WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2022

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF CANADA)

B E T W E E N:

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

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANTS ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN and ATTORNEY GENERAL OF ONTARIO

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

TEAM #2022-13

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. Governments in Canada are grappling with how to address the global threat of climate change. However, the measures they select must fundamentally respect the *Constitution Act, 1867* ("*Constitution Act*") and the division of powers. The *Greenhouse Gas Pollution Pricing Act* (the "*Act*" or the "*GGPPA*") does not. The *Act*'s intrusion into provincial autonomy is not reconcilable with the division of powers and opens the door for a significant shift in the cornerstone of Canadian federalism.

2. The majority of the Supreme Court of Canada ("the SCC") incorrectly defined the pith and substance of the *GGPPA*. The true pith and substance of the *GGPPA* is to reduce greenhouse gas ("GHG") emissions by putting a price on fuels and on GHG emissions in chosen industries. This characterization acknowledges the role of pricing mechanisms and makes clear the federal purpose is to discriminate between industry and supervise provinces. This formulation avoids the majority's abstract, vague, unhelpful notion of "minimum national standards".

3. The true matter of the *GGPPA* cannot be supported by the national concern doctrine of peace, order and good government ("POGG"), as the matter lacks the required singleness, distinctiveness, and indivisibility. With respect to the indicium of provincial inability provinces are able to address the matter by working together. Additionally, the matter lacks interrelatedness between its intra- and extra-provincial aspects.

4. In determining whether a matter is one of national concern, the scale of the impact analysis functions to prevent federal overreach and protect provincial autonomy. The majority

unnecessarily added judicial discretion to their scale of the impact analysis, and used the "importance" of pricing GHG emissions to justify federal overreach.

5. The matter of the *GGPPA* falls squarely within provincial jurisdiction, and the double aspect doctrine does not apply. The extent to which the federal government infringes provincial autonomy is not within reasonable limits. The *GGPPA* only allows a province to set their own pricing limits at the discretion of what the Governor in Council ("GIC" or "Cabinet") deems "sufficiently stringent".

6. Additionally, the *GGPPA* imposes a levy that is neither a valid tax nor regulatory charge. Though the levy has characteristics of a tax, it is not validly enacted under the taxation power and runs afoul of s 53 of the *Constitution Act*. The levy cannot be considered a regulatory charge, as it lacks sufficient nexus between the collection of the funds and the *GGPPA*'s regulatory purpose.

7. The majority neglected an opportunity to clarify the uncertainty that arises when the required nexus for a regulatory charge relies on the purpose of the charge being inherent in the scheme. While Parliament could constitutionally achieve the *GGPPA*'s goals, the levy imposed by Part 1 of the *GGPPA* extends beyond its constitutional limits.

8. The Attorneys General of Alberta, Ontario, and Saskatchewan (the "Appellants") respectfully submit that the majority of the SCC erred in the following ways: (1) incorrectly formulating the pith and substance of the *GGPPA*; (2) improperly applying the national concern doctrine in a way that runs roughshod over provincial jurisdiction and; (3) incorrectly finding the imposed levy by Part 1 of the *GGPPA* to be a valid regulatory charge, rather than an

unconstitutional tax. The Appellants request the Supreme Environmental Moot Court of Canada allow the appeal and overturn the SCC's decision that the *GGPPA* is constitutionally valid.

B. Statement of the Facts

i. Climate Change

9. Climate change is caused by human activity and poses a serious threat to the future of humanity. GHG emissions are pollutants that drive climate change. Mitigating climate change requires action at the local level given provincial jurisdiction over the human and industrial sources of GHG emissions.

> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*].
> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 2, 4, 12, 24 [*Ref re GGPPA*].

ii. Carbon Pricing Mechanisms

10. Carbon pricing is intended to change behaviour to reduce GHG emissions. Prior to adopting the *Paris Agreement* in 2016, the Canadian provinces and territories agreed to work together on international climate commitments. This culminated in the *Vancouver Declaration* which led to a provincial federal working group report on carbon pricing mechanisms. Several options were outlined in the report, including one that allowed provinces to meet GHG reduction targets with individual policies or mechanisms. The federal government declined to choose that option and instead released its own policy document, the Pan-Canadian Approach. The federal government subsequently passed the *GGPPA*.

> *Paris Agreement,* UN Doc FCCC/CP/2015/10Add1, December 12, 2015.
> *Ref re GGPPA*, *supra* para 9 at paras 15, 17.
> "Vancouver Declaration on clean growth and climate change" (3 March 3016), online: *Canadian Intergovernmental Conference Secretariat* <https://scics.ca/en/product-produit/vancouver-declaration-on-clean-growth-and-climate-change/>.
> "Pan-Canadian Approach to Pricing Carbon Pollution" (3 October 2016), online: *Government of Canada* <https://www.canada.ca/en/environment-climate-change/news/2016/10/canadian-approach-pricing-carbon-pollution.html> ["Pan Canadian Approach"].

11. The GIC can list a province or territory under sections 166 and 189 of the *Act* and has discretion to determine the stringency of provincial pricing standards in their decision to list. The GIC also has discretion to choose the amount of the direct fuel charge in Part 1 as well as amounts relating to the GHG emissions pricing in Part 2. The *GGPPA* enforces the federal government's chosen method of reducing GHG emissions through its backstop scheme.

GGPPA, *supra* para 9, ss 166(2)–(3), 168, 171, 172, 189.

12. The revenue collected under Part 1 of the *GGPPA* pays for a tax credit for individual residents in listed provinces; remaining revenue is directed to hospitals, municipalities, and other groups. However, these individuals and groups are not required to demonstrate any action or commitment towards mitigating climate change or reducing GHG emissions to receive this payment.

GGPPA, *supra* para 9, s 165.
Income Tax Act, RSC 1985, c 1 (5th Supp) s 122.8(6) [*Tax Act*].
Budget Implementation Act, 2018, No 2, 2018, c 27, s 13 [*Budget Act*].
Canada, Department of Finance, "Backgrounder: Ensuring Transparency" (23 October 2018).
Canada, *Ontario and pollution pricing* (11 November 2018).

iii. Procedural History

The Court of Appeal for Saskatchewan

13. The Saskatchewan Court of Appeal found the *GGPPA* to be *intra vires* Parliament. The pith and substance of the *Act* was "the establishment of minimum national standards of price stringency for GHG emissions." The *Act* was constitutional under the national concern doctrine of POGG as a matter of national importance. The dissent deemed the *GGPPA* unconstitutional. The impact on provincial jurisdiction could not be reconciled with the division of powers,

writing that Part 1 of the *GGPPA* was an "unconstitutional exercise of Parliament's taxation power" and *ultra vires* Parliament.

> *Ref re GGPPA*, *supra* para 9 at para 40.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [SKCA *Ref*].

The Court of Appeal for Ontario

14. The Ontario Court of Appeal found the *GGPPA* to be *intra vires* Parliament under the national concern branch of POGG, framing the pith and substance of the *Act* as "establishing minimum national standards to reduce greenhouse gas emissions." It held that the levies were valid regulatory charges. One judge writing in dissent found the *GGPPA* to be unconstitutional as the matter did not meet the test for national concern. The provincial impact was too significant to be reconciled with the division of powers.

> *Ref re GGPPA*, *supra* para 9 at paras 41, 42.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

The Court of Appeal of Alberta

15. The Alberta Court of Appeal found the *GGPPA* to be *ultra vires* Parliament. It held the pith and substance of the *Act* was the regulation of GHG emissions. Further, the matter falls under the provincial heads of power in sections 92A, 92(2), 92(10), 92(13) and 109 of the *Constitution Act*. The Court found no need for a POGG analysis. The dissent found the *GGPPA* to be valid under the national concern doctrine and the levies to be valid regulatory charges.

> *Ref re GGPPA*, *supra* para 9 at para 45.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.
> *Constitution Act*, 1867, 30 & 31 Vict, c 3, ss 92A, 92(2), 92(10), 92(13), 109 [*Constitution Act*].

The Supreme Court of Canada

16. The SCC found the *GGPPA* to be constitutionally valid under the national concern doctrine, in pith and substance of "establishing minimum national standards of GHG price stringency to reduce GHG emissions." The SCC considered the levies valid regulatory charges. Côté J's partial dissent agreed with the majority's national concern analysis, but found the *Act* unconstitutional on other grounds. Brown and Rowe JJ dissented in full.

Ref re GGPPA, *supra* para 9 at paras 57, 222, 304, 459.

PART II -- QUESTIONS IN ISSUE

17. Leave to appeal has been granted on the following two issues:

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?

18. The Appellants submit that the answer to both of these questions is no.

PART III -- ARGUMENT

A. The true pith and substance of the *GGPPA* is to reduce GHG emissions by putting a price on fuels and on GHG emissions in chosen industries.

19. To determine the pith and substance of a piece of legislation a court must examine its purpose as well as its legal and practical effects. In doing so, it may consider both intrinsic and extrinsic evidence. The test is not formalistic. The evidence shows that the true pith and substance of the *GGPPA* is to reduce GHG emissions by putting a price on fuels and on GHG emissions in chosen industries.

R v Morgentaler, [1993] 3 SCR 463 at Part B1, JE 93-1654 [*Morgentaler*].

20. The majority of the SCC made two major errors in their framing of the *GGPPA's* pith and substance. They defined the pricing mechanisms overly broadly by failing to differentiate between the impacts of Part 1 and Part 2 of the *Act*, and they included the concept of "minimum national standards", which artificially creates federal jurisdiction over the matter.

Ref re GGPPA, supra para 9 at para 57.

Intrinsic Evidence

21. The preamble of the *GGPPA* provides evidence of the mischief that the *GGPPA* is intended to address. Determining the mischief an enactment seeks to address is one way of identifying its pith and substance.

Reference re Firearms Act (Can), 2000 SCC 31 at para 21.

22. The first four paragraphs of the *Act's* preamble address GHG emissions and the impacts of climate change. The next four paragraphs address Canada's international commitments and the international importance of the issue. The remaining paragraphs speak to the importance of GHG emissions pricing mechanisms in addressing climate change and of concerns about a "lack of stringency in some provincial greenhouse gas emissions pricing systems".

GGPPA, *supra* para 9, Preamble at paras 1–16.

23. The potential for a province to exercise its discretion to enact inadequate pricing mechanisms to address GHG emissions is the mischief the *GGPPA* addresses. The *Act's* provisions provide further evidence of this. For example, the GIC can make amendments in Part

2 to make sure that pricing is applied "at levels that the Governor in Council considers appropriate".

GGPPA, *supra* para 9, s 189.

24. Pricing mechanisms are central to the *GGPPA*. Both the *Act's* short title "Greenhouse Gas Pollution Pricing Act" and long title "An Act to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources and to make consequential amendments to other Acts" speak to pricing mechanisms. Further, the focus of both Parts 1 and 2 of the *GGPPA* is the implementation of pricing mechanisms.

Ref re GGPPA, *supra* para 9 at paras 52–53, 58.

Extrinsic Evidence

25. The events leading up to enactment further show that there was a focus on pricing throughout as evidenced in government reports, debates, and policy papers. For example, the Pan-Canadian approach document states that "[c]arbon pricing should be a central component of the Pan-Canadian Framework."

Ref re GGPPA, *supra* para 9 at paras 62–68.
"Pan Canadian Approach", *supra* para 10.

26. Therefore, the *GGPPA*'s pith and substance formulation must include pricing mechanisms. A formulation that excludes pricing mechanisms, such as "reducing GHG emissions", is impractically vague and insufficiently connected to the means of the *Act*. Like "regulating the environment", "reducing GHG emissions" as a pith and substance can fall under

various heads of power depending on the tools used to achieve the result. Overly broad characterizations are unhelpful because they could artificially fit under various heads of power.

> *Ref re GGPPA*, *supra* para 9 at paras 53, 316–317.
> *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3, 88 DLR (4th) 1 at paras 63-64.
> *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 at para 154.
> *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 35.

27. Legal and practical effects are valuable in determining the pith and substance of an enactment. Legal effects can be assessed by examining how the terms of legislation impact the rights and liabilities of its subjects. The *GGPPA* pricing mechanisms in either, both, or neither Part may apply in a province at the discretion of the GIC. This range of legal impacts depends on whether the GIC has listed the province or territory under s 166 for Part 1 and s 189 for Part 2.

> *Morgentaler, supra* para 19 at Part B(2)(a) .
> *GGPPA*, *supra* para 9, ss 166(2), 189(1).

28. Parts 1 and 2 each have pricing mechanisms that operate differently. Part 1 of the *GGPPA* has the principal legal effect of charging for producing, using, or importing GHG producing fuels. The purpose is to change behaviour to reduce GHG emissions. Part 2 has the effect of discriminating between industries through calculating emissions pricing in part based on competition and carbon leakage concerns in order to reduce GHG emissions. Overall, Part 2 allows for industry by industry, province by province regulation of industrial emissions. It requires individual facilities to report and pay for emissions outside of the emissions limit that applies to them.

> *GGPPA*, *supra* para 9, ss 18(1), 19-20, 21(1), 169, 173–174(1).
> *Ref re GGPPA*, *supra* para 9 at para 310.

> "Voluntary participation policy for Output-Based Pricing System" (28 June 2019), online: Government of Canada <https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/output-based-pricing-system/voluntary-participation-policy.html>.

29. Practical effects include an act's real or predicted impact, as well as its social and economic purposes. Evidence confirms the *Act's* supervisory impact which has frustrated provincial legislative efforts to reduce GHG emissions. For example, the *GGPPA* prevented Saskatchewan from realizing its legislative choice to exempt electricity and natural gas transmission pipelines from its emissions pricing mechanism.

> *Morgentaler, supra* para 19 at Part B(2)(a).
> *Ref re GGPPA*, *supra* para 9 at paras 78–79.

30. Finally, both the intention and effect of the *GGPPA* is the supervision of provincial policy. The federal government evaluates the "stringency" of valid provincial legislation based on changing standards and concerns surrounding carbon leakage and competitiveness. If Cabinet deems it necessary, it is empowered to replace a valid provincial enactment with its own law. However, at the SCC the majority's inclusion of "minimum national standards" is particularly unhelpful to the pith and substance formulation because it does not accurately capture the supervisory intention of the federal government.

i. The pith and substance cannot include "minimum national standards".

31. The SCC majority incorrectly included the phrase "minimum national standards" in determining the pith and substance. The phrase could add a convenient federal aspect to any matter within provincial jurisdiction. Only federal standards can be "national" and constitute a "minimum" because only the federal government can enforce legislation nationwide. The doctrine of paramountcy ensures the supremacy of a federal standard. This formulation must be

rejected to preserve provincial jurisdiction over areas exclusively assigned to the provinces under s 92 of the *Constitution Act*, and hence the integrity of federalism and the division of powers themselves.

> *Ref re GGPPA*, *supra* para 9 at para 327.
> *Constitution Act, supra* para 15, s 92.

32. The inclusion of "minimum national standards" as part of the matter of the *GGPPA* is misleading partly because these "standards" are subject to unconstrained executive discretion. The *Act* gives Cabinet the power under Part 1 to set fuel charges and under Part 2 to determine emissions limits and prices. These standards, which are policy decisions about how to most effectively implement pricing mechanisms to reduce GHG emissions, are subject to change. Therefore, "minimum national standards" fails to reliably narrow the legal or practical impact of the *GGPPA*. Policy choices disguised as minimum standards can have as large an impact as the GIC determines desirable. This is especially impactful in Part 2, where the GIC can discriminate between industries.

> *GGPPA*, *supra* para 9, ss 166, 192.

33. The backstop nature of the *Act* is simply a means to supervise the policy choices of provinces. Cabinet reviews the "stringency" of GHG fuel and industry emissions pricing within each individual province. Any provincial enactment intended to address GHG emissions through pricing, no matter how diverse or comparable the resulting system, is subject to complete or partial replacement under the *GGPPA*. Therefore, the undefined "stringency" in sections 166(3) and 189(2) of the *Act* is a shorthand for what the federal Cabinet believes is an effective policy based on its own policy objectives. However, the effectiveness of an enactment is not relevant to determining its pith and substance.

Ref re GGPPA, *supra* para 9 at para 332.
Ward v Canada (Attorney General), 2002 SCC 17 at para 22.

34. In summary, the dominant purpose of the *GGPPA* is to establish a price for fuels and a price for emissions in certain industries determined by carbon leakage and competitiveness concerns. Ultimately, these pricing mechanisms are intended to lower Canada's GHG emissions. Therefore, the pith and substance of the *GGPPA* is to reduce GHG emissions by putting a price on fuels and on GHG emissions in chosen industries. This formulation captures the diverse effects that the *GGPPA* has and could have on provincial jurisdiction and avoids the misleading inclusion of "minimum national standards".

B. The matter of the *GGPPA* cannot be supported by the POGG Power.

35. The POGG power applies "in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." The *GGPPA's* pith and substance cannot fall under the POGG power because it falls fully under provincial jurisdiction over property and civil rights, matters of a local nature within a province, and non-renewable resources. Additionally, the discretion to discriminate between different industries in Part 2 lends support for provincial jurisdiction. Importantly, the backstop nature of the *GGPPA* is premised on the fact that the provinces can enact valid legislation in this area.

Constitution Act, supra para 15, ss 91, 92(13), 92(16), 92A.
Ref re GGPPA, *supra* para 9 at para 342.

36. Further, the matter contains no elements of federal jurisdiction under any other head of power, unlike in *Crown Zellerbach* where the new matter of national concern only slightly extended existing federal jurisdiction to regulated dumping of substances at sea. International

agreements do not create a federal aspect where there is none because the federal government does not possess a treaty implementation power.

> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 at para 1 [*Crown Zellerbach*].

37. Even if this matter *could* fall under the national concern branch of POGG, it fails to do so because it does not satisfy the test for national concern. In *Ref re GGPPA*, the majority mischaracterized the *Crown Zellerbach* test. A matter of national concern must be a new or newly national matter that is singular, distinct, and indivisible (has a degree of unity, is distinct from provincial matters, retains bounds of form), and is reconcilable with the division of powers.

> *Reference re Anti-Inflation Act,* [1976] 2 SCR 373, 68 DLR (3d) 452 at 458 [*Anti-Inflation*].
> *Crown Zellerbach*, *supra* para 36 at para 33.

38. Notably, the threshold question introduced by the SCC majority, "whether the matter is of sufficient concern to Canada as a whole", is an unhelpful addition. The importance of the matter is not relevant to the national concern analysis, nor does it support federal jurisdiction. Many matters of exclusive provincial jurisdiction are important. Further, the distinctiveness portion of the analysis addresses the sub-issue of whether the *GGPPA*'s matter has a national dimension.

> *Ref re GGPPA*, *supra* para 9 at para 142.

i. The matter of the GGPPA lacks the requisite singleness, distinctiveness, and indivisibility to be found a matter of national concern.

39. Reducing GHG emissions by putting a price on fuels and on GHG emissions in chosen industries is not a single, distinct, or indivisible matter and therefore cannot be supported under POGG. The SCC made several errors in applying this portion of the *Crown Zellerbach* test.

40. First, the *GGPPA's* matter is an aggregate of existing areas of provincial jurisdiction. Indivisibility requires that matters of national concern must be residual in that they cannot simply be an aggregate of other powers. Beetz J's influential dissent in *Anti-Inflation* specified that national concern applies to "cases where a new matter was not an aggregate but had a degree of unity that made it indivisible."

> *Anti-Inflation, supra* para 37 at 458.

41. The SCC majority sidesteps indivisibility by finding that it is addressed through two principles. The majority used "minimum national standards" to artificially fulfil the requirement of its first principle that federal jurisdiction should exist only over a matter that is qualitatively different from matters of provincial concern. Without the inclusion of the descriptor "minimum national standards", the majority's pith and substance formulation could not meet this element of the test. The majority's second principle is that indivisibility is addressed by the provincial inability component. Provincial inability is properly considered as an indicia of whether a matter has a "character of singleness or indivisibility". The majority distorted the correct place of this element in the test.

> *Ref re GGPPA*, *supra* para 9 at paras 157–158.
> *Crown Zellerbach*, *supra* para 36 at para 35.

42. To determine provincial inability, a court should "consider … the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter." This determination is about provincial inability to legislate with respect to a matter, not simply the consequences of not doing so. If provincial inability could be shown in cases where a valid exercise of jurisdiction in one province adversely

affected another, it would be so simple to show provincial inability that it would pose a threat to the balance of powers established in ss 91 and 92 of the *Constitution Act*.

> *Crown Zellerbach*, *supra* para 36 at para 33.
> *Ref re GGPPA*, *supra* para 9 at paras 554, 556.
> *Constitution Act*, *supra* para 15, ss 91, 92.

43. Provincial inability cannot be shown here. The matter of the *GGPPA* lacks the required interrelatedness, which constitutes the underlying logic of the relationship between provincial inability and indivisibility. The SCC in *Crown Zellerbach* clarified that "[i]t is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment." In *Crown Zellerbach* interrelatedness existed due to the difficulty in ascertaining whether ocean dumping occurs in provincial or federal jurisdiction. Here, it is easily determined where GHG emissions are released, and provinces have jurisdiction to regulate them. The majority found that grave extra-provincial harm constitutes interrelatedness. However, just as the impact of the dumping in *Crown Zellerbach* did not play a role in establishing indivisibility, grave extra-provincial consequences of GHG emissions cannot do so here.

> *Crown Zellerbach*, *supra* para 36 at paras 35, 38.
> *Ref re GGPPA*, *supra* para 9 at paras 159, 380–282.

44. Further, the failure of one province to price GHG emissions according to the standards of the federal government would not impact another province's ability to achieve Canada's emission reduction goals and mitigate climate change. The US Supreme Court found that "[a] reduction in domestic emissions would slow the pace of global emissions increases, *no matter what happens elsewhere*" (emphasis added).

Massachusetts v Environmental Protection Agency, 549 US 497, at 526.

45. Even if the pith and substance included "minimum national standards", the provincial inability could not be shown. Per *Crown Zellerbach* provincial inability cannot be established simply by a risk of non-cooperation where provinces could address a problem by working together because this would create overlapping jurisdiction. Instead, if a matter falls under POGG the federal government has exclusive and plenary jurisdiction in relation to it. By definition, a matter that includes "minimum national standards", although intended to address the risk of non-cooperation, creates overlapping jurisdiction since it is premised on the existence of provincial jurisdiction. It therefore cannot be used to show provincial inability.

Crown Zellerbach, *supra* para 36 at para 34.

46. In order to avoid improperly emphasizing provincial inability and under-emphasizing interrelatedness, thus confusing future national concern analyses, the test for singleness, distinctiveness, and indivisibility should remain as expressed by the SCC in *Crown Zellerbach*. However, even if this Court adopts the test proposed by the majority of the SCC, neither element is met.

ii. The scale of provincial impact is too great to be reconcilable with the division of powers.

47. The final step of the national concern test is the scale of the impact analysis. This step of the test serves to protect and uphold provincial autonomy. It is a vital component of Canadian federalism and functions to "prevent federal overreach". However, the majority of the SCC's formulation of the analysis *permits* federal overreach. The *GGPPA*'s intrusion into provincial jurisdiction is not reconcilable with the division of powers.

Ref re GGPPA, *supra* para 9 at para 161 quoting S Choudry, *Constitutional Law and the Politics of Carbon Pricing in Canada* (2019), IRPP Study 74, at p 15; *Reference re Securities Act*, 2011 SCC 66 at para 61 [*2011 Securities Reference*].
Crown Zellerbach, *supra* para 36 at para 3.

48. The *GGPPA* has a "clear impact on provincial autonomy", regardless of how important the matter is. As discussed earlier, importance of a matter is irrelevant to the national concern analysis. The majority erred by inputting the provincial inability analysis into the scale of the impact analysis.

Ref re GGPPA, *supra* para 9 at paras 197, 300, 540.

49. The backstop nature of the *Act* does not limit its provincial impact. The majority of the SCC stated that there is a "compelling federal interest" to protect the provinces that cannot protect themselves, referring to a hypothetical outcome if some provinces failed to enact sufficiently "stringent GHG pricing standards." This misconstrues *Crown Zellerbach* and the supporting case law of *Anti-Inflation*. As per *Crown Zellerbach*, a province's decision to enact a different regulatory framework or a lower pricing standard cannot be said to cause a "grave consequence" for other provinces.

Ref re GGPPA, *supra* para 9 at para 198.
Anti-Inflation, *supra* para 37.
Crown Zellerbach, *supra* para 36 at para 32.

50. In *Chatterjee v Ontario (Attorney General)* the Court acknowledged the danger in conflating federal intrusion and future results in the scale of the impact analysis. This intrusion is unacceptable. The provinces have the jurisdiction to do this alone.

Chatterjee v Ontario (Attorney General), 2009 SCC 19 at para 16.
Ref re GGPPA, *supra* para 9 at para 369.

iii. The double aspect doctrine does not apply.

51. *Crown Zellerbach* provides that Parliament has exclusive jurisdiction over matters deemed to be of national concern. The double aspect doctrine has no application in this case, as the matter is exclusively within provincial jurisdiction and therefore cannot be a matter of national concern.

> *Ref re GGPPA*, *supra* para 9 at paras 129, 376–78.
> *Crown Zellerbach*, *supra* para 36 at para 34.

52. According to *2011 Securities Reference*, the double aspect doctrine does not create concurrent jurisdiction. Parliament and legislatures are attempting to legislate on the same aspect of pricing GHG emissions, which Beetz J specifically warned against in *Bell Canada v Quebec*. The double aspect doctrine cannot be invoked when dealing with "the same aspect of the same matter," yet this is exactly what the *GGPPA* proposes to do.

> *2011 Securities Reference*, *supra* para 47 at para 66.
> *Ref re GGPPA*, *supra* para 9 at paras 66, 377–78.
> *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161 at 766.

53. Further, Wagner CJ notes that "the matter's impact on the provinces' freedom to legislate is minimal." Respectfully, this is incorrect. The matter's impact is significant when the province's ability to legislate hinges on federal determinations of stringency.

> *Ref re GGPPA*, *supra* para 9 at para 199.

54. The *GGPPA* permits provinces to enact GHG emission pricing mechanisms *as long as* they fit within limits the GIC deems sufficient. If these limits are not enough, the federal government intervenes. Therefore, the *GGPPA* purports to regulate the exact same matter that provinces can: the pricing of GHG emissions.

55. The majority of the SCC reformulated the national concern test for the purpose of finding the *GGPPA* constitutional. Both the provinces and Parliament are fully capable of mitigating climate change in a constitutional way in their respective spheres of jurisdiction. Determining that the *Act* is constitutional opens the door for future federal intrusion into provincial jurisdiction, and fundamentally undermines Canadian federalism and provincial autonomy.

C. The levy imposed by Part 1 of the *Act* is neither a valid tax nor regulatory charge.

56. Even if the *GGPPA* were constitutional, the levy imposed by Part 1 would be *ultra vires* Parliament. The levy is a tax. The imposed tax cannot be justified under the taxation power, and offends s 53 of the *Constitution Act*. The purpose of the *GGPPA* is not to authorize taxation. In the alternative that the levy is considered a regulatory charge, it is not a valid one.

> *Constitution Act*, *supra* para 15, ss 53, 91(3).
> *GGPPA*, *supra* para 9.
> *Ref re GGPPA*, *supra* para 9.
> *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134, 176 DLR 4th 276 [*Westbank*].

57. The Court missed an opportunity to clarify doctrinal uncertainty when differentiating a tax from a regulatory charge when the charge is inherent within the scheme. The way to apply the *Westbank* framework to a behaviour-modifying charge is not well established in the case law.

> *Westbank*, *supra* para 56.

58. The levy imposed by Part 1 of the *GGPPA* raises revenue, but the collection of the revenue is not specifically connected to mitigating climate change through GHG pricing mechanisms. The *GGPPA* does not require the collected revenue to be spent on reducing GHG emissions to mitigate climate change.

> *GGPPA*, *supra* para 9.
> *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 [*620 Connaught*].

i. The levy does not have the characteristics of a valid tax and offends s 53 of the Constitution Act.

59. *Lawson v Interior Tree Fruit* states that a tax must be: (1) enforceable by law; (2) imposed under legislative authority; (3) levied by a public body; and (4) intended for a public purpose.

> *Constitution Act*, *supra* para 15, ss 53, 91(3).
> *Lawson v Interior Tree Fruit*, [1931] SCR 357, [1931] 2 DLR 193, at 363 [*Lawson*].

60. Section 53 of the *Constitution Act* guarantees the right to "no taxation without representation." It requires not only that the tax is "enforceable by law", but that it is imposed by a public authority for the purpose of the public. This is an important preservation of the rule of law, and a central component of democracy.

> *Constitution Act*, *supra* para 15, s 53.
> *Eurig Estate (Re)*, [1998] 2 SCR 565, 165 DLR (4th) 1 at para 30 [*Eurig*] quoting *Lawson*, *supra* para 59 at 363.
> EA Driedger, "Money Bills and the Senate" (1968), 3 Ottawa L Rev 25 at 41.
> Paul Daly, "Taxes and Charges: Administrative Law Matter (No 3) in the References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11" (29 October 2021), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2021/10/29/taxes-and-charges-administrative-law-matter-no-3-in-the-references-re-greenhouse-gas-pollution-pricing-act-2021-scc-11/>.

61. To ensure that Parliamentary discretion over the taxation power is not circumvented, an act must specifically authorize taxation. Part 1 of the *GGPPA* contains no indication that the legislature intended to impose a tax.

> *GGPPA*, *supra* para 9.
> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 (Factum of the Appellant) [ONCA Factum].

62. The GIC is authorized to set the fuel charges imposed by Part 1 of the *Act*. Section 53 specifically functions to ensure that a tax "shall originate in the House of Commons." It is unconstitutional for Cabinet, rather than the House of Commons, to choose where and how to apply the imposed charge.

GGPPA, *supra* para 9.
Constitution Act, *supra* para 15, s 53.

63. The *GGPPA* functions as a pricing backstop, but allows the executive to use its discretion as to whether a province's pricing mechanism is sufficiently stringent. The executive can use its discretion to widen the *GGPPA*'s scope, eschewing Parliament's input as to whether a province's pricing strategy is sufficient. The *GGPPA* provides the executive with authority and discretion to determine which provinces the charge applies in.

GGPPA, *supra* para 9, s 166(2).

64. The power to set the charge must be within the *GGPPA* and cannot be delegated. Without explicit authorization of taxation, the *GGPPA* runs afoul of s 53 and is therefore unconstitutional.

ONCA Factum, *supra* para 61.

ii. The levy is not a valid regulatory charge.

65. Many levies have characteristics of both a tax and regulatory charge. Establishing whether a levy is a valid tax or regulatory charge requires determining the pith and substance of the charge. The pith and substance is the charge's "dominant or most important characteristic." It is the "primary purpose of the law that is determinative."

Nathalie Chalifour, "Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019) CanLIIDocs 1964 at 245.
620 Connaught, *supra* para 58 at paras 16–17, 24.

66. In *Re: Exported Natural Gas Tax*, the Court held that "a tax is to be distinguished" from a charge that is primarily imposed for "regulatory purposes." Per *Westbank*, a charge is considered a tax if "unconnected to any form of regulatory scheme."

Westbank, *supra* para 56 at para 43.
Re: Exported Natural Gas Tax, [1982] 1 SCR 1004, 136 DLR (3d) 385 at 1070.

67. *Westbank* outlined a two-step approach to determine whether a levy is connected to a regulatory scheme. The first step is to identify the regulatory scheme, of which the non-exhaustive indicia are: "(1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated."

Westbank, *supra* para 56 at para 24.

68. The *GGPPA* does not have a regulatory scheme beyond the imposition of the charge itself. The *Act* does not rely on any detailed code of regulation to carry out its purpose.

SKCA *Ref*, *supra* para 13 at para 278.

69. The second step of the test from *Westbank* requires finding a connection between the charge and the scheme. *Westbank* suggested that a sufficient nexus could be established when a charge inherently has a regulatory purpose. However, the charge imposed by Part 1 does nothing to further the purpose of the *Act*.

Westbank, *supra* para 56 at para 44.
Ref re GGPPA, *supra* para 9 at para 216.
GGPPA, *supra* para 9.

70. Were the revenue collected specifically for the purpose of mitigating climate change and reducing GHG emissions, this step might be satisfied. As it stands the federal government has revealed only a vague indication as to where the collected revenue will be directed, "calculated in the manner determined by the Minister." The *Act* contains no specifics on how the revenue will be spent, and it is therefore impossible to know how it "promotes compliance with the scheme."

GGPPA, *supra* para 9, s 7.
Ref re GGPPA, *supra* para 9 at para 216.

71. While the purpose of the regulation may be to modify or encourage certain behaviours in an attempt to combat climate change, the case law on behaviour modification through a regulatory charge is not well settled. In both *Westbank* and *620 Connaught*, the Court left the question open as to whether revenue collected from a regulatory charge could be used for a general purpose.

> *Westbank*, *supra* para 56 at para 46..
> *620 Connaught*, *supra* para 58 at para 48.

72. The *GGPPA* allows the revenue to be distributed in a general manner. Currently, ninety percent of the revenue from Part 1 are tax credits for residents in specified provinces. The remaining ten percent is paid to "schools, hospitals, colleges, universities, municipalities, not-for-profit organizations, Indigenous communities and small and medium-sized businesses".

> *Ref re GGPPA*, *supra* para 9 at paras 31, 35.
> *Tax Act*, *supra* para 12, s 122.8(6).
> *Budget Act*, *supra* para 12, s 13.

73. No individual or organization in receipt of the tax credit is required to undertake any kind of action to contribute to reducing GHG emissions or mitigating climate change. Any revenue from excess emissions charge payments must also be distributed. The *GGPPA* does not indicate how this distribution will function beyond supporting "carbon pollution reduction." Notably, the *GGPPA* is intended to regulate more GHG emissions than just carbon.

> *Ref re GGPPA*, *supra* para 9 at paras 31, 35.
> *GGPPA*, *supra* para 9, ss 165, 188.

74. The GIC is circumventing a fundamental principle of the *Constitution Act*. There is an insufficient connection between the *Act's* regulatory purpose and the levy. The levy imposed is an unconstitutional tax, with little direction as to where the profits are directed and for what purpose. This is not only outside the scope of the federal government's taxation power, but an

infringement of the constitutional protections afforded by s 53. The levy imposed by Part 1 of the *GGPPA* is neither valid taxation, nor a valid regulatory charge.

> *GGPPA*, *supra* para 9.
> *Constitution Act*, *supra* para 15, ss 53, 91(3).

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

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

PART V -- ORDER SOUGHT

76. The Appellants request that the Supreme Environmental Moot Court of Canada allow this appeal and answer the reference questions as follows: "Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act* are unconstitutional in their entirety."

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

[redacted]

[redacted]

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PART VI -- TABLE OF AUTHORITIES

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

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