framework* reaffirmed Canada's commitment to reducing GHG emissions and outlined a Canada-wide benchmark for carbon pricing. The framework required every province and territory to have one of two carbon pricing systems in place by 2018: a carbon tax or a cap-and-trade system. After only eight provinces adopted this framework, the *GGPPA* was introduced as Part 5 of Bill C-74, *An Act to implement certain provisions of the budget* and received royal assent on June 21, 2018.

Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change* (December 2019), online: <https://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.
Bill C-74, *An Act to implement certain provisions of the budget*, 1st Sess, 42nd Parl, 2018 (as passed by the House of Commons 4 June 2018).

7 Most provinces were already taking significant action to reduce GHG emissions when the *GGPPA* was introduced: Alberta had implemented an output-based pricing system (OBPS), Saskatchewan had released its own climate change strategy that included an OBPS on heavy emitters and regulations to limit methane emissions in the oil and gas industry, and Ontario had closed the province's coal-fired electricity generation plants. Not only do these initiatives show that the provinces have acted to reduce GHG emissions, but they also display each province's jurisdictional authority to make policy choices regarding the reduction of GHG emissions.

Technology Innovation and Emissions Reduction Regulation, Alta Reg 133/2019.
Government of Saskatchewan, *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy* (December 2017), online <https://www.saskatchewan.ca/business/environmental-protection-and-sustainability/a-made-in-saskatchewan-climate-change-strategy/saskatchewans-climate-change-strategy#:~:text=The%20province%20has%20been%20implementing,recover%20from%20stress%20and%20change>.
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 at para 56.

8 The three provinces representing the Appellants to this matter (Alberta, Saskatchewan, Ontario) asked their respective Courts of Appeal to consider the constitutionality of the *GGPPA.* Both the Ontario and Saskatchewan Courts of Appeal agreed with Canada's argument that establishing a "minimum national standard of price stringency for GHG emissions" was a matter of genuine national concern and determined the *GGPPA* to be *intra vires* Parliament. The Alberta Court of Appeal, however, determined that the *GGPPA* was unconstitutional as it directly intruded into the province's exclusive jurisdiction over the development and management of its national resources.

References re GGPPA, *supra* para 4 at paras 39–46.

9 This reference question was ultimately raised to the Supreme Court, with the majority (the Majority) determining that the *GGPPA* was *intra vires* Parliament's power to legislate on matters of national concern under POGG. In coming to this decision, the Majority reformulated the long-standing *Crown Zellerbach* test for determining matters of national concern and allowed the establishment of "minimum national standards of GHG price stringency to reduce GHG emissions" to become an exclusive power of the federal government.

References re GGPPA, *supra* para 4 at para 80.

PART II -- QUESTIONS IN ISSUE

10 The questions in issue at this appeal are:

1) 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?

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

11 The Appellants submit that the answer to both questions is no.

PART III -- ARGUMENT

A. The *GGPPA* as a whole is *ultra vires* Parliament as an exercise of its jurisdiction to legislate for the peace, order, and good government of Canada to address a matter of national concern

12 The *GGPPA* authorizes two distinct regulatory mechanisms. Part 1 of the *GGPPA* establishes a minimum fuel charge on twenty-two different GHG-producing fuels that are sold and consumed in the listed provinces. This charge is considered a "demand side charge" since it is expected that the fuel charges will be passed on to the end users, ultimately reducing the demand for and consumption of these GHG-emitting fuels.

GGPPA, *supra* para 3 ss 3–168.
ABCA Reference, *supra* para 5 at para 33.

13 Part 2 of the *GGPPA* sets up an OBPS. This system authorizes the federal Cabinet to limit the total GHG emissions that can be produced by an industrial facility without charge. The *GGPPA* defines this type of facility as "a large industrial emitter of greenhouse gases, emitting a quantity of greenhouse gases equal to 50 kilotons or more of CO_2 equivalence" per compliance period. Facilities that meet this definition include those in the "oil and gas, cement, chemical production, vaccines, metal tubing, mining and ore processing, nitrogen-based fertilizers, food processing of potatoes or sugars, pulp and paper, [automotive] and electricity generation" industries. These "covered facilities" are exempt from the fuel charges established in Part 1 of the *GGPPA*. The *Output-Based Pricing System Regulations*, SOR/2019-266 establish the rate at which a facility

must compensate for excess GHG emissions, the compliance period during which emissions must be recorded, and the deadline for when compensation must be received. A covered facility that emits GHGs in excess of the 50-kiloton limit during a compliance period must provide compensation for the excess emissions.

GGPPA, *supra* para 3 ss 17(2), 169–261.
ABCA Reference, *supra* para 5 at para 925.
Output-Based Pricing System Regulations, SOR/2019-266.

14 The *GGPPA* only applies if a province has not exercised its legislative authority to enact a GHG emissions reducing scheme, and thus operates as a backstop in jurisdictions that have not adopted measures that meet federal standards.

References re GGPPA, *supra* para 4 at para 302.

15 The *GGPPA* should be declared *ultra vires* Parliament for several reasons. First, its pith and substance falls within the enumerated constitutional provincial heads of power and cannot be assigned to Parliament's residual POGG power. Next, the double aspect doctrine does not remedy the *GGPPA*'s unjustifiable encroachment into provincial jurisdiction. Finally, the *GGPPA* does not meet the national concern doctrine test as set out in *Crown Zellerbach* or as modified by the Supreme Court in *References re GGPPA*.

Crown Zellerbach, *supra* para 3.
References re GGPPA, *supra* para 4 at paras 142–144.

(i) *The GGPPA's pith and substance falls within provincial jurisdiction and cannot be classified under POGG*

16 A two-pronged analysis is conducted to determine if an enactment falls within the enacting body's legislative authority. The first step is to characterize the legislation to determine its pith and substance, or dominant subject matter. The identified subject matter must then be classified within the heads of power listed in sections 91 and 92 of the *Constitution Act, 1867*.

Régimbald, *supra* para 3 at 175–176.
Desgagnés Transport Inc v Wärtsilä Canada Inc, 2019 SCC 58 at paras 31–35 [*Desgagnés Transport*].

17 Parliament has relied on the national concern branch of POGG as the source of its authority to enact the *GGPPA*. The Appellants' position is that the subject matter of the *GGPPA* fits within provincial jurisdiction and thus cannot fall under Parliament's residual POGG power as a matter of national concern. In the alternative, if this Court does not accept that the characterization analysis must first look to the enumerated provincial heads of power, the subject matter of the

GGPPA does not meet the conditions of the national concern doctrine test in *Crown Zellerbach* and is unjustifiable under this branch of POGG.

References re GGPPA, *supra* para 4 at para 47.
Crown Zellerbach, *supra* para 3.

1. The *GGPPA*'s pith and substance is to "implement pricing mechanisms to reduce GHG emissions"

18 The pith and substance of a law is described as its "dominant purpose". The dominant subject matter of legislation is determined by considering its purpose and effects. Crucial to this step is ensuring that the characterization is not too broad or vague, while still being precise enough so the legislation's dominant purpose can be later associated with a head of power established in the *Constitution Act, 1867*.

R v Morgentaler, [1993] 3 SCR 463 at 481, 107 DLR (4th) 537.
Québec (Attorney General) v Canada (Attorney General), 2015 SCC 14 at para 29.
Ward v Canada (Attorney General), 2002 SCC 17 at para 25.

19 Canada's position throughout all proceedings has shifted with respect to the dominant purpose of the *GGPPA* and the matter claimed to be of national concern. The Attorney General has not had a clear and consistent stance regarding what exactly Parliament is achieving with the *GGPPA*. It is fair to expect that the Attorney General would distinctly identify what Canada seeks to address with this legislation if the matter was of such importance to be classified as one of national concern. This lack of clarity begs for a re-examination of the characterization analysis to determine the true purpose of the *GGPPA*.

References re GGPPA, *supra* para 4 at para 322.

20 The Appellants reject the Majority's characterization of the pith and substance of the *GGPPA* as "establishing minimum national standards of GHG price stringency to reduce GHG emissions." The concept of "minimum national standards" is "a nothing", as identified by Justice Brown in *References re GGPPA*. Only federally enacted statutes can be national and set a country-wide threshold. The Majority's characterization further fails to establish the exact subject matter to be governed by "minimum national standards".

References re GGPPA, *supra* para 4 at paras 57, 326–327.

21 The *GGPPA* must be upheld based on its constitutional validity, not on clever workarounds that temporarily solve problems and open the door to future practical and constitutional issues.

Adding a "national standards" label to a matter creates a manifest destiny situation, inevitably resulting in the matter being classified as one of national concern. By including "minimum national standards" in the *GGPPA*'s pith and substance, the Majority "permits the assertion of various 'national standards' as automatically within federal jurisdiction." This decision "throws dirt on the Canadian Constitution" by allowing Parliament to use this label to pilfer pieces of provincial power.

> *References re GGPPA*, *supra* para 4 at para 375.
> Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 200 [Newman].

22 The Majority's characterization of the *GGPPA* fails to recognize that Part 1 and Part 2 employ different means to achieve the Act's legislative purpose. Part 1 raises the cost of fuel to reduce GHG emissions, while Part 2 prices GHG emissions in specific emission-intensive industries. The *GGPPA* as a whole is therefore centred around raising the price of fuel and pricing GHG emissions. The *GGPPA* contains "pricing" in its name, further supporting this characterization. The true pith and substance of the *GGPPA* is, therefore, to implement pricing mechanisms to reduce GHG emissions.

> *References re GGPPA*, *supra* para 4 at para 337.

2. Implementing pricing mechanisms to reduce GHG emissions is within provincial jurisdiction

23 After determining the pith and substance or the "true nature" of the impugned legislation, it must next be classified under the appropriate constitutional head of power. Classifying the "implementation of pricing mechanisms to reduce GHGs emissions" as a matter of national concern would grant parliamentary power over enumerated areas of provincial jurisdiction.

> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 26.

24 The fact that the *GGPPA* acts as a "backstop" demonstrates Canada's recognition that the provinces have jurisdiction to implement pricing mechanisms to reduce GHG emissions under sections 92(10), 92(13), 92(16), and 92A of the *Constitution Act, 1982*. The *GGPPA* is premised on the provinces having the jurisdiction to do precisely what the Act purports to do.

> *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), c 11, ss 92(10), 92(13), 92(16), 92A [*Constitution Act, 1982*]
> *References re GGPPA*, *supra* para 4 at para 350.

25 Section 92(10) grants the provinces exclusive jurisdiction over local works and undertakings (excluding those that are federally regulated, such as railways). The implementation of pricing mechanisms to reduce greenhouse gases that apply to local businesses and GHG-emitting facilities is therefore squarely within provincial authority. This same point, coupled with the GHG-emitting activity of individuals, invokes the jurisdiction over "property and civil rights" and "matters of a merely local or private nature in the province" conveyed by sections 92(13) and 92(16), respectively.

> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(10), 92(13), 92(16) [*Constitution Act, 1867*].
> *ABCA Reference*, *supra* para 5 at paras 262, 815.

26 Section 92A grants exclusive provincial jurisdiction over: (1) the development, conservation, and management of non-renewable resources; (2) the export of these resources from the province; and (3) taxing powers over these resources. Not only does section 92A clarify the scope of the provinces' proprietary rights, but it also authorizes their power to "determin[e] the terms and conditions under which industry will exploit those resources in the province." The provinces thus have the authority to legislate regarding the implementation of pricing mechanisms to reduce the GHGs emitted by the natural resource sector.

> *Constitution Act, 1982*, *supra* para 24 ss 92A(1)–(2), (4).
> *ABCA Reference*, *supra* para 5 at paras 125, 265.

27 The Supreme Court has recognized that "law-making and implementation are often best achieved at a level of government that is…closest to the citizens affected and thus more responsive to their needs, to local distinctiveness, and to population diversity." This notion of subsidiarity is an "underlying principle of federalism" that "helps ensure that a province, no matter how small or large, is able to defend itself against those asserting the national good trumps the province's interests." The provinces' constitutional authority to legislate on the implementation of pricing mechanisms to reduce GHG emissions, therefore, cannot be usurped by Parliament's insistence of using "minimum national standards" to reduce Canada's carbon footprint in the name of "the national good".

> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.
> *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 52.
> Dwight Newman, "Changing Division of Power Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask L Rev 21 at 26–28.
> *ABCA Reference*, *supra* para 5 at paras 137, 140.

28 The importance of subsidiarity is reflected in the diversity of Canada's provinces and territories, and the legislative means that their governments have adopted to reduce GHG emissions. A scheme that successfully reduces GHG emissions in British Columbia may not yield the same results in Alberta due to differences in climate, supply chains and transportation, population density, and industry. Each province is "best suited to decide the most appropriate combination of policies for their province amongst recognized policy choices – carbon pricing, regulations and subsidies for households, and regulations and subsidies for businesses." The existential threat to humanity presented by climate change would therefore be best addressed by provincial governments' retention of jurisdiction over the implementation of pricing mechanisms to reduce GHG emissions.

ABCA Reference, *supra* para 5 at paras 330–334.

3. POGG is a residual power

29 The federal POGG power, including its national concern branch, is residuary in nature and applies only to "matters not coming within the classes of subjects by [the *Constitution Act, 1867*] assigned exclusively to the Legislatures of the provinces." Parliament is assigned permanent jurisdiction over matters falling under the national concern doctrine and "anything required to maintain control over that field will also be found necessary to enable the power", resulting in no room for provincial operations. The application of the national concern doctrine should thus be exercised with extreme caution to protect the enumerated heads of power enshrined in the *Constitution Act, 1867*.

Constitution Act, 1867, *supra* para 25 s 91.
Hogg, *supra* para 2 at 17:1, 17:3, 17:12.
Régimbald, *supra* para 3 at 234.
Newman, *supra* para 21 at 196, 200–201.
Local Prohibition, *supra* para 3.
Anti-Inflation, *supra* para 3 at 442–444.
Crown Zellerbach, *supra* para 3 at 423.

30 The implementation of pricing mechanisms to reduce GHG emissions unreservedly falls within provincial jurisdiction under sections 92(10), 92(13), 92(16), and 92A of the *Constitution Act, 1982*, as established above. Federal jurisdiction over this subject as a matter of national concern is therefore precluded.

Constitution Act, 1982, *supra* para 24.
Régimbald, *supra* para 3 at 231.

31 There is no dispute that "[g]reat caution must be observed in distinguishing between that which is local or provincial, and that which has ceased to be merely local or provincial and has become a matter of national concern" to assign the matter within federal jurisdiction. This "last resort" approach for applying the national concern doctrine is crucial in maintaining the integrity of the federation and its division of powers. Declaring the *GGPPA intra vires* Parliament's POGG power as a matter of national concern would throw caution to the wind and allow the federal government to intervene in future matters of provincial concern simply "on the pretext of establishing 'national standards'".

Hogg, *supra* para 2 at 17:3.
Local Prohibition, *supra* para 3.
References re GGPPA, *supra* para 4 at para 457.
Newman, *supra* para 21.

32 It is true that society's understanding of the implications of accumulative GHG emissions has changed, but this fact does not answer the question before this Court. The question is whether the federal government can unilaterally enter a realm of jurisdiction that the provinces have a constitutionally enumerated right to legislate in. The requisite distinction from the enumerated heads of power for a new matter to be one of national concern is not present.

33 The Appellants are not asserting that Parliament cannot enact legislation regarding GHG emissions, or the reduction thereof. Rather, Parliament must do so in accordance with the federal heads of power enshrined in the *Constitution Act, 1867*. Many Parliamentary heads of power, including trade and commerce, criminal law, and the raising of money by any mode or system of taxation, give the federal government "a solid legislative foundation for many environmental initiatives." This Court should not allow Parliament to unnecessarily take over a whole field of jurisdiction when other constitutionally sound options are available.

Constitution Act, 1867, *supra* para 25 s 91.
ABCA Reference, *supra* para 5 at para 653.

34 Legislation regarding the reduction of GHG emissions, like the environment generally, does not "comfortably fit within the existing division of powers without considerable [constitutional] overlap and uncertainty." Determining the implementation of pricing mechanisms to reduce GHG emissions to be a matter of national concern would grant Parliament "exclusive jurisdiction over the matter, including its intra-provincial aspects" and in turn "flatten regional differences". Since the reduction of GHG emissions can be separated and shared between the

enumerated heads of power for both levels of government, the national concern branch of POGG should not apply.

> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64, 88 DLR (4th) 1.
> *References re GGPPA*, *supra* para 4 at para 531.

35 Canada's attempt to assert jurisdiction over the implementation of pricing mechanisms to reduce GHG emissions under its POGG power fails as the *GGPPA* purports to "do exactly what *the provinces* can do, and for precisely the same reason." The Appellants echo the Alberta Court of Appeal's sentiment that this Court "should not permit the national concern doctrine to be used to render the provinces' potent proprietary rights and powers impotent" regarding the reduction of GHG emissions. Only where a new matter is clearly distinct from established heads of power should it be classified under POGG. This distinction does not exist in this case.

> *References re GGPPA*, *supra* para 4 at para 378 [emphasis in original].
> *ABCA Reference*, *supra* para 5 at para 273.
> Hogg, *supra* para 2.

(ii) *The double aspect doctrine does not minimize the GGPPA's infringement on provincial jurisdiction*

36 The double aspect doctrine "recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power." This doctrine does not apply to the *GGPPA* as it would unacceptably result in both levels of government regulating GHG emissions "for the same purpose and in the same aspect." The Attorney General of Canada opined that the *GGPPA* leaves "ample room" for the provinces to enact their own carbon pricing systems. In reality, the provinces may only do so if their laws meet "the criteria unilaterally set by the federal government." This artificial application of the double aspect doctrine equates to a transfer of jurisdiction from the provinces to Parliament, rather than the opportunity for concurrent legislation.

> *Desgagnés Transport*, *supra* para 16 at para 84.
> *ABCA Reference*, *supra* para 5 at para 209.
> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (Factum of the Respondent at para 5).
> *References re GGPPA*, *supra* para 4 at para 378.

37 While the courts have not provided a clear test regarding the appropriate application of the double aspect doctrine – or theoretically precluded its application to matters under POGG – its use in this case would have disastrous consequences for federalism in Canada. Even if the *GGPPA* leaves room for the provinces to legislate on the implementation of pricing mechanisms to reduce

GHG emissions within their borders, such legislation would overstep the boundaries of the double aspect doctrine and could not stand. The concurrency of power that the doctrine incites would inevitably spur conflict between valid provincial and federal laws. The doctrine of federal paramountcy functions to resolve such conflict and favours the preservation of federal law. This phenomenon would erode the federation by continuously indulging Parliament's overreach into areas of provincial jurisdiction.

> Nathalie J Chalifour, Peter Oliver & Taylor Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the *Greenhouse Gas Pollution Pricing Act Appeals*" (2020) 40:2 Nat'l J Const L 153 at 154.
> Hogg, *supra* para 2 ch 15 at 15:7.

(iii) *The GGPPA does not meet the Crown Zellerbach test for a matter of national concern*

38 The test for determining if a matter is one of national concern is outlined in *Crown Zellerbach*. First, the doctrine applies to either new matters that did not exist at the time of Confederation or matters that were local or private in nature but have since become matters of national concern which are not of national emergency. Next, the matter must be single, distinct, and indivisible, to separate it from provincial matters. To determine if a matter is single, distinct, and indivisible, it is important to consider the effects on extra-provincial interests if the provinces failed to effectively deal with the regulation or control of the intra-provincial parts of the matter. Finally, the matter's scale of impact on provincial jurisdiction must be "reconcilable with the fundamental distribution of legislative power under the Constitution." The *GGPPA* fails each step of this test.

> *Crown Zellerbach*, *supra* para 3.

1. <u>The implementation of pricing mechanisms to reduce GHG emissions is not a matter of national concern</u>

39 The first step of the *Crown Zellerbach* test asks whether the impugned matter is genuinely new – in that it did not exist at Confederation – or is effectively new having become a non-emergent matter of "national concern". This stage is satisfied upon the presentation of "a factual matrix that supports [the] assertion of a constitutionally significant transformation."

> *Crown Zellerbach*, *supra* para 3.
> *Reference re Securities Act*, 2011 SCC 66 at para 115.

40 The implementation of pricing mechanisms to reduce GHG emissions is not a matter of national concern because it does not affect Canada as a whole. The provinces have effectively legislated in relation to this subject, thus negating a constitutional transformation that would usurp their authority. A broader characterization of this matter as the "regulation of [GHG] emissions" – as initially argued by Canada – is similarly unsuitable for regulation as a matter of national concern. The regulation of GHG emissions is not "beyond the power of the provinces to deal with", which makes it a divisible matter that fails the first step of the national concern doctrine test.

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (Factum of the Appellant, the Attorney General of Ontario at paras 39, 42) [FOA].
Schneider v The Queen, [1982] 2 SCR 112 at 132, 139 DLR (3d) 417.

2. <u>The implementation of pricing mechanisms to reduce GHG emissions is not a single, distinct, and indivisible matter</u>

41 For a matter to be placed under the national concern doctrine it must be single, distinct, and indivisible. A matter must therefore be new and distinct from provincial jurisdiction to meet the test as set out in *Crown Zellerbach*. The implementation of pricing mechanisms to reduce GHG emissions lacks this requisite singleness, distinctiveness, and indivisibility because it cannot be clearly distinguished from matters of provincial jurisdiction.

Crown Zellerbach, *supra para* 3.
References re GGPPA, *supra* para 4 at para 145.

42 There is a key distinction between *Crown Zellerbach* and *Ontario Hydro* – where Canada was last successful in asserting jurisdiction under the national concern doctrine – and the case at hand. These previous cases did not rely on establishing a "national standard" to show that the matter before the court had the requisite singleness, distinctness, or indivisibility for a matter of national concern. The matters considered in these cases (marine pollution and labour relations in a federal undertaking, respectively) fell within the POGG power because of their inherent nature. In the present case, the implementation of pricing mechanisms to reduce GHG emissions requires a coupling with the label of "national standards" for the matter to fit within the national concern doctrine.

Crown Zellerbach, *supra* para 3.
Ontario Hydro v Ontario (Labour Relations Board), [1993] 3 SCR 327, 107 DLR (4th) 457.
References re GGPPA, *supra* para 4 at para 379.

43 GHGs are a broad range of pollutants that are created by a wide range of non-industrial and industrial activity. Sources of GHG emissions are clearly identifiable, as opposed to the matter in *Crown Zellerbach* which was indivisible due to the difficulty of pinpointing the source and physical location of marine pollution. The implementation of pricing mechanisms to reduce GHG emissions is divisible since "whenever fuel is purchased, or an industrial activity is undertaken no question arises as to physical location" or that provincial jurisdiction applies to this matter. Canada's imposition of the label "minimum national standards" is the only truly distinctive element of the matter addressed by the *GGPPA*. The *GGPPA*'s pith and substance may be characterized dozens of different ways, and each would fail the national concern doctrine test upon the omission of this "nothing" terminology.

References re GGPPA, *supra* para 4 at paras 380–381.

44 Referring to a matter as a "national standard" does not change its true character. When a prism separates light, it may appear to the viewer that clear lines of demarcated colour materialize, which can be named accordingly, but at its source it remains light. The nature of the subject matter has not changed, only the angle of refraction – so too with GHG emissions in this case. The *GGPPA*'s subject matter must be indivisible at its source for it to meet the purposefully high threshold in *Crown Zellerbach*, given the wide jurisdictional latitude the national concern doctrine instils on the federal government. Implementing pricing mechanisms to reduce GHG emissions can and has been done by the provinces, rendering the matter divisible at its source.

Anti-Inflation, *supra* para 3.
Crown Zellerbach, *supra* para 3.

45 Another marker of singleness, distinctiveness, and indivisibility is provincial inability to deal with the matter. The national concern doctrine test as established in *Crown Zellerbach* considers the extra-provincial interests that would be affected if there was a provincial failure to "deal effectively with the control or regulation of the intra-provincial aspects of the matter". The Court in *Crown Zellerbach* found that a province's failure to deal with a matter that crosses provincial boundaries is "but one indicum of singleness and indivisibility." Therefore, the provincial inability step should also consider whether a province is constitutionally incapable of dealing with a matter and "if the federal government were not able to legislate, would there be a constitutional gap." There is no constitutional gap to fill in this case, as the provinces have already

legislated over the implementation of pricing mechanisms to reduce GHG emissions under their various constitutional heads of power.

Crown Zellerbach, *supra* para 3.
References re GGPPA, *supra* para 4 at para 383.
FOA, *supra* para 40 at para 54.

3. The *GGPPA*'s scale of impact on provincial jurisdiction is unreconcilable with the fundamental distribution of legislative power under the *Constitution Act, 1867*

46 The provinces have legislated regarding the reduction of GHG emissions under their enumerated heads of power prior to implementation of the *GGPPA*. Although this fact is not determinative in deciding whether the provinces should have jurisdiction in this area, it does highlight an important issue. Should the federal government be permitted to unilaterally control a broad area like implementing pricing mechanisms to reduce GHG emissions under the national concern doctrine, the provinces would be effectively forced to implement the federal government's preferred policy. As Professor Newman asserts, "[t]o override provincial powers in the name of certain policy objectives is to undermine the federation." This result is not reconcilable with the fundamental distribution of powers and therefore fails the *Crown Zellerbach* test.

FOA, *supra* para 40 at para 13.
Sarah Burningham, "The Relevance of Government Practice in Constitutional Decision-Making: A Review of the Supreme Court's Federalism Jurisprudence" (2021) 58:1 Osgoode Hall LJ 109 at 115–118.
Newman, *supra* para 21 at 201.

47 The implementation of pricing mechanisms to reduce GHG emissions extends to the regulation of any activity that requires carbon-based fuel – a power that the Saskatchewan Court of Appeal characterized as having boundaries "limited only by the imagination." Classifying the implementation of pricing mechanisms to reduce GHG emissions as one single regulatory matter of national concern simply cannot be tolerated, as any system in which one level of government is so powerful would no longer be one of federalism.

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 at para 128.
References re GGPPA, *supra* para 4 at para 389.

48 The Supreme Court previously established that "no one level of government is isolated from the other, nor can it usurp the functions of the other." Seeing as there are multiple heads of power under which the provinces may legislate regarding the implementation of pricing mechanisms to reduce GHG emissions, the scale of impact that the *GGPPA* has on provincial jurisdiction is too great to reconcile with the principles of federalism. The entire scheme of the Act

is premised on the provinces having the jurisdiction to implement pricing mechanisms to reduce GHG emissions, which is precisely what Parliament is attempting to do via the *GGPPA*.

Reference re Firearms Act (Can), 2000 SCC 31 at para 26.
References re GGPPA, *supra* para 4 at para 302.

49 The Supreme Court has adopted a cooperative conception of the division of powers that permits overlap between "valid exercises of federal and provincial authority and encourages intergovernmental cooperation." While there are elements of GHG emissions and their reduction that can be dealt with by both levels of government, this sort of "cooperative federalism" cannot override the division of powers to make "*ultra vires* legislation *intra vires*." The *GGPPA* subjects the provinces to federal oversight in a way that overrides provincial jurisdiction to implement pricing mechanisms to reduce GHG emissions. The *GGPPA* is therefore not an exercise of cooperative federalism but a way to enforce supervisory federalism, which is not federalism at all.

References re GGPPA, *supra* para 4 at paras 471, 570, 590.
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 at para 18 [*Pan-Canadian Securities*].

50 Several alternatives were available to Canada to legislate on the implementation of pricing mechanisms to reduce GHG emissions in a way that abides by cooperative federalism and maintains the division of powers. There are many examples of how the federal government has been able to establish a cooperative approach to matters considered to be under provincial jurisdiction, such as in *Anti-Inflation* and *Pan-Canadian Securities*.

Anti-Inflation, *supra* para 3.
Pan-Canadian Securities, *supra* para 49.

51 The *GGPPA* does not allow provinces to "contract in" to its framework; they must either follow the *GGPPA* or establish their own federally approved scheme. One of the key features of the *Anti-Inflation Act* (*AIA*) was the provinces' ability to "enter into an agreement with the [federal government]...providing for the application of [the] Act." The *GGPPA* is distinguishable from the *AIA* because of its unilateral imposition on the provinces. Upholding the *GGPPA* as written essentially permits the federal government to dictate the GHG emission reduction policies of each province and creates bottomless supervisory incursions into provincial jurisdiction, which is unreconcilable with the fundamental division of powers.

Anti-Inflation, *supra* para 3 at 375, 382.

52 Similarly, the *Pan-Canadian Securities* decision considered a piece of draft legislation which the provinces could choose to reject. The Supreme Court thus found this system to be truly cooperative and that it did not "purport to fetter the law-making powers of the participating provinces' legislatures." The same cannot be said for the *GGPPA*'s effect on the provinces' ability to legislate on the implementation of pricing mechanisms to reduce GHG emissions. The only way in which the provinces are "free to choose" in this case is if they meet the pricing standards set by the federal government. This standard is merely the appearance of a choice that flies in the face of cooperative federalism and represents a model of supervisory federalism.

Pan-Canadian Securities, *supra* para 49 at paras 26, 52.
References re GGPPA, *supra* para 4 at paras 146, 358.

53 If this Court finds the current form of the *GGPPA* to be constitutional under the national concern branch of POGG, this decision will allocate exclusive power to implement pricing mechanisms to reduce GHG emissions to the federal government and would sacrifice the principles of federalism enshrined in the Canadian Constitution.

4. <u>The national concern test should not be modernized</u>

54 The amended *Crown Zellerbach* test as presented by the Majority introduces a qualitative analysis into the singleness, distinctiveness, and indivisibility step that superficially allows for the *GGPPA* to be spared from being found *ultra vires* Parliament's POGG power. The Appellants respectfully disagree with this modernization of the *Crown Zellerbach* test.

References re GGPPA, *supra* para 4 at para 163.

55 The Majority altered the *Crown Zellerbach* test to allow for the *GGPPA* to fit within the bounds of its new threshold question. They noted that a matter must be of "sufficient concern to the country as a whole" to meet this initial step, which leaves out an important aspect of the original test. For a matter to be previously established as one of national concern, it had to be distinguished from matters of provincial concern. Removing this reference to the provinces' jurisdiction over local matters only serves to further the centralization of power to the federal government. Altering the test to include only a subjective sufficiency requirement does not aid in determining whether a matter is truly of national concern but replaces an objective standard with that of the court's discretion.

References re GGPPA, *supra* para 4 at para 163.
Crown Zellerbach, *supra* para 3.

56 There is no jurisprudential or constitutionally sound reason to modernize the *Crown Zellerbach* national concern doctrine test. Under this altered framework, provincial jurisdiction could be usurped at Parliament's whim whenever a matter is deemed to be of "sufficient concern" to Canada as a whole.

References re GGPPA, *supra* para 4 at para 587.

B. The fuel charge under Part 1 of the *GGPPA* is *ultra vires* Parliament as a valid regulatory charge or tax

57 The fuel charge under Part 1 of the *GGPPA* meets the *Westbank* test for a valid regulatory charge. However, the unconstitutionality of the *GGPPA* must logically extend to its regulatory charge. The *GGPPA* does not purport to raise revenue for a federal purpose, and as such its fuel charge is not a tax. Alternatively, if this Court deems this charge to be a tax, the fuel charge offends section 53 of the *Constitution Act, 1867*.

Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 at 157, 176 DLR (4th) 276 [*Westbank*].
References re GGPPA, *supra* para 4 at para 409.
Constitution Act, 1867, *supra* para 25 s 53.

(i) *The fuel charge under Part 1 of the GGPPA is ultra vires Parliament as a valid regulatory charge*

58 The court must first "identify the presence of a regulatory scheme" to find that a regulatory charge exists. A regulatory scheme may be identified by the presence of: (1) "a complete, complex and detailed code of regulation"; (2) "a regulatory purpose which seeks to affect some behaviour"; (3) "the presence of actual or properly estimated costs of the regulation"; or (4) "a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation." It is conceded that the *GGPPA* creates a regulatory scheme, so a detailed analysis of these indicia is not required.

Westbank, *supra* para 57.

59 It must then be considered whether the impugned charge is connected to the regulatory scheme or if the "charge itself *is* the scheme". A connection exists "when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such as the regulation of certain behaviour". The Appellants agree with Justice Brown that the fuel charge under Part 1 of the *GGPPA* serves "the regulatory purpose of changing behaviour, for the

broader purpose of reducing GHG emissions." While this fuel charge may theoretically be a valid regulatory scheme in and of itself, it is rendered *ultra vires* Parliament by the unconstitutionality of the *GGPPA* as a whole.

References re GGPPA, *supra* para 4 at paras 407, 409 [emphasis in original].
Westbank, *supra* para 56 at 157–158.

(ii) *The fuel charge under Part 1 of the GGPPA is not a valid tax*

60 The provisions of the *GGPPA* do not call for the "raising of revenue for federal purposes" and so it is unnecessary to consider the tax implications of section 53 of the *Constitution Act, 1867*.

References re GGPPA, *supra* para 4 at para 409.

61 In the alternative, if this Court finds that the fuel charge is a tax, it offends section 53 of the *Constitution Act, 1867*, which stipulates that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons." The language of the *GGPPA* does not "expressly and unambiguously" delegate Parliament's taxation power, but rather "make[s] it clear that Parliament intended to regulate greenhouse gases, not authorize the imposition of taxation." The fuel charge also "violates the principle of the rule of law by permitting the executive branch of government to widen the scope of the [*GGPPA*] without ratification by legislative authority." The fuel charge under Part 1 therefore cannot stand as a valid tax.

Constitution Act, 1867, *supra* para 25 s 53.
Confédération des syndicats nationaux v Canada (Attorney General), 2008 SCC 68 at para 92.
FOA, *supra* para 40 at para 91.
620 Connaught Ltd v Canada (Attorney General), 2008 SCC 7 at para 4.
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 (Factum of the Appellant, the Attorney General of Saskatchewan at para 118).

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

62 The Appellants do not seek costs and request that no costs be awarded against them.

PART V -- ORDER SOUGHT

63 The Appellants request that their appeal be allowed and that this Court answer the reference questions as follows:

1) "The *GGPPA* as a whole is *ultra 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"; and,

2) "The fuel charge under Part 1 of the *GGPPA* is *ultra vires* Parliament as both a regulatory charge and tax."

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

[redacted]

[redacted]

[redacted]

Counsel for the Appellants
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PART VI -- TABLE OF AUTHORITIES

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PART VII -- LEGISLATION AT ISSUE

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

PROVISION(S) AT ISSUE	Paragraph No.
Part 1 – Fuel Charge (ss 3–168).	12
Part 2 – Industrial Greenhouse Gas Emissions (ss 169–261).	13

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