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 # 2022-12

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 The largest threat to the health and livelihood of Canadians is climate change. Greenhouse gas (GHG) emissions are the most significant contributing factor to increasing global temperatures. The devastating effects of climate change know no national or provincial borders and require multilateral and multi-jurisdictional efforts to combat. Canadians will continue to suffer from the effects of climate change, including forest fires, floods, and the degradation of water resources if we do not change course.

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at paras 8, 11 [*SCC Reference*].

2 Due to the importance of tackling climate change, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (*Act*) to put a price on GHG emissions. The effects of climate change are economically catastrophic to all Canadians. Parliament was correct to enact this legislation to force a behavioral change across Canada.

Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186 ["*Act*"].

3 The Supreme Court of Canada (SCC) correctly held that the *Act* is *intra vires* parliament. The Court correctly characterized the *Act* as legislation creating a national minimum standard of price stringency for GHG emissions with the goal of reducing emissions. The *Act* is classified as a national concern under Parliament's Peace, Order, and Good Governance (POGG) clause of the *Constitution*.

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

4 The SCC properly characterized the fuel charges in Part 1 of the *Act* as valid regulatory charges. The charges are connected to a regulatory scheme and seek to achieve a regulatory purpose by incentivizing behavioural change and innovation in order to reduce GHG emissions. Further, the Respondent agrees with the SCC's conclusion that S. 53 of the *Constitution* is only applicable expressly to taxation. Therefore, the Court should uphold the SCC ruling and dismiss the appeal.

SCC Reference, *supra* para 1 at para 221.

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

5 With respect, the Respondent does not agree with the facts as set out by the Appellants. The Respondent will supplement the Appellants' Statement of Facts, provide a brief overview of

the *Act* in its entirety, and address those facts asserted by the Appellant that are irrelevant to the issues on appeal.

(i) Climate change is detrimental to all Canadians

6 Canada is being disproportionately impacted by climate change, as the temperature has risen in Canada at nearly double the rate of the global average since 1948. The impacts of climate change on Canada are already devastating.

SCC Reference, *supra* para 1 at para 10.

7 Canadian coastal, Indigenous, and northern communities are being impacted particularly hard by climate change. Ocean acidification is changing ecosystems and rising sea levels are changing coast lines. The temperature in the arctic is increasing at three times the global rate and Indigenous nations' traditions are being threatened.

SCC Reference, *supra* para 1 at para 11.

8 Climate change has three notable unique characteristics. Firstly, it is inherently transboundary. Secondly, any province or territory can be impacted by GHG emissions, no matter their actual contribution to emissions. Thirdly, no single province or nation can combat climate change alone.

SCC Reference, *supra* para 1 at para 12.

(ii) Canada's efforts to address climate change are evolving

9 In 2015, Canada signed the *Paris Agreement* recognizing that "climate change represents an urgent and potentially irreversible threat to human societies and the planet and requires the widest possible cooperation by all countries." Canada ratified the *Paris Agreement* in 2016, committing to reduce its GHG emissions by 30 percent below 2005 levels by 2030.

10 In 2016, all the First Ministers signed the *Vancouver Declaration on Clean Growth and Climate Change* ("*Vancouver Declaration*"), committing to "[i]mplement[ing] GHG mitigation policies in support of meeting or exceeding Canada's 2030 target [...] including specific provincial and territorial targets and objectives." The First Ministers further committed to "transition to a low carbon economy by adopting a broad range of domestic measures, including carbon pricing ["GHG pricing"] mechanisms."

Vancouver Declaration on Clean Growth and Climate Change, (3 March 2016) at 1 & 3, online (pdf): *Canadian Intergovernmental Conference Secretariat* <https://itk.ca/wp-content/uploads/2016/04/Vancouver_Declaration_clean_Growth_Climate_Change.pdf.>.

11 GHG pricing is a regulatory mechanism that places a price on GHG emissions to reduce them. Placing a price on GHG emissions can incentivize businesses and individuals to make more environmentally sustainable choices, redirect financial investments and reduce their GHG emissions by substituting carbon-intensive goods for low-GHG alternatives.

SCC Reference, *supra* para 1 at para 16.

12 In 2016, the Federal Government released the *Pan-Canadian Framework on Clean Growth and Climate Change* ("*Pan-Canadian Framework*"), which reaffirmed the principles set out in the *Vancouver Declaration*. The *Pan-Canadian Framework* requires every province and territory to have a GHG pricing system in place by 2018. All provinces and territories except Saskatchewan adopted the *Pan-Canadian Framework* in 2018.

SCC Reference, *supra* para 1 at paras 18, 19.
Pan-Canada Framework on Clean Growth and Climate Change, (2016), online (pdf): *Government of Canada* <https://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf>.

13 Canada's GHG emissions only decreased 3.8 percent between 2005 and 2016. While six provinces and one territory decreased their emissions, their actions were offset by the remaining provinces and territories increasing emissions. Only four provinces had carbon pricing systems prior to the *Act*.

SCC Reference, *supra* para 1 at para 24.

(iii) The *Act* places a price on GHG emissions to create a national minimum

14 The *Act* is composed of four parts and four schedules with only Part 1 at issue in this appeal. Part 1 establishes a fuel charge on producers, distributors and importers of various types of GHG emitting fuels. Part 2 sets out a pricing mechanism for GHG emissions by large industrial facilities. Part 3 allows the Governor in Council (GIC) to make regulations for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land, and Indigenous land in the province, as well as internal waters located in or contiguous to the province. Part 4 requires the Minister of Environment to prepare an annual report on the administration of the *Act* and table it in Parliament.

SCC Reference, *supra* para 1 at para *26*.

15 Together Parts 1 and 2 of the *Act* operate as a federal GHG pricing system which can apply in whole or in part, as a backstop to ensure a comparable approach to GHG pricing across Canada

with increasing stringency over time. Parts 1 and 2 of the *Act* only apply to a province or territory if the GIC determines that their GHG pricing mechanism is insufficiently stringent.

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

16 The Appellants state that "*[a]ll* of Canada's provinces and territories have taken action to address climate change." This may be true but significant actions are needed. The SCC states "[a]t the time the Pan-Canadian Framework was released, *most* of the provinces and territories had already taken significant actions to address climate change" [*emphasis added*].

> Appellants, "Factum of the Appellants, Attorney General of Alberta, Attorney General of Saskatchewan and Attorney General of Ontario," online (pdf): *Environmental Law Moot* <http://moot.willmsshier.com/docs/default-source/default-document-library/team-2022-08---appellants-factum---redacted_2091935-(1).pdf?sfvrsn=13594510_0> at para 5 [*Appellants' Factum*].
> *SCC Reference*, *supra* para 1 at para 23.

17 The Appellants state that the *Act* is mandatory for all provinces. Respectfully, the *Act* is not mandatory. Rather, it merely applies to jurisdictions that fail to enact sufficiently stringent GHG pricing schemes.

> *Appellants' Factum*, *supra* para 16 at para 6.

18 The Appellants state that the *Act* has 2 parts. Respectfully, the appeal only deals with part 1 of the *Act*, but the *Act* itself has 4 parts.

> *Appellants' Factum*, *supra* para 16 at para 7.

19 The Appellants rely on citations from a factum submitted to the SCC and a submission to senate. These are not judicially tested and cannot be considered facts before the court.

> *Appellants' Factum*, *supra* para 16 at paras 8, 9.

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

20 The Respondent does not raise any additional questions. The Respondent submits that the Appellants' first question should be answered in the affirmative, that the *Act* is *intra vires* Parliament's authority to legislate for the POGG of Canada. In response to the second question, the Respondent submits that the fuel charge under Part 1 of the *Act* is a valid regulatory charge and therefore *intra vires* Parliament.

21 The Respondent therefore argues that the appeal ought to be dismissed.

PART III -- ARGUMENT

22 The Respondent submits that the SCC's holding that the *Act* is *intra vires* Parliament should be upheld. First, the Respondent will demonstrate that the SCC correctly characterized the *Act's* pith and substance as establishing a minimum standard of GHG price stringency with a goal of reducing GHG emissions. Next, the Respondent will show that the SCC correctly classified the *Act* as a matter of national concern under POGG.

23 The Respondent will then proceed to the second issue on appeal arguing that the SCC was correct in finding the fuel charge listed in Part 1 of the *Act* is a valid regulatory charge. In the alternative that the Court finds that fuel charges in Part 1 is a tax, the Respondent will establish that the tax is *intra vires* Parliament's authority and is not in violation of s. 53 of the *Constitution*.

24 The Appellants have made several arguments in their factum that are irrelevant to the analysis and/or are not issues on appeal. These should not be taken into consideration. The Respondent has never stated that GHG pricing is the sole method to achieving Canada's GHG emissions reduction goal, rather it was one of the most efficient methods. Further, the ability to trace GHG emissions back to their source has no bearing as to whether there is provincial ability under the national concern test. Also, the Respondent is not attempting to regulate "the environment" as the Appellants have stated, nor the reduction of GHG emissions, rather it is establishing a minimum national standard of price stringency on GHG emissions.

Appellants' Factum, *supra* para 16 at paras 20, 54.
Pan-Canadian Framework, supra para 12 at 7.

25 The Appellants have further asserted that the *Act* disproportionately burdens Indigenous communities. These impacts, while important, are irrelevant to the analysis and should be addressed specifically through Parliament.

Appellants' Factum, *supra* para 16 at paras 9, 24, 38, 39, 83.

A. The SCC Correctly Characterized the *Act's* Pith and Substance as Establishing a Minimum Standard of GHG Price Stringency with the Goal of Reducing GHG Emissions

26 The first steps in the division of powers analysis begins with characterization of the law's pith and substance followed by a classification of the statute or clause under a head of power in the *Constitution*.

R v Morgentaler, [1988] 1 SCR 30 at 40.

27 The pith and substance of the *Act* is "establishing minimum national standards of GHG price stringency to reduce GHG emissions." As outlined in *Canadian Western Bank*, the pith and substance is the dominant "matter" of the legislation as seen through an analysis of the *Act's* "purpose and effects." The purpose of the *Act* is derived by examining both intrinsic evidence, such as the legislation's clauses or preamble, and extrinsic evidence, such as minutes of parliamentary committees or Hansard. Two 'types' of effects are assessed, the legal effects that derive directly from the statute and the practical 'side' effects that flow from the application.

SCC Reference, *supra* para 1 at para 80.
Canadian Western Bank v Alberta, 2007 SCC 22 at paras 25-28.

(i) Intrinsic evidence: the text of the legislation aligns with the proposed purpose as stated by the SCC

28 Firstly, the title of the *Act* exhibits that its purpose is more than mitigating climate change. The Appellants selected a small portion of the long title to try to illustrate their proposed purpose. Respectfully, the entire title is "*An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources.*" This highlights that the goal of the *Act* is to lower emissions <u>through</u> creating a national standard of GHG pricing. The "application of pricing mechanisms" is an essential portion of the title and exhibits what the *Act* seeks to achieve.

Appellants' Factum, *supra* para 16 at para 21.
Act, *supra* para 2 at The Title.

29 The short title, "*Greenhouse Gas Pollution Pricing Act,"* also highlights that the goal of this *Act* is specifically to price carbon.

Act, *supra* para 2 at The Title.

30 Second, the preamble exhibits Parliament's intention to create a national minimum standard for GHG pricing thereby reducing emissions. The preamble details the catastrophic effects of climate change and Canada's commitment to reducing emissions and then situates the *Act* in this context.

Act, *supra* para 2 at Preamble.

31 The preamble states that "it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that [...] greenhouse gas emissions pricing applies broadly in Canada." It also states that the "absence of greenhouse gas emissions pricing in some provinces and a lack of

stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment."

Act, *supra* para 2 at Preamble.

32 The Appellants quote one preambular clause where the government states its intention to uphold its *Paris Agreement* commitments through taking comprehensive action and rely on this as the basis for claiming the purpose of the *Act* is mitigating climate change. However, this is one clause in a lengthy preamble that is focused on the government's more specific intention to create a minimum national pricing scheme for numerous reasons, including meeting *Paris* commitment.

Appellants' Factum, *supra* para 16 at para 20.

(ii) Extrinsic evidence: Parliamentary records detail that the intended purpose was to create a national minimum standard

33 The extrinsic evidence supports a finding that the Act's purpose is to create a national minimum standard for GHG pricing to help reduce emissions. The *Act* was scrutinized during various House of Commons debates and Senate Question periods. In all of these sessions, the Liberal government consistently stated that the *Act's* purpose was to establish a national minimum price on carbon. In the Standing Committee on Finance, Judy Meltzer, stated:

> "In order to ensure that there is a price on carbon across Canada, the benchmark also commits the Government of Canada to develop and implement a federal carbon-pricing backstop system that would apply in any province or territory that requests it or that does not have a carbon-pricing system […] that meets the federal standard."

House of Commons, Standing Committee on Finance. *Evidence*, 42-1, No 146, (25 April 2018) at 5, Judy Meltzer.

34 The goal of the legislation stated in the House of Commons by Jonathan Wilkinson was to create a price stringency that created a national carbon pricing approach. He stated:

> "To ensure that a national pollution pricing system can be implemented across the country, the government promised to set a regulated federal floor price on carbon."

House of Commons, *House of Commons Debates*, 42-1, vol 148, No 294, (8 May 2018) at 19213 [*HOC debate 2018*].

35 The Appellants explain that the broader policy context of the *Act* indicates that GHG pricing was only one of the options that the Federal government could have chosen to adhere to its international agreements, and as a result the purpose of the *Act* must be to read broadly as "to mitigate climate change." This conclusion is respectfully misguided. The fact that the *Act* is only

one of the options that the Federal government could have chosen points to the fact that this choice is integral to the subject matter of the *Act*. As there are many climate change initiatives which try to lower GHG emissions, it is important to precisely delineate the *Act's* subject matter. It is because the *Act* is borne out of those broad policy contexts with many options that it is important to identify the true subject matter of this *Act*.

Appellants' Factum, *supra* para 16 at para 27.

(iii) The legal effects of the *Act* are to create a backstop provision and to reduce emissions, respectively; The Appellants mis-interpret and mis-apply the effects analysis

36 In *Reference re GNDA,* the SCC held that "the legal and practical effects of the law will assist the court in determining the law's essential character." This approach is confirmed in *Reference re Securities Act* where the court explains characterization as an "analysis [that] looks at the *purpose* and *effects* of the law to identify its 'main thrust.'" As a result, courts should assess the effects to assist in the determining subject matter.

Reference re Genetic Non-Discrimination Act, 2020 SCC 17 at para 30 [*GNDA*].
Reference re Securities Act, 2011 SCC 66 at para 64; citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 29.

37 The *Act* operates as a back stopping provision for GHG emissions. It does so by setting minimum prices for GHG emission and by ensuring, through Parts 1 and 2, that this lower threshold only applies in provinces where there is either no GHG pricing, or the pricing does not meet the national standards. The effect is that GHG emissions have a minimum price and that provinces are induced to either develop a system that meets the minimum or be subject to the federal scheme.

38 There are no provisions controlling the production or amount of GHG allowed to be produced. Therefore, the *Act* could have the effect of reducing emissions by placing a cost on emitting, but it is also possible that industries could simply pay the price to continue emitting at current levels. This indicates that the main effect of the *Act* is the pricing as opposed to the reduction of emissions. The reduction of emissions is the hope, the pricing is the effect.

39 The Appellants' discussion of legal effects respectfully, conflates the characterization of the subject matter with the later classification stage. The Appellants contend that the effects of the *Act* are an over delegation of power to the GIC which makes the *Act* outside of its jurisdiction.

This is a matter to be properly dealt with when assessing whether the *Act*, due to its pith and substance, falls within the jurisdiction of parliament, not while addressing the subject matter of the *Act*. Indeed, whether or not the subject matter is within the proper head of power has no bearing on what the subject matter actually is. We therefore address the Appellants' concerns below.

Appellants' Factum, *supra* para 16 at paras 28, 33.

40 If the court accepts the Appellants' understanding of the effects analyzing, the Respondent submits that the delegation of power to the GIC does not change the subject matter of the *Act*.

41 In the alternative that the Appellants' effects are accepted, the argument that the delegation to the GIC is an indication of overreach is not true. Delegation of power being a permissible effect is a settled area of law per the *2018 Securities Reference*. The SCC stated that "the Court has consistently held that delegation such as the one at issue in this case is constitutional." There is no need to relitigate this issue.

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 at para 84.
SCC Reference, *supra* para 1 at para 73.
SCC Reference, *supra* para 1 at para 84.

(iv) The practical consequences of the *Act* are not of concern for this *Act*

42 The SCC indicated that the practical effects in this case are not particularly useful and/or difficult to ascertain because the *Act* has not been in effect for long enough to assess the true 'side' effects. However, the SCC does indicate that any 'side' effects would be minimal as the *Act* allows for flexibility in its application and the *Act* would not apply in any province which has their own act.

43 The Appellants state that "provinces will be unable to regulate large swaths of their own economies," which is respectfully a bold and unsubstantiated claim. The citation to Alberta's SCC factum provided by the Appellants in support of this statement does not exist. We are assuming they meant to cite Alberta's submission to the Court of Appeal. If so, this paragraph does not say that Alberta will be unable to regulate the majority of their economy. It states that the regulation of emissions cannot be uncoupled from the regulation of non-renewable energy industries which are under the provincial head of power.

Appellants' Factum, *supra* para 16 at para 37.
Factum of the Attorney General of Alberta, ABCA, dated Aug 2 2019 at para 251.

44 In any case, the Appellants again conflate the classification stage with the characterization stage. How does inability to regulate go to the subject matter of the *Act?* This argument should be placed under the classification stage, which is where Alberta places it in their factum.

45 Outside of the relevancy issues with this argument, the claim itself is untrue. The Appellants have not demonstrated how a federal backstop would inhibit the regulation of a province's economy.

46 Furthermore, there is no indication that the *Act* will inhibit green technology development. On the contrary, during the House of Commons debates, evidence was provided that "experts around the world agree that carbon pricing is one of the most cost-effective ways to reduce emissions while driving clean innovation." GHG pricing allowing for clean technology development was a main feature of this legislative decision, and that is made clear in the debates.

HOC debate 2018, *supra* para 34 at 19002.

(v) Means may be used in this analysis to provide the true subject matter

47 The Appellants state that "care must be taken to avoid confusing the law's purpose with the means chosen to achieve it." However, *Ward* does not prohibit using the means in the analysis of an act's purpose. In fact, the SCC has stated, that "[i]n some cases … Parliament's choice of means may be so central to the legislative objective that the main thrust of the law, properly understood, is to achieve a result in a particular way."

Appellants' Factum, *supra* para 16 at 18.
SCC Reference, *supra* para 1 at para 42.
Reference re Firearms Act (Can), 2000 SCC 31 at paras 11-12, 15-16 [*re Firearms*].

48 An acts's means has been used by courts to help guide the purpose analysis. For example, in *Crown Zellerbach* the court found that the creation of dumping permits to control marine pollution was the relevant act's purpose. Here, the act did not have the broad purpose of prohibiting dumping because it allowed dumping with a permit. It also did not have the purpose of restricting all marine pollution, just regulating dumping. In other words, the permit was so integral to the act that it could not be separated from the pith and substance.

R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401 at para 18 [*Crown Zellerbach*].

49 Similarly, the *Act* does not have the broad purpose of reducing GHG emissions because there are no restrictions on GHG emissions. The *Act* prices GHG emissions with the goal of

influencing a behavioural change to reduce emissions. The pricing of GHG emissions are so inherent to the *Act* because it is only able to achieve its goal through it.

50 Furthermore, per *Chatterjee,* the pith and substance should ask "[w]hat is the essence of what the law does and how does it do it?" The "how" in this *Act* is so intimately tied to the essence of the law that without it, the entire point of the law was missed. As will be explained below, Parliament set out to create a minimum national pricing scheme and that is what they did.

Chatterjee v Ontario (Attorney General), 2009 SCC 19 at para 16.

(vi) Pith and substance must be defined with precision and the Appellants' proposed characterization is too broad and does not address the main subject matter

51 The purpose of the *Act* as characterized by the Appellants is "to reduce GHG emissions to mitigate climate change.*"* This is not only too vague but incorrect, as it excludes the key component of GHG pricing.

52 The characterization proposed by the Appellants can be a "catch all" subject matter for many different pieces of legislation dealing with emissions. Pith and substance must be described with the utmost precision. As stated in *re AHRA*, a characterization such as "health" or "the environment" is too vague and might exaggerate the extent of the overlap in a jurisdictional issue.

Reference re Assisted Human Reproduction Act, 2010 SCC 61 at para 190 [*AHRA*].

53 Although we agree that precise characterization should not be confused with narrowness, it is a point of law "to identify the pith and substance of the impugned provisions *as precisely as possible*" (emphasis added). The Appellants' cite *GNDA* as an example where the *Act* was defined too narrowly as it only captured the effects on the insurance industry. This mistake of narrow characterizing does not apply to this *Act* for two reasons.

AHRA, *supra* para 52 at para 180.
GNDA, *supra* para 36 at paras 63-65.

54 Firstly, characterizing the *Act* based on the effect on one industry (insurance) is more analogous to characterizing this *Act* as affecting the automotive industry because the *Act* specifies a 'fuel' levy. Capturing the law's subject matter as its effect on only one industry is not determining the true subject matter. This is not the approach the Respondent is proposing. Insurance was too narrow because it missed important effects the *GNDA* sought to achieve.

GNDA, *supra* para 36 at paras 63-65.

55 Secondly, the Appellants state that "'[t]he fact that Parliament's purpose can be stated at multiple levels of generality does not mean that the most general purpose is the true one,' [the SCC] incorrectly assume the reverse to be true." *GNDA* states that the pith and substance "should capture the law's essential character in terms that are as precise as the law will allow." This means that if there are multiple definitions that could be true, the one that is most precise should be used by law.

GNDA, *supra* para 36 at paras 32 and 65.

56 The Appellants' Factum states that "precision cannot mean the narrowest possible definition is correct." The Respondent is not arguing for the narrowest possible definition nor was the SCC.

Appellants' Factum, *supra* para 16 at para 16.

B. The *Act* Should be Classified a National Concern within Federal Jurisdiction under POGG

57 Given the *Act's* pith and substance as establishing a minimum standard of GHG price stringency with the goal of reducing GHG emissions, we now must classify the *Act*. The Respondent submits that the *Act* does not fall under any of the enumerated heads of power under the *Constitution*. The *Act* therefore ought to be classified as a matter of national concern under POGG, rendering it *intra vires* federal jurisdiction.

(i) The *Act* does not fall under the ss. 91 or 92 of the *Constitution*

58 Establishing a minimum national standard of stringency in reducing GHG emissions does not fall under any of the existing heads of power under ss. 92 or 91. The SCC states: "[t]he environment is not an independent matter of legislation under the *Constitution* and [...] is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and certainty." GHG emissions are a narrow matter that fall under the broader scope of the environment.

Friends of the Oldman River Society v Canada (Minister of Transport), 1992 SCR 3 at 64 [*Oldman River*].

59 However, there is no need to proceed through an analysis of the heads of power under ss. 92 and 91 to prove that the matter is of national concern. This has never been part of the national concern test, and there is no principled reason to alter the test at this point.

SCC Reference, *supra* para 1 at para 114.

(ii) The *Act* ought to be considered under POGG

60 POGG ought to be used to classify GHG emissions as a residual power of parliament. POGG is a federal residuary power under s. 91. Therefore, any matter that does not fall under ss. 91 or 92, will be found *intra vires* federal jurisdiction if it can be classified under one of the POGG branches.

Constitution, *supra* para 3 at s 91.

61 The three branches of POGG include matters of national concern, gaps in the existing law, or addressing emergencies. A matter only needs to fit into one category to fall under POGG. GHG emissions are best analyzed as a matter of national concern given their transboundary nature. The SCC has recognized that a "discrete area of environmental legislative power" can be of national concern if the *Crown Zellerbach* test is met.

SCC Reference, *supra* para 1 at para 108.
R v Hydro-Québec, 1997 3 SCR 213, at paras 115 -116 [*Hydro-Québec*].

(iii) Under the POGG analysis, the *Act* satisfies the national concern test as outlined in *Crown Zellerbach*

62 The three-part test to determine a national concern was established in *Crown Zellerbach*. Firstly, this test requires that GHG emissions are either an established national concern or were unknown at the time of federation. Secondly, the matter must have singleness, distinctiveness, and indivisibility from the provinces. Thirdly, there must be provincial inability to address the matter. Finally, the provincial impact must be justified.

Appellants' Factum, *supra* para 16 at para 62.
Crown Zellerbach, *supra* para 48 at paras 33-34.

63 First, reducing GHG emissions through pricing mechanisms meets the first part of the *Crown Zellerbach* test, as it is an issue of established national concern. In *Crown Zellerbach,* Marine pollution was established as a national concern as it is transboundary in nature, predominantly extra-provincial, and has international implications.

Crown Zellerbach, *supra* para 48 at para 37.

64 These characteristics of marine pollution are identical to those of pollution broadly, including GHG emission pollution. Once released into the atmosphere, GHG emissions cannot be contained to their province of origin, instead they naturally disperse into the atmosphere. Similar

to that of chemical pollutants released into the sea, this involves crossing transboundary borders, which provinces are unable to control.

> *Crown Zellerbach*, *supra* para 48 at para 37.
> *Oldman River*, *supra* para 58 at 64.

65 GHG emissions were also unknown at the time of federation. If the Court does not accept that GHG emissions are an established national concern as a form of pollution, the first tenet of the *Crown Zellerbach* test is still met.

66 The *Act* also meets the second tenet of the *Crown Zellerbach* test of singleness, distinctiveness, and indivisibility. These properties are defined as:

> (1) singleness requires that the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute; (2) distinctiveness requires that the matter be one beyond the practical or legal capacity of the provinces because of the constitutional limitation on their jurisdiction to matters "in the Province"; and (3) indivisibility means that the matter must not be an aggregate of matters within provincial competence, but must have its own integrity.

The Appellants mischaracterize this test, when they state "[s]ingleness and distinctiveness mean the matter should be distinct from provincial matters." With respect, the test is more complex than this; singleness addresses the characterization of the matter, while distinctiveness addresses the provinces' capacities.

> *Act*, *supra* para 2 at para 113.
> *Crown Zellerbach*, *supra* para 48 at para 33.
> *Appellants' Factum*, *supra* para 16 at para 63.

67 Singleness exists within the *Act* as, "GHGs are a distinct form of pollution, identified with precision in Schedule 3 to the *Act*. They have known and chemically distinct scientific characteristics." GHG emissions are therefore narrowly defined and represent a distinct category of pollution.

> *Act*, *supra* para 2 at para 114.

68 Distinctiveness exists inherently with GHG emissions, as they are transboundary in nature and flow between provincial boundaries. Provinces cannot practically control GHG emissions leaving or entering their jurisdiction. Further, provinces have no legal authority to regulate GHG emissions entering from other provinces. These limitations exceed the capacity of provinces to effectively regulate GHG emissions and require a national approach to reducing GHG emissions.

69 Indivisibility exists because as previously demonstrated, the matter is not an aggregate of matters that could fit into s. 92 of the *Constitution*. The Appellants claim that indivisibility speaks to the matter itself. This is false; indivisibility does not concern the subject matter of the *Act* itself, but instead concerns provincial competence.

Appellants' Factum, *supra* para 16 at para 64.

70 The Appellants claim that provincial inability cannot be found where the provinces can act to regulate a matter and that "[a] province's decision whether to act together, or to act at all, is a question of policy." This is a false interpretation of the law. Provincial inability is found where there are negative extra-provincial externalities, collective action problems, or 'true inabilities', including legal and practical inabilities. Collective action problems occur when all provinces *can* regulate a matter, but there are issues with cooperation.

Appellants' Factum, *supra* para 16 at para 65.
Crown Zellerbach, *supra* para 48 at para 34.
Sujit Choudry, "Recasting Social Canada: a reconsideration of federal jurisdiction over policy" (2002) 52 UTLJ 163 at 231.

71 Provincial inability is therefore clear since GHG emissions cannot be contained within provincial boundaries and are inherently negative externalities. Further, collective action problems can be demonstrated through Saskatchewan's refusal to join the *Pan Canadian Framework*.

72 Finally, the provincial impact test ensures that "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution." The *Act* has reasonable and ascertainable limits, as it merely applies a national minimum standard to the provinces. Any province that meets this backstop is not subject to the *Act*. The provincial impact is reasonable. Therefore, the *Act* satisfies all tenets of the national concern test outlined in *Crown Zellerbach.* The *Act* is valid as a matter of national concern under POGG.

Crown Zellerbach, *supra* para 48 at para 57.

(iv) The principles 'of subsidiary' and 'federal cooperativism' are not relevant

73 The Appellants erroneously state that the SCC has endorsed the principle of subsidiary for environmental protection. The SCC states, "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added by Justice L'Heureux-Dubé). Limiting GHG emissions is part of environmental

protection broadly. The federal government has the power to regulate environmental matters that fall within its jurisdiction. As GHG emissions are a matter of national concern, the federal government has the power to take action on them.

Appellants' Factum, *supra* para 16 at para 73.
Hydro-Québec, *supra* para 61 at para 127.
114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 at para 3 [*Spraytech*].

74 The Appellants cite *Spraytech* to demonstrate the use of the principle of subsidiary in an environmental context. In *Spraytech* the SCC found it was within a municipality's jurisdiction to legislate on pesticides for the general welfare of its citizens.

Spraytech, *supra* at 73, at para 3.

75 The Appellants' analogy is unhelpful as *Spraytech* addresses the use of pesticides, which travel differently compared to GHG emissions. Pesticides leach into the ground and flow into groundwater, and thus are largely matters of a local and private nature. Contrarily, GHG emissions flow into the atmosphere and are transboundary by nature.

76 The principle of cooperative federalism is also inapplicable to the *Act*, because there are no conflicting policies. The Appellants claim this principle renders the *Act* an intrusion on provincial policies. Neither the principle of cooperative federalism nor the principle of subsidiary is applicable in determining the validity of the *Act*.

Appellants' Factum, *supra* para 16 at para 71.

(v) The 'double aspect doctrine' is not needed in this case but if used, should not be applied narrowly

77 The double aspect doctrine (DAD) can apply in matters of national concern but it is not mandatory. The analysis of national concern shows that the *Act* is a valid exercise of POGG power. The DAD applies where there are two regulations, one in federal and one provincial, in which both levels of government have an equally valid constitutional right to legislate on a specific issue. The DAD is not necessary to make this *Act intra vires*.

Rogers Communications Inc v Châteauguay (City), 2016 SCC 23, at para. 51.

C. The Charges are Valid Regulatory Charges Tied to the Scheme of the *Act*

78 The fuel charges imposed under Part 1 of the *Act* are valid regulatory charges under the *Westbank First Nation v British Columbia Hydro and Power Authority* analysis. *Westbank* sets out the appropriate test in determining the validity of a regulatory charge. This analysis is broken into two steps, step one is to determine if there is a relevant regulatory scheme then step two is to demonstrate a relationship between the charge and the scheme itself. There is a relevant regulatory scheme in place and the charges themselves have a regulatory purpose of altering behavior, thereby meeting both steps set out in *Westbank*.

Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 [*Westbank*].

(i) There is a valid regulatory scheme

79 The *Act* is a valid regulatory scheme. In *Westbank*, the SCC set out a non-exhaustive list of indices of a regulatory scheme:

> (1) a complete, complex and detailed code regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from or causes the need for, the regulation.

The *Act* satisfies all the indices set out in *Westbank* as a regulatory scheme.

Westbank, *supra* para 78 at para 44.
620 Connaught Ltd v Canada (Attorney General), 2008 SCC 7, at para 27 [*620 Connaught*].

80 The fuel charge contained within the *Act* is a complete, complex and detailed code of regulation satisfying the first criteria set out in *Westbank*. This factor was met in *Allard* and *Ontario Home Builders* where the SCC held that the impugned schemes were detailed codes of regulation. The fuel charge under the *Act* provides a detailed code of regulation, establishing who and to what extent the regulations apply, a detailed charge determination per type of fuel, and a framework for the administration of the *Act* including a delegation to the GIC to make regulations in regards to the fuel charge system. The *Act* and the regulations form a complete and detailed scheme to establish minimum national standards of GHG pricing. The Appellants have conceded that Part 1 meets the first criteria set out in *Westbank*, and we submit the first criteria is met.

Allard Contractors Ltd v Coquitlam (District), [1993] 4 SCR 371 at 409.
Ontario Home Builders' Association v York Region Board of Education, [1996] 2 SCR 929 at para 28.
Act, *supra* para 2, at s 17-41, 168(2), 168(3).
Appellants' Factum, *supra* para 16 at para 76.

81 Part 1 of the *Act* has a regulatory purpose that seeks to alter the behaviour of producers, importers and distributors of GHG emitting fuels satisfying the second criteria in *Westbank*. The fuel charge creates a financial incentive to alter their behaviour and to innovate to reduce GHG emissions. The fuel charges place an economic incentive on producers, importers and distributors to decrease their GHG emissions so as to not drive away consumers due to the increasing costs of their product. Therefore, the second criteria set out in *Westbank* is satisfied.

Westbank, *supra* para 78 at para 44.

82 Criteria three of *Westbank* has been satisfied as the costs have been properly estimated. The federal government has estimated the costs of administering the *Act* to be $109 million.

HOC debate 2018, *supra* para 34 at 19014.
Westbank, *supra* para 78 at para 44.

83 There is a sufficient relationship between the regulatory scheme and the fuel producers, importers and distributors satisfying the fourth criteria of *Westbank*. The need to regulate GHG emissions is caused by imports and producers of GHG-emitting fuel. The production, delivery and use of fossil fuels produce emissions, leading to climate change and the need for regulation. The *Act* reduces GHG emissions thereby reducing climate change and its harmful impacts. The connection between fuel producers, importers, distributors, and the *Act* are established and satisfy the fourth criteria.

Westbank, *supra* para 78 at para 44.

(ii) There is a nexus between the fuel charge and the regulatory scheme

84 The relationship between the regulatory scheme and the fuel charge is present. The SCC held in *Westbank* that a relationship exists where: "the revenues are tied to the scheme", or where the charge has "a regulatory purpose, such as the regulation of certain behaviour." The Appellants' state that there must be a "nexus between the regulatory scheme and the revenue collected." There is no requirement that the revenues generated by a charge designed to regulate certain behaviour be tied to the regulatory scheme.

Westbank, *supra* para 78 at para 44.
620 Connaught, *supra* para 79 at para 27.
Appellants' Factum, *supra* para 16 at para 80.

85 The fuel charge achieves its purpose by creating increased costs of carbon-intensive fuels, incentivizing the reduction of their production, importation and distribution. The higher the costs of producing, importing and distributing these fuels, the less economically viable they become.

Parliament sought to alter behaviour by using the fuel charge as a regulatory mechanism to achieve the *Act's* purpose. For a nexus to be established, the revenue generated from the charge does not need to go to the administrative costs of the scheme so long as the charge itself has a regulatory purpose. The charges seek to regulate behaviour providing a sufficient nexus to the scheme. Therefore, the fuel charges under Part 1 are valid regulatory charges.

D. The Charges are Regulatory, Therefore S. 53 Of the *Constitution* does not Need to be Considered

86 The charges in the *Act* are regulatory, not taxes, therefore s. 53 of the *Constitution* is not applicable. The SCC held in *Eurig* that s. 53 does not apply when the fees are not deemed to be taxes. Since the charges are regulatory in nature and not a tax, s. 53 of the *Constitution* need not be considered.

Eurig Estate (Re), [1998] 2 SCR 565 at para 8 [*Eurig*].

E. Even if this Court Finds that Part 1 is a Tax, it does not Violate S. 53 of the *Constitution*

87 Although this argument has not been advanced by the Appellants, even if the Court does not find the fuel charge in Part 1 to be a regulatory charge and instead a tax, we argue in the alternative that the tax is valid and does not violate s. 53 of the *Constitution*. Parliament is not prohibited from delegating control over the details and mechanism of taxation to statutory delegates. The SCC in *The Ontario English Catholic Teachers' Association v Ontario (Attorney General)* held that Parliament has the power to delegate its ability to impose taxes to a delegated body or individual if "express and unambiguous language is used in making the delegation."

The Ontario English Catholic Teachers' Association v Ontario (Attorney General), 2001 SCC 15 at para 74.
Eurig, *supra* para 86 at para 69.

88 Parliament expressly and unambiguously delegated the authority given to the GIC. The *Act* originated in the House of Commons. Parliament had every opportunity to debate the meaning and scope of the GIC's discretion in relation to the *Act*. The exercise of this statutory power remains subject to judicial review. The delegation granted by Parliament does not violate s. 53 of the *Constitution*.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

89 The Respondent does not seek costs and requests that no costs be awarded against Canada.

PART V -- ORDER SOUGHT

90 The Respondent seeks that the appeal be dismissed and that the Court find the *Act* valid under the national concern branch of Parliament's powers to pass laws under POGG and that Part 1 of the *Act* is a valid regulatory charge.

91 In the alternative, if the fuel charges under Part 1 are found to be taxes, the Respondent seeks an order that Part 1 does not violate s. 53 of the *Constitution* and is validly enacted under Parliament's taxation power and Part 2 of the *Act* is a valid enactment under Parliament's powers to pass laws under POGG.

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

[redacted]

[redacted]

[redacted]

Counsel for the Respondent
Attorney General of Canada

PART VI -- TABLE OF AUTHORITIES

Legislation

Secondary Sources

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

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT ATTORNEY GENERAL OF CANADA

TEAM # 2022-12

[redacted]

Counsel for the Respondent,
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