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 SASKATCHE-WAN 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 #2022-14

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 There is no dispute that greenhouse gas ("GHG") emissions cause real harms to Canada and present an existential threat to humanity through their contribution to global warming, extreme weather, and climate change. This appeal concerns Parliament's enactment of the *Greenhouse Gas Pollution Pricing Act* (the "*GGPPA*") to respond to the threat GHG emissions pose to Canadians.

2 Parliament has enacted the *GGPPA* to narrowly target this threat and the stringency of GHG pricing nationwide, preventing low or minimal emissions reduction efforts in one jurisdiction from causing climate change harms to the country as a whole. As a backstop measure, the *GGPPA* meets both: (i) the call of international agreements for timely and coordinated action to limit GHG emissions across all jurisdictions; and (ii) the co-operative approach to curbing GHG emissions endorsed by the provinces. In pith and substance, the *GGPPA* **ensures that efforts to reduce Canada's GHG emissions are not nullified by insufficiently stringent GHG pricing mechanisms**.

3 In the decision under appeal, a majority of the Supreme Court of Canada (the "Majority") correctly found that the *GGPPA* was *intra vires* Parliament's power to legislate for the peace, order and good government ("POGG") of Canada regarding matters of national concern. In doing so, the Majority incrementally developed the national concern doctrine building on past jurisprudence. Through its backstop pricing scheme for GHGs, the *GGPPA* satisfies both the doctrinal requirements of national concern, old and new, and addresses a narrow matter of national concern in a manner consistent with Canadian federalism.

4 The Appellants make three fundamental errors in their challenge to the Majority's decision: first, the Appellants' characterization fails to capture the *GGPPA's* essential features; second, the Appellants portray the national concern doctrine as a residual power without any basis in law; third, the Appellants improperly apply the national concern doctrine.

5 Further, the *GGPPA* does not impose a tax. In so claiming, the Appellants ignore the *GGPPA's* backstop nature and mischaracterize it as directly imposing its fuel charge and industrial emissions limits. The backstop demonstrates that the fuel charge is regulatory because its primary purpose is not to raise revenue, but to regulate through influencing behaviour.

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

6 The following additional facts and clarifications are relevant to this appeal.

(i) GHG emissions contribute to climate change, causing drastic harms to Canada and threatening humanity as a whole

7 Climate change poses a grave and existential threat to both Canada and the rest of the world. It is uncontested that GHG emissions must be lowered to effectively address the threat of climate change (RFJ). Nonetheless, the Appellants fail to highlight climate change or the central and dangerous role GHG emissions play in that process. These facts form the urgent and national backdrop to this case.

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

8 GHG emissions — the release of fossil fuels into the atmosphere — trap solar radiation, warming the planet and causing varied harms to climates and people around the world, including increased extreme weather events, disease, and coastline loss. Today, global temperatures are already 1.0 degrees Celsius above pre-industrial levels and expected to rise to 1.5 by 2040.

RFJ, *supra* para (7) at paras 7-9.

9 The harms caused by climate change are uniquely devastating in Canada. Compared to the rest of the world, Canada's temperatures have nearly doubled relative to the global average since 1948. This effect is exasperated in Canada's Arctic, which has experienced temperature increases at nearly three times the global average. Extreme and deadly weather events, disease, and famine will become a permanent reality for Canadians unless drastic action is taken immediately.

RFJ, *supra* para (7) at paras 10-11.

(ii) GHG emissions contribute to climate change harms regardless of origin

10 Climate change harms occur globally, regardless of where GHG emissions originate. Climate change is not constrained by national or provincial borders, and often affects jurisdictions in disproportion to their contribution to GHG emissions. GHG emissions that originate in a particular province, state, or country impact the level of GHG products in the atmosphere as a whole. As a result, collective action is necessary to reduce GHG emissions and the risk to individuals, provinces, and the country.

RFJ, *supra* para (7) at paras 13 and 12.

(iii) International and inter-provincial consensus confirms that stringent GHG pricing schemes are essential to mitigating GHG emissions and climate change harms

11 In 2015, nations around the world came together to fight the existential threat of climate change through the *Paris Agreement*, recognizing climate change as an international and global problem (*Paris Agreement*). Labelling climate change "an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries", signatories committed to keeping global average temperature increase below 2.0 degrees Celsius, ideally 1.5 degrees, through limits on GHG emissions (RFJ).

> *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1 at page 1 [*Paris Agreement*].
> RFJ*, supra* para (7) at paras 13-14.

12 Canada ratified the *Paris Agreement* in 2016, committing to reduce its GHG emissions by 30 percent below 2005 levels by 2030. Prior to this, all provincial First Ministers agreed on that target through the *Vancouver Declaration on clean growth and climate change* (the "*Vancouver Declaration*"), recognizing the importance of a "collaborative approach" with the federal government.

> RFJ, *supra* para (7) at paras 13-14.

13 Soon after, a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms (the "Working Group") found that GHG pricing is the most efficient method to lower emissions. GHG pricing operates as a method to change consumer and industry behaviours by incentivizing them to make more environmentally sustainable choices (Final Report).

> Working Group on Carbon Pricing Mechanisms, "Final Report" (2016) at pages 7-8, online (pdf): Government of Canada [Final Report].

14 The Appellants stress that the Working Group did not require GHG pricing mechanisms for every province (AF). However, the Working Group specifically found that GHG pricing should apply broadly across Canada and at comparable levels of stringency. This was in keeping with international consensus that GHG pricing is essential to reducing global GHG emissions by influencing businesses and developers to redirect their efforts towards low-emission investments (Final Report).

> Appellants' Factum TEAM #2022-11 at para 10 [AF].
> Final Report, *supra* para (13) at page 43.

(iv) The Pan-Canadian Framework is a cooperative and flexible approach to effective GHG pricing nation-wide

15 In 2016, the federal government built on the interprovincial agreements in the *Vancouver Declaration* and the Working Group's final report by publishing the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "*Framework*"). The *Framework* coordinated provincial GHG pricing efforts through a federal benchmark for pricing stringency (*i.e.* a backstop GHG pricing mechanism for jurisdictions with insufficiently stringent pricing mechanisms), while at the same time recognizing provincial sovereignty by allowing individualized pricing mechanisms in every province.

RFJ, *supra* para (7) at paras 17 and 18.

16 This risk has manifested, indicating a federal backstop is necessary. By 2016, emissions in Canada had only dropped by 3.8%, and today, Canada continues to fall short in fulfilling its targets under the *Paris Agreement*. Notably, many of the strides being made by provinces such as Ontario were offset by increasing emissions in Alberta and Saskatchewan, because they had withdrawn or never signed the *Framework*. (RFJ). The Appellants cite a handful of provincial climate policies (AF), but fail to recognize the problem of non-cooperation for what it is: a dangerous threat specific to the country as a whole, necessitating a federal response.

RFJ, *supra* para (7) at paras 19, 24.
AF, *supra* para (14) at paras 17-20.

(v) The *GGPPA* implements Canada's unique backstop role in effective GHG pricing nation-wide

17 The *GGPPA* implements the *Framework* by establishing pricing stringency benchmarks and applying GHG pricing mechanisms only in those jurisdictions with insufficiently stringent provincial benchmarks (RFJ). This is accomplished through the pricing mechanism in Parts 1 and 2 of the *GGPPA*. Part 1 directly prices emissions by applying a charge to listed fuels and their emission, production, or import. Part 2 establishes an output-based pricing system ("OBPS") for specific and large industrial emitters.

RFJ, *supra* para (7) at para 21.

18 The *GGPPA* is limited to serving as a federal backstop, consistent with the national GHG pricing strategy agreed to in the *Vancouver Declaration*. Part 1 specifies that federal fuel charges

apply only when a jurisdiction is listed in the Regulations by the Governor in Council (the "GIC"). Contrary to the Appellants' submission (AF), the GIC's discretion to list a jurisdiction is limited: the GIC can only list or delist a jurisdiction "for the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada" and must "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions". Part 2 applies — and restricts — the OBPS in a similar way (*GGPPA*).

AF, *supra* para (14) at para 101.
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, ss 186, 166, 166(2), 166(3), 189 [*GGPPA*].

19 Contrary to the Appellants' assertion, neither Part 1 nor Part 2 "forces a pricing regime" within any jurisdiction (AF). Provinces are free to create their own mechanisms for GHG pricing as long as those mechanisms are not significantly less stringent than what is sufficient to lower Canada's GHG emissions.

AF, *supra* para (14) at para 16.

20 Parliament's purpose is clear in the preamble to the *GGPPA*. The federal backstop is necessary because, as set out above, the effects of GHG emissions are not defined by any boundary. Climate change affects every part of the country equally without regard to a jurisdiction's proportion of GHG emissions.

GGPPA, supra para (18), Preamble ss 14-16.

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

21 The Respondent's answers to the Appellants' questions in issue are as follows:

(1) The *GGPPA* as a whole is *intra vires* as an exercise of Parliament's jurisdiction to legislate for POGG to address a matter of national concern.

(2) The fuel charge under Part 1 of the *GGPPA* is *intra vires* as:

(a) a valid regulatory charge; or in the alternative,

(b) a valid tax.

PART III -- ARGUMENT

22 The Respondent agrees that the standard of review is correctness (AF).

AF, *supra* para (14) at para 24.

A. Characterization – the Pith and Substance of the *GGPPA*

(i) The *GGPPA*'s pith and substance is ensuring that efforts to reduce Canada's GHG emissions are not nullified by insufficiently stringent GHG pricing mechanisms

23 The pith and substance of a statute is its "main thrust, or dominant or most important characteristic", and is determined from: (i) the statute's purpose, having regard to both instrinsic and extrinsic evidence; and (ii) and the statute's legal and practical effects (*Desgagnés Transport*) (*Kitkala*).

> *Desgagnés Transport Inc. v. Wärtsilä Canada Inc*., 2019 SCC 58 at para 31 [*Desgagnés Transport*].
> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146 at paras 53, 54 [*Kitkatla*].

24 Correctly characterizing the *GGPPA* demands regard for two central features: (i) the *GGPPA*'s 'backstop' role and (ii) the 'mischief' which it addresses. The *GGPPA*'s pricing scheme forms a backstop to ensure that every jurisdiction has a sufficiently stringent mechanism. It targets a specific and narrow mischief: the grave national harms that could occur if a province's pricing scheme is not stringent enough. Building on the Majority's characterization, the Respondent characterizes the *GGPPA*'s pith and substance as **ensuring that efforts to reduce Canada's GHG emissions through pricing are not nullified by insufficiently stringent GHG pricing mechanisms**.

25 The Appellants' characterization fails to have regard for these central features, leading them to make three errors in characterizing the *GGPPA* as "reducing GHG emissions in specific provinces through fuel charges and industrial emission limits". First, the Appellants place undue emphasis on reducing provincial emissions when the goal of the *GGPPA* was to reduce *Canada's* GHG emissions. Second, the Appellants fail to capture the backstop nature of the *GGPPA*, which is essential to its purpose and effects. Third, the Appellants conflate the characterization and classification stages, creating the misleading impression that the *GGPPA* must be under provincial jurisdiction.

AF, *supra* para (14) at para 23.

(ii) The Appellants' characterization places undue emphasis on reducing provincial emissions

26 The Appellants argue that the purpose of the *GGPPA* is "reducing GHG emissions in **specified provinces**" (AF). This ignores the fact that Parliament enacted the *GGPPA* to target **nation-wide** GHG emissions. In the preamble of the *GGPPA*, Parliament stressed the need "to reduce emissions across **all** sectors of the economy" in order to reach Canada's *Paris Agreement* targets (*GGPPA*). Furthermore, the *Framework*, which informed the *GGPPA*, created a plan to reduce Canada's overall GHG emissions. While the *Framework* included a collaborative approach between provincial and federal governments, its goal was to reduce national GHG emissions (Pan-Canadian Framework).

> AF, *supra* para (14) at para 36 (emphasis added).
> *GGPPA*, *supra* para (18) Preamble ss 14-16, (emphasis added).
> Environment and Climate Change Canada, "Pan-Canadian Framework on Clean Growth and Climate Change" (2016) at page 4 online (pdf): Government of Canada [Pan-Canadian Framework].

27 The *GGPPA*'s central aim to ensure sufficiently stringent nation-wide pricing schemes is clear from its preamble. Parliament explains that while several provinces have created their own systems of GHG pricing, some of these mechanisms lack stringency. The consequences of this could be dire, as it would threaten Canada's ability to reach its *Paris Agreement* targets and combat climate change. Therefore, it is necessary to ensure there is a GHG pricing scheme that "applies broadly in Canada" (*GGPPA*).

> *GGPPA*, *supra* para (18) Preamble ss 14-16.

28 In its judgment, the Majority took note of the *GGPPA*'s preamble, which illustrates the 'mischief' which the *GGPPA* addresses: "the profound nationwide harm associated with a purely intraprovincial approach to regulating GHG emissions" and "the effects of the failure of some provinces to implement GHG pricing systems or sufficiently stringent pricing systems, and the consequential failure to reduce emissions across Canada". The Supreme Court of Canada (the "SCC") has identified the mischief as an effective means to determine the purpose of a statute (*Firearms*).

> RFJ, *supra* para (7) at para 61.
> *Reference re Firearms Act*, 2000 SCC 31 at para 21 [*Firearms*].

29 This mischief is a genuine concern. As already noted, in the years since the *Paris Agreement*, reduction in GHG emissions in some jurisdictions has been offset by increased emissions in

others (RFJ). The *GGPPA* addresses this concern by creating a pricing scheme that operates as a backstop. Crucially, the *GGPPA* does not automatically apply in every province. Instead, the *GGPPA*'s application is limited to those provinces whose current mechanism is not sufficiently stringent. The purpose in creating this backstop is to give provinces the latitude to create their own pricing scheme while still ensuring that Canada's national GHG emissions are lowered.

RFJ*, supra* para (7) at paras 23-24.

(iii) The Appellants' characterization does not convey the *GGPPA*'s backstop nature

30 The Appellants attempt to capture the backstop nature of the *GGPPA* in their characterization by referring to fuel charges and industrial emissions limits "in specified provinces" (AF). This clouds the backstop's true nature. The primary legal effect of the backstop is to create a scheme in each province that is comparable in its stringency with the rest of Canada. Any regulations made in relation to the *GGPPA* must take the "stringency of existing provincial mechanisms into account as the primary factor" (*GGPPA*).

AF, *supra* para (14) at paras 35-36.
GGPPA, supra para (18) ss 166, 189.

31 The practical effect of the *GGPPA* is a federal pricing scheme that is limited in its application, allowing for flexibility and support of already-existing provincial pricing schemes. After all, as the Majority notes, "the only thing not permitted by the *GGPPA* is for a province or a territory to not implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent" (RFJ).

RFJ, *supra* para (7) at para 79.

32 The Appellants claim that the primary effect of the *GGPPA* is to regulate a wide range of GHG-enabling and emitting businesses and activities by placing charges on fuels and limits on industrial emitters (AF). This approach emphasizes the means of the legislation, rather than its dominant effect and primary implications. The Appellants' characterization also ignores the fact that the *GGPPA* does not always impose GHG pricing, but always imposes a backstop.

AF, *supra* para (14) at para 36.

33 While past jurisprudence acknowledges that legislative means can be included in an analysis of pith and substance, those means cannot overwhelm the true subject matter of the statute (*Desgagnés Transport*). There must not be "any confusion with the purpose of the statute with the

means to carry out that purpose" (*Ward*). By placing undue focus on the means of the *GGPPA* in examining its effects, the Appellants fail to properly account for the backstop nature of the *GGPPA*. Doing so obscures the true subject matter of the *GGPPA* and leads the Appellants to an untenable characterization.

Desgagnés Transport, *supra* para (23) at para 35.
Ward v. Canada (Attorney General), 2002 SCC 17, [2002] 1 S.C.R. 569, at para 25. [*Ward*].

(iv) The Appellants' characterization conflates the *GGPPA*'s mechanism with its purpose

34 By claiming that the pith and substance of the *GGPPA* is to reduce GHG emissions in "specified provinces", the Appellants have created a matter that appears to be under provincial jurisdiction before going through the classification process. In doing so, the Appellants commit the same error of which they accuse the Majority: conflating the characterization and classification stages (AF).

AF, *supra* para (14) at paras 36, 34.

35 According to the principles in *Chatterjee*, courts should be careful to avoid blurring the characterization and classification stages, or risk analysis that is "overly oriented towards results". It follows that pith and substance should be determined "without regard to head(s) of legislative competence" (*Chatterjee*). This does not mean that the words "national" or "provincial" cannot be used, but rather that their use must be justified by the text. Based on the use of "specified provinces" in the Appellants' characterization, they do not disagree.

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

36 However, the use of "specified provinces" in the Appellants' characterization has no basis in the text of the *GGPPA* (AF). There is negligible evidence for the Appellants' characterization in the *GGPPA*'s purpose, effects, or context. The *GGPPA* clearly addresses national GHG emissions, not provincial. Therefore, the Appellants' characterization makes little sense without keeping the heads of power in mind.

AF, *supra* para (14) at para 36.

37 The Appellants contend, incorrectly, that the Majority conflated characterization with classification by including the term "national" in its statement of pith and substance (AF). The Majority sourced its use of "national" in the *GGPPA*'s text, purpose, and effects, in order to capture the

GGPPA's essential backstop nature (RFJ). The use of "national" by the Majority is justified, while the Appellants' use of "specific provinces" is not.

> AF, *supra* para (14) at para 34.
> RFJ*, supra* para (7) at para 72.

38 The Respondent acknowledges that its characterization departs from the Majority's reference to "minimum national standards". However, this is not because the Majority's characterization conflates the classification stage, but because it is not as precise as it could be. The characterization of a statute is meant to not only reflect what a statute does, but also **why** a statute does what it does (*Pilots*). While minimum national standards describe the form that the backstop takes, the phrase does not convey why Parliament felt that the backstop was necessary.

> *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para 17 [*Pilots*].

39 The second part of the Majority's characterization — "reducing GHG emissions"— also does not convey the 'why' component precisely. It does not answer the question of why Parliament decided that it could not leave it solely up to the provinces to ensure their GHG emissions pricing mechanisms were stringent enough to reduce national GHG emissions. This is the essence of the mischief addressed above, and the reason why the *GGPPA* exists and operates as it does: to ensure that efforts to reduce Canada's GHG emissions are not nullified by insufficiently stringent pricing mechanisms.

B. Classification – the *GGPPA* is Valid Under the National Concern Branch

40 The *GGPPA* is validly enacted under Parliament's POGG power to address matters of national concern. Specifically, as discussed above, the *GGPPA* addresses the matter of **ensuring that efforts to reduce Canada's GHG emissions are not nullified by insufficiently stringent pricing mechanisms** (the "Matter").

41 The Appellants commit a fundamental error when they portray the national concern doctrine as "residual power of last resort" (AF). National concern jurisprudence establishes the doctrine's threshold is met by a matter when it is inherently of national concern.

> AF, *supra* para (14) at para 41.

42 In the decision below, the Majority clarified the existing *Crown Zellerbach* formulation of the national concern test. Validly drawing from past jurisprudence, the national concern test is as follows (RFJ):

(1) Is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?

(2) Singleness, distinctiveness, and indivisibility analysis:

(a) is the matter qualitatively different from matters of provincial concern?

(b) does the evidence establish provincial inability to deal with the matter?

(3) Is the proposed matter's scale of impact reconcilable with the division of powers?

R v Crown Zellerbach,[1988] 1 SCR 401 at 432, 49 DLR (4th) 161 [*Crown Zellerbach*].
RFJ, *supra* para (7) at paras 162-166.

43 The Appellants commit another fundamental error by improperly applying the national concern test. The Matter satisfies both the clarified and earlier formulations of the national concern test because:

(i) the Matter satisfies the threshold inquiry because of climate change's national importance;

(ii) the Matter is qualitatively different from matters of provincial concern;

(iii) the evidence establishes provincial inability to deal with the matter; and

(iv) the Matter has a reconcilable scale of impact.

(i) The national concern doctrine is not a residual power of last resort

44 The Appellants contend that the national concern branch of POGG is a "residual power of last resort" and say that the Majority should have relied on the enumerated classes of section 91 and 92 before looking to POGG and national concern (AF). This position mischaracterizes how and when the national concern doctrine should be applied.

AF, *supra* para (14) at paras 40 and 44.

45 The Appellants' conception of the national concern doctrine has no basis in law. While section 91 specifies that POGG powers apply to matters that are not "assigned exclusively to the

Legislatures of the Provinces", it does not follow that the other heads of power must be examined first. As the Majority noted, the national concern doctrine was not applied in *Crown Zellerbach* and other POGG cases "by way of a two-step search for a jurisdictional vacuum; rather, it applied the national concern test to identify matters of inherent national concern." The purpose of the national concern doctrine is to identify matters that "transcend the provinces" due to the use/purpose of the legislation in question (RFJ). The limiting factors in the classification of a matter as one of national concern are its inherent features, not whether it can first be classified under the other enumerated heads of power.

RFJ*, supra* para (7) at paras 139 and 140.

(ii) The Matter satisfies the threshold inquiry because of climate change's national importance

46 The Appellants' criticism of the threshold inquiry results from a misguided focus on the residual power (AF). In so doing, the Appellants fail to recognize that the Majority's threshold inquiry limits, rather than encourages, adoption of new matters under the national concern branch. It makes explicit the restraint with which the doctrine should be invoked and "operates to limit the application of the national concern doctrine" (RFJ).

AF, *supra* para (14) at paras 38-41.
RFJ*, supra* para (7) at paras 144.

47 The threshold step asks whether the matter which Parliament proposes to be of national concern is in fact "of sufficient concern to Canada as a whole" (RFJ). This inquiry reflects Le Dain J.'s validation of marine pollution in *Crown Zellerbach* because it was "of concern to Canada as a whole" due to its "predominantly extra-provincial as well as international character and implications" (*Crown Zellerbach*).

RFJ, *supra* para (7) at para 144.
Crown Zellerbach, *supra* para (42) at para 37.

48 The Appellants contend that the Majority improperly applied the inquiry by placing undue focus "on carbon pricing's efficacy" (AF). This mischaracterizes the Majority's analysis, which highlighted the **necessity** of GHG pricing measures to fight climate change, not their efficacy (RFJ).

AF *supra* para (16) at paras 40, 45.
RFJ *supra* para (7) at paras 144 and 169-170.

49 In its analysis, the Majority correctly identified that the *GGPPA* addresses a matter of concern to Canada as a whole. It aims to address the serious and existential threat posed to Canada by climate change: "a threat of the highest order to the country, and indeed to the world" (RFJ). The Majority thus recognized the extraprovincial and international character of climate change, which in turn bestows the highest national importance on the matter of GHG pricing stringency.

RFJ, *supra* para (7) at paras 167 and 169.

50 The Majority's analysis clearly satisfies the threshold step. The Respondent's refined characterization of the *GGPPA*'s matter does not alter the analysis because GHG emissions retain their extraprovincial character and international implications.

(iii) The Matter is qualitatively different from matters of provincial concern

51 The Majority clarified past jurisprudence by elucidating the two principles underlying the singleness, distinctiveness, and indivisibility analysis. Under the first principle, courts determine whether a matter is qualitatively different from matters of provincial concern by the following factors (RFJ):

(1) whether or not the matter is predominantly extraprovincial and international in its nature or its effects;

(2) the content of any international agreements in relation to the matter; and

(3) whether or not the matter involves a federal legislative role that is distinct from and not duplicative of that of the provinces.

RFJ, *supra* para (7) at paras 146, 151, 157, 164.

52 Under the first factor, the Matter is clearly extraprovincial and international in nature, because GHG emissions contribute to climate change harms felt across Canada. GHG emissions cross both national and provincial boundaries, and have universally serious environmental effects regardless of emission locale. A province which has insufficiently stringent GHG pricing mechanisms poses great risk outside its jurisdiction (RFJ).

RFJ, *supra* para (7) at paras 10-11.

53 The Appellants suggest the Matter should not be considered distinct and indivisible merely because GHG emissions crosses boundaries (AF). However, this oversimplifies the Majority's

analysis. The Matter is not extraprovincial in character merely because it addresses GHG emissions, which cross borders to affect the provinces collectively. Rather, the Matter is extraprovincial in the sense that it addresses a harm which threatens the country as a whole. A federal backstop – and federal jurisdiction – is necessary because the threat which insufficiently stringent provincial GHG pricing mechanisms pose to provinces is identical to the threat they pose to the country.

AF, *supra* para (14) at para 54.

54 Under the second factor, the *Paris Agreement* supports the Matter's international character, as discussed at paras 11-14, above.

55 Under the third factor, the *GGPPA* is focused on the distinctly federal role of determining if the provinces' pricing mechanisms are sufficiently stringent for Canada to comply with its *Paris Agreement* targets. Crucially, the backstop nature of the *GGPPA* limits its application to the field of GHG pricing. There is a clear distinction between ensuring sufficiently stringent GHG pricing mechanisms are implemented by each province and the pricing mechanisms each province chooses to utilize. Therefore, the *GGPPA* does not aggregate provincial matters nor duplicate their respective GHG pricing systems. Rather, it imposes a backstop to ensure stringency.

56 These distinct roles illustrate that the double aspect doctrine applies, contrary to the Appellants' submission (AF). This doctrine acknowledges that the same fact situations can be regulated from both a provincial and federal perspective (RFJ), allowing for concurrent application of federal and provincial legislation over a single matter (*2011 Securities Reference*). In the modern era of cooperative federalism, the courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government" (*Western Bank*).

AF, *supra* para (14) at para 59.
RFJ, *supra* para (7) at para 125.
Reference re Securities Act, 2011 SCC 66 at para 66 [*2011 Securities Reference*].
Canadian Western Bank v Alberta, 2007 SCC 22 at para 37 (emphasis in original) [*Western Bank*].

57 The Appellants suggest that the provinces regulate the same aspect of GHG pricing as the *GGPPA* (AF). This is untrue, and is only conceivable from the Appellants' erroneous oversimplification of the *GGPPA*. The provinces cannot regulate the *GGPPA*'s narrow aim to address harms to the nation due to insufficient intraprovincial GHG pricing schemes. The *GGPPA*'s backstop does not "artificially separate" (AF) the distinct federal and provincial roles but observes them. Provinces are able to apply unique GHG pricing mechanisms sensitive to the needs and wishes of

their industries and electorates. The *GGPPA*'s backstop operates only to ensure that Canada complies with its nationally determined contribution and reduce the nation-wide risk.

AF, *supra* para (14) at para 60.

(iv) The evidence establishes provincial inability to deal with the Matter

58 Under the second principle, courts determine whether the evidence establishes provincial inability to deal with the matter by the following factors (RFJ):

(1) whether the legislation is of a nature that the provinces jointly or severally would be constitutionally incapable of enacting;

(2) whether the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country; and

(3) whether a province's failure to deal with the matter would have grave extraprovincial consequences.

RFJ, *supra* para (7) at paras 152-153, 157.

59 The first two factors demonstrate that federal jurisdiction over GHG emission price stringency is necessary because the provinces are unable to guarantee Canada will meet its *Paris Agreement* targets and reduce nation-wide risk. While each province can enact legislation to address its own GHG pricing mechanisms, no province or provinces can ensure all mechanisms are **collectively** sufficiently stringent.

60 The Appellants contend that provincial competency to "enact comparable, if not identical" GHG pricing schemes to the *GGPPA* betrays provincial ability (AF) However, this ignores the *GGPPA*'s focus on GHG pricing stringency. No province can address the jeopardy into which effective nation-wide GHG pricing is thrown by another province's insufficient stringency.

AF, *supra* para (14) at para 62.

61 Under the third factor, grave consequences to extraprovincial interests confirm the necessity of federal jurisdiction. As outlined at paras 7-10 above, climate change causes catastrophic interprovincial and international harms. Therefore, an insufficiently stringent GHG pricing scheme in any province threatens Canada and the world.

(v) The Matter has a reconcilable scale of impact

62 The *GGPPA* complements provincial GHG pricing legislation and is analogous to the legislation at issue in the *2018 Securities Reference.*

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 [*2018 Securities Reference*].

63 The Appellants attempt to distinguish that case by arguing that the federal legislation at issue was limited in scope because it addressed "only the regulation of securities firmly in Parliament's jurisdiction" and "was designed to complement provincial legislation regarding the day-day regulation of securities trade" (AF). The *GGPPA* is similarly limited in scope. The *GGPPA* addresses only the stringency of the pricing mechanisms adopted by the provinces. In addition, it is designed to complement the provinces' GHG pricing mechanisms through its backstop.

2018 Securities Reference, supra para (62) at paras 21, 96.
AF, *supra* para (14) at para 70.

64 The Appellants argue that the *GGPPA* grants federal supervisory powers over areas of provincial jurisdiction (AF). However, two key features of the *GGPPA* demonstrate that it observes the "ascertainable and reasonable limits" imposed in *Crown Zellerbach*: its strict focus on GHG pricing stringency, and its operation through a backstop. The *GGPPA* limits its concerns entirely to GHG pricing stringency, leaving provinces to regulate all other aspects of GHG emissions and sources. The backstop imposes a further limit by preventing the fuel charge or emissions cap from applying at all when the provincial mechanism is sufficiently stiringent.

AF, *supra* para (14) at para 71.
Crown Zellerbach, supra (42) at para 39.

65 Both of these limits stem from the fact that the *GGPPA* addresses GHG emissions only insofar as they threaten the country as a whole. The *GGPPA* does not "displace" provincial jurisdiction, nor does it coerce provinces (AF). Provinces are not automatically required to enact the *GGPPA*'s pricing mechanism. The *GGPPA*'s federal pricing scheme will apply within the province only to address the risk posed to the country as a whole. The GIC's discretion surrounding pricing stringency is limited in section 166(3) to conform with the *GGPPA*'s pruposes (*GGPPA*), contrary to the Appellants concerns (AF).

AF, *supra* para (14) at paras 70, 73.
GGPPA, supra para (18) s 166(3).

66 Even to the extent that the *GGPPA* reasonably limits the freedom of provinces to legislate on the sufficiency of their GHG pricing mechanisms, the significance of such limitations is outweighed by the devastating effects of climate change that could result if Parliament was constitutionally unable to regulate the stringency of GHG pricing mechanisms nationwide.

C. The Fuel Charge is *Intra Vires* Parliament as a Valid Regulatory charge

67 The Appellants further challenge the fuel charge under Part 1 of the *GGPPA* (the "Charge") on the basis that it (i) imposes a tax rather than regulatory charge, and (ii) violates s. 53 of the *Constitution Act, 1867* and unspecified "fundamental constitutional principles" (AF). Neither basis withstands scrutiny.

> AF, *supra* para (14) at para 75.

68 The Charge is *intra vires* Parliament as a valid regulatory charge because it satisfies the *Westbank* two-step test. First, the *GGPPA* creates a regulatory scheme; second, the *GGPPA* creates a nexus between the charges imposed and the regulatory scheme. Both the Majority and Brown J. – the only justices who addressed this issue – affirmed these holdings in the court below (RFJ).

> *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 [*Westbank*].
> RFJ, *supra* para (7) at paras 219, 409.

69 Alternatively, even if this court finds that the fuel charge imposes a tax, the *GGPPA* is nonetheless *intra vires* Parliament because it complies with s. 53 of the *Constitution Act, 1867*.

(i) The *GGPPA* creates a regulatory scheme

70 The SCC in *Westbank* established a clear two-step approach to distinguish regulatory charges from taxes: the court must "[1] identify the presence of a regulatory scheme … [2] establish a relationship between the charge and the scheme itself" (*Westbank*). This approach was required because the traditional characteristics of a tax "will likely apply to most government levies" (*Connaught*). The Appellants' comparisons of individual provisions in the *GGPPA* to provisions of tax legislation are therefore unhelpful in determining whether it is a regulatory charge (AF).

> *Westbank*, *supra* para (68) at para 44.
> *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7 at para 23 [*Connaught*].
> AF, *supra* para (14) at para 82.

71 The first stage of the *Westbank* analysis lays out four indicia of a regulatory scheme. Because they are merely indicia, not all are necessary and the list is non-exhaustive. The indicia "include the presence of" (*Westbank*):

(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, where the person being regulated either causes the need for the regulation, or benefits from it.

Westbank, supra para (68) at para 24.

72 The Appellants limit their analysis to these indicia (AF). They ignore the SCC's direction that "it is the *primary purpose* of the law that is determinative" (*Connaught*). Having due regard for the highly contextual and variable nature of regulatory schemes, the primary purpose analysis recognizes that "the central task for the court is to whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; [or] (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme" (*Westbank*).

AF, *supra* para (14) at para 79.
Connaught, *supra* para (70) at para 17 (emphasis in original).
Westbank, *supra* para (68) at para 30.

73 The Charge's primary purpose is regulatory. Specifically, it aims to regulate GHG emissions pricing stringency to influence the behaviour of GHG emitters across Canada and reduce the risks climate change poses to the country.

74 The Appellants maintain the fuel charge has a primary purpose of generating revenue consistent with taxation (AF). This position fails to acknowledge that the fuel charge raises no revenue when provincial schemes are sufficiently stringent. The Chief Justice of the Saskatchewan Court of Appeal observed that the *GGPPA* "could fully accomplish its objectives … without raising a cent" (RFJ-SKCA) because its narrow regulatory aim is GHG pricing stringency, to ensure Canada's efforts to reduce GHG emissions are not nullified.

AF, *supra* para (14) at para 86.
Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 at para 87 [RFJ-SKCA].

75 Regulatory charges may themselves be the means of advancing a regulatory purpose (*Westbank*). In *Jonnie Walker*, imposing customs duties was itself the primary regulatory purpose of the legislation. Levying charges encouraged businesses to import certain products while discouraging the importation of others. Therefore, the act of imposing a levy was itself the primary regulatory measure and the levies were found to be regulatory charges (*Johnnie Walker*). Here, as in *Johnnie Walker*, the *GGPPA*'s primary purpose is to impose charges for the regulatory purpose of influencing behaviour, and the levies are regulatory charges.

> *Westbank, supra* para (68) at para 29.
> *Attorney-General of British Columbia v. Attorney-General of Canada* (1922), 1922 CanLII 47 (SCC), 64 S.C.R. 377 (aff'd 1923 CanLII 426 (UK JCPC), [1924] A.C. 222) [*Johnnie Walker*].

76 The Appellants argue the Charge does not have a primarily behaviour-influencing purpose because it does not charge consumers directly, citing *Cape Breton* (*AF*). In fact, the charge in *Cape Breton* was not levied on consumers directly. Bottle **distributers** paid the charge, which cost was then passed on to retailers and consumers. The charge encouraged consumers to recycle, because they could earn five cents per bottle returned from the revenues generated by the charge on distributors (*Cape Breton*).

> AF, *supra* para (14) at para 83.
> *Cape Breton Beverages Ltd. v. Nova Scotia (Attorney General)*, 1997 CarswellNS 100 (WL Can) leave to appeal to NSCA refused, 1997 NSCA 122 at paras 8, 35, 1997 CanLII 9915 (NS SC) [*Cape Breton*].

77 Properly read, *Cape Breton* confirms regulatory charges may indirectly influence behaviour. The Charge does the same by levying against producers, importers and distributors who will pass the charge on to consumers and influence everyone's behaviour.

78 In addition to satisfying the primary purpose test, all four *Westbank* indicia are met:

(1) the Charge is part of a complete and complex nation-wide GHG pricing scheme, including both Part 2 of the *GGPPA* and provincial GHG pricing legislation;

(2) as discussed, the Charge has the specific regulatory purpose of influencing behaviour to reduce GHG emissions;

(3) the Charge's estimated costs may be derived from the operating costs of the Ministry of National Revenue acting through the Canada Revenue Agency, which administers the Charge; and

(4) there is a relationship between the Charge's regulation and those being regulated, since producers, importers and distributors all create the need for the regulation of pricing, and – as in *Cape Breton* "all members of the public" benefit from the scheme due to the reduced risk of climate change harms (*Cape Breton*).

Cape Breton, *supra* para (76) at para 35.

(ii) The relationship between charge and regulatory scheme inheres in the Charge itself

79 Under the second stage of the *Westbank* analysis, "the court must establish a relationship between the charge and the scheme itself" (*Westbank*).

Westbank, *supra* para (68) at para 44.

80 The SCC commented in *Westbank* that the relationship "will exist 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" (*Westbank*). However, in *Connaught* the SCC noted this question remained open and expressly did not rule on "whether the costs of the regulatory scheme are a limit on the fee revenue generated, where the purpose of the regulatory charge is to proscribe, prohibit or lend preference to certain conduct" (*Connaught*).

Westbank, *supra* para (68) at para 44.
Connaught, *supra* para (70) at para 48.

81 The Charge should not be limited to the costs of administering the *GGPPA*. In *Canadian Broadcasters*, the Federal Court of Appeal validated a federal regulatory scheme whose charges exceeded the costs of the scheme. Concurring, Létourneau J.A. held that the relationship between regulatory charge and purpose was established because the levy itself had a regulatory purpose. The ONCA adopted this point, which the SCC followed (RFJ). *Canadian Broadcasters* demonstrates that the levy of regulatory charges may exceed the scheme's costs.

Canadian Assn. of Broadcasters v. Canada, [2008] F.C.J. No. 672, 2008 FCA 157, [2009], leave to appeal to SCC granted [2008] S.C.C.A. No. 423, appeal discontinued on October 7, 2009, at paras 49, 103 [*Canadian Broadcasters*].
RFJ*, supra* para (7) at para 216.

82 Here, as in *Canadian Broadcasters,* the very imposition of the Charge accomplishes the *GGPPA*'s regulatory purpose. As the Majority observed, "the [C]harge itself is a regulatory mechanism that promotes compliance with the scheme or furthers its objective" (RFJ). To avoid higher prices, GHG emitters will find more efficient ways of emitting fewer GHGs or simply choose not

to emit the GHGs in the first place. The required relationship between regulatory charge and regulatory purpose inheres in the Charge itself, because imposing the Charge itself accomplishes the regulatory goal. This satisfies the second stage of the *Westbank* analysis.

RFJ, *supra* para (7) at para 216.

(iii) The *GGPPA* complies with section 53 of the *Constitution Act, 1867*

83 Even if this court finds that Part 1 imposes a tax, the *GGPPA* complies with s. 53 of the *Constitution Act, 1867* and is therefore *intra vires* Parliament as a valid tax.

84 Section 53 requires that all bills imposing taxes originate in the House of Commons, imposing the limit on Parliament's delegation of the taxing power. The enabling statute must clearly and unambiguously authorize taxation (*Eurig*).

Eurig Estate (Re), [1998] 2 SCR 565 165 DLR (4th) 1 at paras 30, 90 [*Eurig*].

85 The *GGPPA* does not contravene the limits on delegation of the taxing power. The Charge is imposed by the *GGPPA*, not by regulation. The *GGPPA* expressly delegates authority to the GIC to set the rate and list or delist provinces to which the Charge applies at section 166. However, this authority is clearly limited by subection 166(3). The GIC may conduct such action only in accordance with the purpose of the *GGPPA,* preserving the power of the legislation and Parliament over the GIC.

GGPPA, supra para (18) ss 17(1), 18(1), 19(1), 19(2), 21(1), 166.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

86 The Respondent seeks no costs and requests that no costs be awarded against it.

PART V -- ORDER SOUGHT

87 The Respondent seeks the following declaratory orders:

(1) The *GGPPA* as a whole is *intra vires* 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) The fuel charge under Part 1 of the *GGPPA* is *intra vires* as a valid regulatory charge.

88 In the alternative to 87(2), the Respondent seeks a declaratory order that the fuel charge under Part 1 of the *GGPPA* is *intra vires* as a valid tax.

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

Counsel for the Respondent
Attorney General of Canada

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

LEGISLATION

JURISPRUDENCE

OTHER MATERIALS

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

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 #2022-14

[redacted]

Counsel for the Respondent,
Attorney General of Canada

Document #: 2100267