WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2022

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF CANADA)

B E T W E E N:

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

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF CANADA

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

TEAM #2022-15

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 Canada's Position

1 The climate crisis is a dire threat to Canadians and humanity. Increasingly extreme natural disasters due to the climate crisis (e.g., floods, droughts, and fires) are putting serious strain on communities, the environment, and the economy. Canada cannot stand by while the climate crisis accelerates and intensifies. Canada must act to protect communities, the environment, and the economy. Greenhouse gas ("GHG") emissions released through human activity are causing the climate crisis. Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (the "*Act*") to reduce Canada's GHG emissions by creating increasingly stringent national standards for carbon pricing. Canada took a cooperative approach to implementing carbon pricing by consulting with and including the provinces throughout.

2 The Appellants challenge the *Act*'s constitutionality, claiming that it infringes on provincial constitutional powers. However, the Appellants are bringing a political challenge to thwart climate action that will help Canadians, under the guise of a division of powers dispute.

3 The burden of proof is on the Appellants to prove that the *Act* is unconstitutional. Canada submits that the Appellants have not discharged their burden.

4 Canada's position on the first reference question is that the *Act* is constitutional within Parliament's Peace, Order and good Government ("POGG") powers to address a matter of national concern. In the alternative, if this Honourable Court finds that the *Act* does not fall under the national concern branch, Canada argues that the *Act* is constitutional under POGG to address a matter of emergency.

5 Canada's position on the second reference question is that the fuel charges under Part 1 of the *Act* are constitutionally valid regulatory charges.

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

6 Canada substantially agrees with the Appellants' facts in paragraphs 6, 7, and 8 in their Factum, except where otherwise noted.

(i) *Mitigating the national climate emergency will require carbon pricing*

7 Climate change is a dire threat of the highest concern to Canada. The Intergovernmental Panel on Climate Change ("IPCC") concluded that only ten years remain to stop a 1.5 ℃ increase in global temperature that threatens to cause a global extinction-level event (IPCC Special Report).

United Nations Secretary-General António Guterres has said that the IPCC Special Report is "nothing less than a code red for humanity" (UN News). Additionally, on June 17, 2019, the House of Commons declared in a resolution that climate change is both a crisis and a national emergency.

> IPCC, Working Group: Technical Support Unit, *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways* (IPCC, 2019) [IPCC Special Report].
>
> UN News, "IPCC report: 'Code red' for human driven global heating, warns UN chief" (9 August 2021) online: *United Nations* <https://news.un.org/en/story/2021/08/1097362> [UN News].

8 GHG emissions released into the atmosphere by human activity are causing this crisis and the national emergency. Managing GHG emissions is a unique global problem because GHG use releases emissions into the local atmosphere that cross jurisdictional boundaries.

9 In 2021, coastal communities in British Columbia issued a state of emergency twice, once due to extreme heat and once due to extreme flooding (BBC). Climatologists have linked these increasingly severe catastrophes to the climate crisis (BBC). The rise in atmospheric temperature induced by human activity has increased not only the frequency, but the intensity of these natural disasters (BBC).

> BBC News, "Vancouver storm: A state of emergency has been declared in British Columbia" (19 November 2021) online: *British Broadcasting Company* < https://www.bbc.com/news/world-us-canada-59324764> [BBC].

10 The Appellants contribute 70% of Canada's total GHG emissions (Environment and Climate Change Canada). Therefore, one province alone is not capable of reducing emissions enough to meet Canada's commitment to the *Paris Agreemen*t reduction targets (*Paris Agreement*).

> Canada, Environment and Climate Change Canada, *National Inventory Report 1990-2019: Greenhouse Gas Sources and Sinks in Canada: Canada's Submission to the United Nations Framework Convention on Climate Change*, vol 1 (Gatineau: MECC, 2021) at 12 [Environment and Climate Change Canada].
>
> *Paris Agreement*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740 (entered into force 4 November 2016) [*Paris Agreement*].

11 Carbon pricing is a commonly used strategy to reduce GHG emissions. As of December 2021, 45 national jurisdictions have implemented carbon pricing schemes (World Bank).

> The World Bank, "Carbon Pricing Dashboard" (2021), online: *The World Bank* <https://carbonpricingdashboard.worldbank.org> [World Bank].

(ii) ***Carbon pricing is already common across Canada***

12 Most provinces, including Ontario and Alberta, have implemented carbon pricing schemes. At the time the House of Commons completed their first reading of the *Act*, carbon pricing covered nearly 85% of Canada's population and economy (Mascher).

> Sharon Mascher, "Striving for equivalency across the Alberta, British Columbia, Ontario and Québec carbon pricing systems: the Pan-Canadian carbon pricing benchmark" (2018), 18:8 Climate Pol'y 1012 at 1013 [Mascher].

13 In 2008, British Columbia implemented a carbon pricing regime that reduced per capita fuel consumption by more than 16% and by over 19% relative to the rest of Canada (Pedersen & Elgie).

> Thomas F Pedersen & Stewart Elgie, "A template for the world: British Columbia's carbon tax shift" in Larry Kreiser et al, eds, *Carbon Pricing: Design, Experiences and Issues*, (Cheltenham: Edward Elgar Publishing Limited, 2015) at 3, 6 [Pedersen & Elgie].

14 In 2013, Quebec implemented a cap-and-trade carbon pricing scheme.

15 In December 2015, Canada and 194 other countries adopted the *Paris Agreement* which strengthens the global response to the climate crisis (*Paris Agreement*). Canada committed to reduce GHG emissions by 30% below 2005 levels by 2030 (Environment and Climate Change Canada).

> *Paris Agreement*, *supra* para 10.
>
> Environment and Climate Change Canada, *supra* para 10 at 2.

16 In 2017, the Ontario government implemented a cap-and-trade carbon pricing scheme, which was part of the largest carbon market in North America (Walker). In 2018, the newly elected Ontario government repealed the carbon pricing scheme. The decision to cancel the scheme was objected to by 78.6% of people commenting through the Environmental Registry of Ontario; less than 1% of commenters favoured cancellation (Walker).

> Chad Walker, "Bill 4 and the Removal of Cap and Trade: A Case Study of Carbon Pricing, Climate Change Law and Public Participation in Ontario, Canada" (2020) 33:1 J Envtl L & Prac 35 at 44, 45, 53 [Walker].

17 Alberta's legislature also enacted a carbon pricing scheme. Prior to being elected in 2019, the Alberta premier committed to repealing carbon pricing if elected, "regardless of what conditions the federal government impose[d]" (Trynacity). In May 2019, the newly elected government followed through on this commitment to repeal carbon pricing (Bennett).

Kim Trynacity, "Alberta carbon tax fuels attack ad, fundraising by UCP" *Canadian Broadcasting Corporation* (11 January 2018) online: <https://www.cbc.ca/news/canada/edmonton/carbon-tax-alberta-ndp-united-conservative-party-1.4481776> [Trynacity].

Dean Bennett, "Jason Kenney says Alberta didn't prep carbon tax fallback plan, was hoping to win in court" *Canadian Broadcasting Company* (26 March 2021) online: <https://www.cbc.ca/news/canada/edmonton/alta-carbon-tax-1.5965871> [Bennett].

18 Saskatchewan did not have a carbon pricing scheme in place prior to Parliament passing the *Act*.

19 The *Vancouver Declaration on Clean Growth and Climate Change* ("*Vancouver Declaration*") and the Working Group on Carbon Pricing led to the adoption of the *Pan-Canadian Framework on Clean Growth and Climate Change* (the "*Framework*") in 2016 (*Vancouver Declaration*, *Framework*). Canada developed the *Framework* in collaboration with all provinces and territories. The benchmark emphasizes carbon pricing as a foundational element of Canada's approach to fighting climate change (*Working Group Final Report*). The *Framework* ensures "that carbon pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time to reduce GHG emissions" (*Framework*). Alberta and Ontario both signed on to the *Framework*, including the carbon pricing provisions, but subsequently renounced their endorsement of carbon pricing.

Canadian Intergovernmental Conference Secretariat, *Vancouver Declaration on clean growth and climate change* (Vancouver: 3 March 2016) [*Vancouver Declaration*].

Canada, *Pan-Canadian Framework on Clean Growth and Climate Change* (2016) at 50 [*Framework*].

Canada, *Working Group on Carbon Pricing Mechanisms: Final Report* (2016) [*Working Group Final Report*].

(iii) The lagging response of Alberta, Ontario, and Saskatchewan to the national climate emergency creates the need for a national benchmark

20 Ontario's climate targets are going in the wrong direction. Ontario's previous government set an ambitious 2030 GHG emissions target of a 37% reduction in GHG emissions from 1990 levels; meaning by 2030, Ontario's GHG emissions would be just 115 Mt CO_2e (Environmental Commissioner of Ontario). The current Ontario government has set an unambitious 2030 target of 143 Mt CO_2e (Office of the Auditor General of Ontario).

Ontario, Environmental Commissioner of Ontario, *Ontario's Climate Act From Plan to Progress: Annual Greenhouse Gas Progress Report 2017* (Toronto: Environmental Commissioner of Ontario, 2018) at 83 [Environmental Commissioner of Ontario].

Office of the Auditor General of Ontario, News Release, "Province's Plan to Address Climate Change Not Yet Supported by Sound Evidence: Auditor General" (3 December 2019) online (pdf): < https://www.auditor.on.ca/en/content/news/19_newsreleases/2019news_v2_3.00.pdf> [Office of the Auditor General of Ontario].

21 Since the election of Ontario's current government, Ontario's GHG emissions have increased. In 2017, Ontario's GHG emissions were 159 Mt CO_2e but increased to 163 Mt CO_2e for both 2018 and 2019 (Environment and Climate Change Canada).

Environment and Climate Change Canada, *supra* para 10 at 12.

22 Alberta has not set 2030 GHG emissions reductions targets (Office of the Auditor General of Canada).

Canada, Office of the Auditor General of Canada, *Perspectives on Climate Change Action in Canada: A Collaborative Report from Auditors General: March 2018*, online: <https://www.oag-bvg.gc.ca/internet/English/parl_otp_201803_e_42883.html> [Office of the Auditor General of Canada].

23 Further, Alberta's annual GHG emissions increased from 2017 to 2019. Alberta's emissions were 271 Mt CO_2e in 2017, but then increased in 2018 to 272 Mt CO_2e and again in 2019 to 276 Mt CO_2e (Environment and Climate Change Canada).

Environment and Climate Change Canada, *supra* para 10 at 12.

24 Saskatchewan has also not set any 2030 GHG emissions reductions targets (Office of the Auditor General of Canada).

Office of the Auditor General of Canada, *supra* para 22.

25 Further, Saskatchewan's annual GHG emissions have not decreased significantly between 2017 to 2019. Saskatchewan's GHG emissions were 76 Mt CO_2e in 2017 (Environment and Climate Change Canada). Saskatchewan's GHG emissions stayed steady at 76 Mt CO_2e in 2018 and were slightly lower at 75 Mt CO_2e in 2019 (Environment and Climate Change Canada).

Environment and Climate Change Canada, *supra* para 10 at 12.

(iv) ***The* Greenhouse Gas Pollution Pricing Act**

26 Parliament enacted the *Greenhouse Gas Pollution Pricing Act* in June 2018 to reduce Canada's GHG emissions and to meet Canada's international obligations under the *Paris Agreement* (*Act*).

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

27 The *Act* creates a backstop, ensuring all provinces and territories at minimum meet a certain standard. The backstop avoids carbon leakage, wherein high-carbon industries relocate operations to non-regulated jurisdictions to avoid charges. Provinces and territories are entitled to set more ambitious pricing if they choose.

28 The federal government rebates roughly 90% of revenue from the carbon levy directly towards families and individuals (Government of Canada). The federal government invests revenues from the carbon levy not returned to individuals into the revenues' jurisdiction of origin (Government of Canada). The federal government also returns revenues generated from the output-based pricing system to the jurisdiction of origin (Government of Canada).

> Government of Canada, "How we're putting a price on carbon pollution" (28 June 2019), online: *Government of Canada* < https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html> [Government of Canada].

(v) *The Supreme Court of Canada found the Act constitutional*

29 Appellants challenged the *Act*'s constitutionality at their respective courts of appeal. Both the Ontario and Saskatchewan courts of appeal found the *Act* constitutional.

30 The Supreme Court of Canada ("SCC") Majority found the *Act* constitutional in whole, under the national concern branch of POGG (SCC Decision). The Majority defined the *Act*'s pith and substance as "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (SCC Decision).

> *References Re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 151, 57 [SCC Decision].

31 The Majority determined the *Act* imposed levies that are regulatory charges (SCC Decision). The Majority further determined the regulatory charges do not offend s 53 of the *Constitution Act, 1867* (SCC Decision).

> SCC Decision, *supra* para 30 at para 219.

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

32 Canada's position is that the *Act* is within Parliament's POGG powers as follows:

a) The whole *Act* is constitutional as a matter of national concern under POGG.

b) In the alternative, if the Court finds that the national concern branch does not apply, the whole *Act* is constitutional as a matter of national emergency under POGG.

33 Additionally, Canada's position is that the fuel charge under Part 1 of the Act is a constitutionally valid regulatory charge. Section 53 of the *Constitution Act, 1867* does not apply because the fuel charge is a regulatory charge.

PART III -- ARGUMENT

34 In cases where there is a challenge to a statute's validity, the burden of proof is on the party challenging the statute's validity. Constitutionality is the presumption when courts determine a statute's validity (Hogg). Therefore, the burden of proof in the present case is on the Appellants. Canada submits that the Appellants have not discharged their burden.

> Peter Hogg, *Constitutional Law of Canada: 2020 Student Edition* (Toronto: Thomson Reuters, 2020) at 15-23 [Hogg].

35 In reply to the first question posed by the Appellants, Canada submits that the *Act*, in its entirety, is constitutional under Parliament's jurisdiction to legislate under POGG to address a matter of national concern.

36 First, to determine that the *Act* is within Parliament's jurisdiction, Canada will show the *Act*'s pith and substance is not within enumerated provincial heads of power.

37 Second, Canada will demonstrate the *Act*'s constitutionality under the national concern branch of POGG.

38 Third, Canada will demonstrate the *Act*'s constitutionality under the emergency branch of POGG.

39 In reply to the second question posed by the Appellants, Canada submits that the fuel charges under Part 1 of the *Act* are constitutionally valid regulatory charges.

40 First, Canada will demonstrate that the fuel charges in Part 1 of the *Act* are regulatory charges, not taxes.

41 Second, Canada will demonstrate that the power delegated to the executive in the *Act* is constitutional.

A. The *Act*'s Pith and Substance is Establishing Minimum National Standards of GHG Price Stringency to Reduce GHG Emissions

42 When undertaking a division of powers analysis, the first step is determining the pith and substance of the law. The court must consider the law's purpose and effect to identify the main thrust of the law (*Securities Reference*). The true purpose of the *Act* is establishing minimum national standards of GHG price stringency to reduce GHG emissions.

Reference Re Securities Act, 2011 SCC 66 at para 63 [*Securities Reference*].

43 Canada has clarified the *Act*'s pith and substance to respond to the characterization of the courts below. Nevertheless, the essence of the pith and substance has not changed and remains strictly limited to pricing. In respecting that Parliament's powers under POGG is not plenary, the *Act* prescribes a narrow purpose, specific to minimum national standards of GHG price stringency.

(i) *The* Act*'s purpose is to encourage behavioural change to reduce GHG emissions*

44 The SCC held that courts may determine a law's purpose from intrinsic evidence, such as purpose clauses and the structure of the statute, and extrinsic evidence, such as Hansard and other documentation of the legislative process (*Securities Reference*). The evidence suggests the *Act*'s dominant purpose is to encourage behavioural change to reduce GHG emissions by establishing minimum national standards for GHG price stringency which increase over time.

Securities Reference, *supra* para 42 at para 64.

45 The *Act*'s purpose can be found in the *Act*'s Preamble. The *Act*'s Preamble states that one aim is to trigger "behavioural change that leads to increased energy efficiency, to the use of cleaner energy, to the adoption of cleaner technologies and practices and to innovation." The Preamble further states that "pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to create incentives for that behavioural change." The Preamble also states that "a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to significant deleterious effects on the environment." Finally, the Preamble expresses that "it is necessary to create a federal greenhouse gas emissions pricing scheme to ensure that, taking provincial greenhouse gas emissions pricing systems into account, greenhouse gas emissions pricing applies broadly in Canada."

46 Under the *Act*, the Governor in Council establishes minimum national standards for GHG pricing that act as a backstop to provincial pricing schemes. The backstop ensures price stringency across the country and only applies in a province if the scheme of that provincial government fails to meet the benchmark set by the Governor in Council. Section 168 of the *Act* permits the Governor in Council to make rules on when, how, and whether fuel charges will apply and in which provinces the charges will apply (*Act*). Section 166(3) of the *Act* states that the primary factor the Governor in Council shall consider in deciding whether the fuel charge backstop should apply to a province is the stringency of the province's pricing mechanisms (*Act*). Further, sections 192 and 195 authorize the Governor in Council to establish an output-based pricing system, including who the system will apply to (*Act*). Section 189(2) states that the primary factor the Governor in Council shall consider in deciding whether the output-based pricing system backstop should apply to a province is again the stringency of the province's pricing mechanisms (*Act*).

Act, *supra* para 26 at s 168, 166(3), 193, 195, 189(2).

47 Considering the *Act*'s Preamble and text, the *Act*'s dominant purpose is to encourage behavioural change to reduce GHG emissions by establishing minimum national standards for GHG price stringency that increase over time.

(ii) *The* Act*'s effect is to provide the framework that establishes increasing minimum national standards for carbon pricing schemes to reduce GHG emissions*

48 The SCC held that courts may determine a law's effects from the text's legal effect and the practical consequences of the statute's application (*Securities Reference*). The *Act*'s effect is to provide the framework that establishes increasing minimum national standards for carbon pricing schemes to reduce GHG emissions.

Securities Reference, *supra* para 42 at para 64.

49 Parts 1 and 2 of the *Act* combined, provide a comprehensive carbon pricing scheme across the country that aims to influence the behaviour of consumers and industries, while minimizing the pricing scheme's effects on industries intensively using GHGs. The *Act* only applies in jurisdictions with carbon pricing schemes that are not sufficiently stringent to meet the *Act*'s minimum national standards. Therefore, the *Act* ensures continuously increasing minimum

standards for carbon pricing schemes apply across Canada. Provinces have authority to set higher standards than the *Act* and its associated regulations establish.

50 Therefore, the *Act*'s effect is to provide the framework that establishes increasing minimum national standards for carbon pricing schemes to reduce Canada's GHG emissions.

(iii) *GHG pricing stringency does not fall within provincial jurisdiction*

51 Canada objects to the invalid application of the double aspect doctrine because GHG price stringency is not within provincial jurisdiction. The double aspect doctrine only applies when there is encroachment or intrusion by another level of government. The matter of setting minimum pricing standards does not result in extra-jurisdictional intrusion because the matter does not fall under any enumerated provincial powers. The *Act* does not contravene powers in s 92(10) "local works and undertakings", s 92(13) "property and civil rights", and s 92(16) "matters of a merely local or private nature in the province" (*Constitution Act, 1867*). The *Act* just attaches a price to the emissions released from activities in specific industries. Further, the matter is not local due to the intra-provincial effects and spread of GHG emissions across Canada. The *Act* also does not prohibit any industrial activity from the natural resources sector under s 92A, it simply adds cost, in accordance with the long-standing Polluter-Pays Principle (*Constitution Act, 1867*).

> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 92(10), 92(13), 92(16), 92A [*Constitution Act, 1867*].

52 The Appellants make an unfounded assertion at paragraph 20 of their Factum that "the concept of minimum national standards is a nothing". The Appellants have a misplaced concern over the potential for unfettered, unilateral control by the federal government. The matter in question in this case is narrow: price stringency specific to GHG emissions. Canada would have to support any future assertion of federal legislative authority under the national concern branch by a factual pattern specific to that jurisdictional assertion. The "minimum national standard" characterization is not a path opening the floodgates to overbroad federal jurisdiction.

53 Canada rejects the assertion that the principle of subsidiarity should apply with respect to the national climate emergency. In distinguishing the issue in *Spraytech* concerning the use of a federally regulated pesticide in a municipality, the climate crisis calls for collaboration between all entities in the federation, including the provinces, to foster cooperation for the health and well-being of the nation (*Spraytech*). Hence, in line with the underlying notion of federalism to foster

cooperation between the different levels of government, the *Act* provides for a flexible scheme that enables provinces to tailor their own scheme.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 [*Spraytech*].

54 In summary, the *Act*'s dominant purpose is to encourage behavioural change to reduce GHG emissions by establishing minimum national standards for GHG price stringency that increase over time. The *Act*'s effect is to provide the framework that establishes increasing minimum national standards for carbon pricing schemes to reduce Canada's GHG emissions. Therefore, the *Act*'s pith and substance is establishing minimum national standards of GHG price stringency to reduce GHG emissions. The pith and substance, establishing minimum national standards of GHG price stringency to reduce GHG emissions, does not fall under one of the enumerated federal or provincial powers.

B. The *Act* is Constitutionally Valid Under POGG's National Concern Branch

55 The second step in the division of powers analysis is to determine which head of power the subject matter squarely fits under. The *Act*, and specifically, the matter in question, *establishing minimum national standards of GHG price stringency to reduce GHG emissions,* is a matter of national concern because 1) it is a new matter that concerns the nation as whole, 2) it is single, distinct, and indivisible and wholly different from provincial matters, and 3) the backstop approach minimally impacts provincial jurisdiction.

56 Contrary to the Appellant's assertions in para 34 of their Factum, the federal government should not have used other heads of power, such as criminal law. The national concern branch under POGG remains the least intrusive way to reduce carbon emissions to protect the health, safety, and well-being of Canadians. Therefore, it upholds and respects principles of cooperative federalism by orchestrating a cooperative pricing scheme that promotes the equalization of regional disparities consistent with the Polluter-Pays Principle.

57 Parliament is the only entity that can orchestrate interjurisdictional action between provinces to mitigate the national climate emergency. In *Crown Zellerbach*, the SCC established a framework derived from s 91 of the *Constitution Act, 1867*, to determine whether a law is valid based on the national concern branch (*Crown Zellerbach*). The national concern branch is reserved for matters that transcend provinces owning to their inherently national character (SCC Decision).

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

SCC Decision, *supra* para 30 at para 110.

(i) ***The matter is new and of sufficient concern to Canada as a whole***

58 The first element of the national concern test is the identification of a "new matter". The new matter designation applies to the control of extra-provincial and international GHG emissions. The evidence is conclusive that GHG emissions, regardless of their origin, have potentially catastrophic global and extra-provincial impacts on human health and the environment. As the Ontario Court of Appeal Majority stated, this subject matter is new because "the existential threat to human civilization posed by anthropogenic climate change was discovered" well after Confederation.

59 The SCC Majority, at paragraph 141, held that "historical newness" is irrelevant to this analysis (SCC Decision). Instead, the SCC asked whether the matter's threshold is of sufficient concern to Canada as a whole (SCC Decision). By both standards, the proposed matter: establishing minimum national standards of GHG price stringency to reduce GHG emissions, is critical to addressing the existential threat the national climate emergency poses to human life.

SCC Decision, *supra* para 30 at para 141.

(ii) ***The modernized single, distinct, and indivisible test is correct***

60 The second element; the single, distinct, and indivisible test; demonstrates that price stringency of GHG emissions is an indivisible matter, thereby creating an inability for provincial regulation.

1. Narrow and specific scope of the Act to address GHG pollution

61 For the past 50 years, Parliament has legislated with respect to intra-provincial environmental pollution without impairing provincial authority to legislate. As the SCC found in *Oldman River* and *Hydro-Québec*, environmental pollution is not too broad to be categorized as a matter of national concern if the matter is single, distinct, and indivisible (*Oldman River*, *Hydro-Quebéc*). Price stringency on specific GHG emissions is within federal jurisdiction because GHGs are a readily identifiable, specific, and indivisible group of atmospheric pollutants. Schedule 3 of the *Act* lists the 33 chemical compounds categorized as GHGs. Such pollutants are chemically distinct, locatable, and contribute to the climate crisis.

Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3, 88 DLR (4th) 1 [*Oldman River*].

R v Hydro-Québec, [1997] 3 SCR 213 [*Hydro-Québec*].

2. Provincial inability to regulate GHG emissions exists, and its failure creates systemic risk

62 The singleness, distinctiveness, and indivisibility test; established in *Crown Zellerbach*; has three elements: (1) the legislation should be of a nature that provinces jointly or severally would be constitutionally incapable of enacting; and (2) 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 (*Crown Zellerbach*). The Supreme Court of Canada added a third factor in the SCC Decision: (3) a province's inability to deal with the matter must have grave extra-provincial consequences (SCC Decision).

Crown Zellerbach, *supra* para 57 at 431-432.

SCC Decision, *supra* para 30 at para 146.

63 Canada asserts that provincial failure to impose carbon pricing stringency poses a systemic risk, akin to the financial failures in the *2018 Securities Reference*. In fact, the national climate emergency and its threat to humanity is far more severe than the threat to Canada's financial system (*2018 Securities Reference*). Therefore, it is pertinent, if not imperative for Canada to address the risk of provincial inaction that may "slip through the cracks" due to carbon leakage, by regulating price stringency through establishing minimum national standards.

Reference Re Pan-Canadian Securities Regulation, 2018 SCC 48 at para 96 [*2018 Securities Reference*].

64 Complying provinces can only reduce emissions within their respective boundaries, which collectively make up less than one-third of Canada's total GHG emissions. Therefore, when provinces opt out of the cooperative scheme, it highlights the limitations of a non-binding cooperative approach. Their failure to reduce GHG emissions would disproportionately impact the provinces participating in the cooperative scheme. Further, due to the transboundary nature of their dispersal, GHG emissions do not solely impact their province of origin.

65 Some provinces would suffer the consequences of inaction, with no effective recourse. Canada must mitigate against this risk. The lack of recourse is evident by emergency declarations due to extreme weather events in British Columbia, a province responsible for only 16% of

Canada's GHG emissions. These disproportionate impacts are indicators of systemic risk. When provinces fail to implement effective GHG pricing mechanisms, only Canada can step in to reduce the systemic risks from the national climate emergency.

3. Canada is in the most effective position to address GHG emissions for the country

66 The SCC has repeatedly found environmental matters to be of national concern due to their serious global impacts. In *Ontario Hydro*, the court held that the regulation of atomic energy is a matter of national concern because "it is predominantly extra-provincial and international in character and in implications" (*Ontario Hydro*).

> *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 379, 107 DLR (4th) 457 [*Ontario Hydro*].

67 In *Crown Zellerbach*, the SCC held that "marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole" (*Crown Zellerbach*). Similarly, GHGs are international in character and their implications: they are an international problem affecting the atmosphere, a global commons, that requires international coordination, as evidenced by numerous international agreements. The *Paris Agreement*; targeting the specific problem of GHG emissions; is strong evidence that it is a single, distinct, and indivisible matter.

> *Crown Zellerbach*, *supra* para 57 at 436.

68 In *Interprovincial Co-operatives*, the SCC held that Parliament has jurisdiction over interprovincial water pollution, analogous to interprovincial atmospheric pollution (*Interprovincial Co-operatives*).

> *Interprovincial Co-operatives Ltd v R,* [1976] 1 SCR 477 at 511-515 [*Interprovincial Co-operatives*].

69 In *Canada Metal*, the Manitoba Court of Queen's Bench held that the control of extra provincial and international air pollution fell within the POGG power, in upholding the federal *Clean Air Act* (*Canada Metal*).

> *Re Canada Metal Co and The Queen*, 144 DLR (3d) 124, 1982 CanLII 2994 at paras 16-18 [*Canada Metal*].

4. Grave extra-provincial consequences if there is provincial inaction

70 The Majority in the SCC Decision held that every emission of GHGs, no matter how minor, contributes to the national climate emergency (SCC Decision). The climate crisis' global nature

weighs in favour of finding provincial inability because it is a problem that no single province acting alone can address effectively. The provincial failure to regulate GHGs would have significant impacts on other provinces and other countries. Canada will fail to meet its international climate obligations, such as the *Paris Agreement* in face of provincial inaction.

SCC Decision, *supra* para 30 at para 189.

(iii) ***The Act supports cooperative federalism and has minimal impact on provinces***

71 Third, the scale of impact test intends to balance the impugned objectives while minimizing the impacts on provincial jurisdiction as much as possible. Canada is only doing what the provinces cannot do on their own. Inaction triggers the federal scheme. The *Act* minimally impacts provincial jurisdiction by allowing for scheme design flexibility and redistributing the revenues back to the provinces of origin.

1. The backstop approach allows for cooperative federalism

72 Constitutional coordination between levels of government is long accepted under the *Constitution Act*, *1867* for matters within shared federal-provincial jurisdiction, such as the environment. The backstop approach allows provinces to tailor carbon pricing schemes to their needs, minimizing adverse impacts on their jurisdiction through design flexibility. Alberta and Ontario had functioning carbon pricing schemes prior to their repeal. An approach where provinces address a matter that also falls within federal jurisdiction is consistent with the well-established double aspect doctrine.

73 When developing the *Framework*, Canada took a cooperative approach, by consulting with the provinces multiple times to obtain meaningful feedback on the carbon pricing schemes. The federal government afforded the provinces latitude to develop their own schemes up to the point the schemes are insufficient to meet GHG reduction targets and thereby create systemic risk. The federal-provincial consultations demonstrate a cooperative approach to accommodate the varying needs of provinces.

2. The provinces benefit from the carbon pricing scheme

74 Canada returns all revenues from the carbon pricing scheme to the provinces of origin, affording provinces opportunities to develop innovative strategies to mitigate the climate crisis in addition to a market-based approach (*Act*). The Appellants have not suggested any alternative

method to reduce their GHG emissions despite rejecting the economically sound and ecologically effective carbon pricing approach. Research from Canada's Ecofiscal Commission indicates that an effective pricing strategy has the lowest cost of the various methods to reduce carbon emissions (Ecofiscal Commission).

> *Act*, *supra* para 26 at s 165(2), 188(1).
>
> Dale Beugin et al, "Clearing the air: how carbon pricing helps Canada fight climate change" (4 April 2018), online (pdf): *Canada's Ecofiscal Commission* <http://ecofiscal.ca/wp-content/uploads/2018/04/Ecofiscal-Commission-Carbon-Pricing-Report-Clearing-the-Air-April-4-2018.pdf> [Ecofiscal Commission].

75 In conclusion, the *Act*, in its entirety, is constitutional under Parliament's jurisdiction to legislate under POGG to address a matter of national concern. Provincial inability exists in face of inaction. Therefore, the federal government must mitigate existential risks to humanity by implementing minimum national standards of GHG price stringency to reduce emissions.

C. The *Act* is Constitutionally Valid Under POGG's Emergency Branch

76 In the case that this Honourable Court does not uphold the *Act* under the national concern branch, Canada submits that the emergency power under POGG upholds the *Act* as a valid exercise of Parliament's powers.

77 The climate crisis is an undisputed "code red" threat to humanity's future and a national emergency for Canada, as declared by a resolution of the House of Commons. The urgency to reduce GHG emissions as a national project could hardly be clearer.

78 The test for federal jurisdiction under the national emergency branch of POGG requires an urgent situation that adversely affects all Canadians, of such a proportion that it transcends provincial authority, and that only Parliament can deal with effectively (*Anti-Inflation Act*). The climate crisis is undisputed within the scientific community and is causing natural disasters in Canada and around the world at unprecedented frequencies. As stipulated by the IPCC Special Report, the urgent timeline leans towards upholding the matter under the emergency branch recognizing that the federal assertion of authority would be temporary so long as effective action is taken (IPCC Special Report).

> *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 436-437, 68 DLR (3d) 452 [*Anti-Inflation Act*].
>
> IPCC Special Report, *supra* para 7.

79 Because the emergency branch does not invoke a discussion on subject matter jurisdiction, the powers granted under the emergency branch would be both time-limited and limited to the proposed legislation. Although the *Act* has no fixed end-date, the Preamble references the need for emissions control measures to meet Canada's *Paris Agreement* targets by 2030. The emergency branch power is complementary to the *Act*'s legislated yearly reports to Parliament, that allow Parliament to assess, based on data, whether to amend or withdraw the backstop provisions.

80 Canada asserts that the risks that temporary measures to address the national climate emergency become permanent are small, any claims of permanence can in any event be addressed through judicial review as the climate crisis abates. Parliament can continue to enforce a seemingly temporary measure (Hogg). In both *Fort Frances* and *Co-operative Committee on Japanese Canadians*, Parliament extended temporary war-time measures beyond their original temporal limits (*Fort Francis*, *Co-operative Committee on Japanese Canadians*).

> Hogg, *supra* para 34 at 17-27 to 17-28.
>
> *Fort Frances v Boise Cascade Canada Ltd*, [1983] 1 SCR 171 [*Fort Francis*].
>
> *Co-operative Committee on Japanese Canadians v Attorney General for Canada*, [1947] AC 87 [*Co-operative Committee on Japanese Canadians*].

81 Chief Justice Laskin stated that for courts to hold Parliament validly enacted legislation under the national emergency branch of POGG, there only needs to be a "rational basis to characterize it as a measure responding to "exceptional circumstances" (*Anti-Inflation Reference*). On a balance of probabilities, courts would consult extrinsic evidence to determine the matter's exceptional circumstances. While Parliament need not formally declare an emergency, like what occurred in this case, it is enough that Parliament was "motivated by a sense of urgent necessity created by highly exceptional circumstances" (*Anti-Inflation Act*).

> *Anti-Inflation Act*, *supra* para 78 at 439.

D. The *Act*'s Fuel Charges are Valid Regulatory Charges and Comply with Section 53 of the *Constitution Act, 1867*

82 The fuel charges in Part 1 of the *Act* are regulatory charges, not taxes. The charges meet both branches of the *Westbank* test: (1) a regulatory scheme exists; and (2) there is a relationship between the regulatory scheme and the charges because the charges aim to modify behaviour, namely GHG use.

83 Since the fuel charges are regulatory charges, they do not violate s 53 of the *Constitution Act, 1867*, which requires taxes to originate in the House of Commons (*Constitution Act, 1867*).

Constitution Act, 1867, *supra* para 51, s 53.

84 In addition, Parliament can delegate major legislative functions to the executive. Therefore, the power delegated to the executive in the *Act* is constitutional and does not impact the fuel charges' validity.

(i) ***All parties agree the fuel charge is a regulatory charge***

85 Canada asserts that a regulatory scheme exists and that there is a connection between the fuel charges and the regulatory scheme. The Appellants conceded, in paragraph 58 of their Factum, that a regulatory scheme exists. As for the second step, the Appellants concede, at paragraph 59 of their Factum, that there is a connection between the fuel charges and the regulatory scheme. The Appellants accept that the charges are constitutional on their face but dispute the *Act*'s constitutionality as a whole. Canada will address this argument in the next section.

86 To assess whether the fuel charges are connected to a regulatory scheme, and hence constitutionally valid, the SCC set out a two-step test in *Westbank*: (1) find a regulatory scheme; and (2) find a connection between the charge and the regulatory scheme (*Westbank*, *620 Connaught*).

Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134 at para 44 [*Westbank*].

620 Connaught Ltd v Canada (Attorney General), 2008 SCC 7 at paras 25-27 [*620 Connaught*].

87 All parties agree that the fuel charges meet step one of the test, a regulatory scheme exists.

88 All parties also agree that the fuel charges meet step two of the test, there is a connection between the fuel charge and the regulatory scheme. For a connection between the fuel charges and a regulatory scheme to exist, the scheme's revenues need to be tied to the costs of the scheme or the charges need to have a regulatory purpose, such as modifying behaviour (*Westbank*, *620 Connaught*).

Westbank, *supra* para 86 at para 44.

620 Connaught, *supra* para 86 at para 27.

89 The second factor, the charges have a behavioural modification purpose, applies here. The aim of the *Act* is to modify the behaviour of consumers and businesses through increasing the costs of GHG emissions over time. The *Act* increases GHG fuel charges over time (*Act*). Although the fuel charges are not directly charged to consumers who use GHGs; but are charged directly to producers, importers, and distributors; the charges will likely be passed onto the consumers. Price increases in GHGs will then be felt by consumers and encourage consumers to use either less GHGs or use alternatives to GHGs.

Act, *supra* para 26 at Schedule 2.

90 Altogether, there is a connection between the fuel charges and the regulatory scheme because the charges have a regulatory purpose of modifying behaviour, namely GHG use. Due to the existence of a regulatory scheme and a connection between the scheme and the charges, this Honourable Court should classify the fuel charges as regulatory charges, not taxes.

(ii) ***The power delegated to the executive branch is constitutionally valid***

91 Justice Côté of the SCC found the *Act* was unconstitutional in part due to the power the *Act* delegates to the executive branch (SCC Decision). The Appellants adopt this argument to dispute the *Act*'s constitutionality at paragraph 61 of their Factum. Canada disagrees, asserting that the power delegated to the executive branch in the *Act* is constitutional.

SCC Decision*, supra* para 30 at para 222.

92 First, Parliament is entitled to delegate major legislative functions to the executive branch. As Hogg noted:

> [*Hodge*, *Shannon*, and *Re Gray*] establish that in Canada there is no requirement that "legislative" and "executive" powers be exercised by separate and independent bodies. A delegation cannot be attacked on the ground that it confers "legislative" power on the executive branch of government.

Hogg, *supra* para 34 at 14-4 to 14-5.

93 As stated in *Re Gray*, Parliament routinely delegates major legislative functions to the executive branch, such as when Parliament legislates that statutes shall come into effect on a day named by proclamation under an order-in-council (*Re Gray*). Parliament, in these cases, entrusts the executive branch with bringing legislation into effect, a broad power. Further, if this Honourable Court finds delegation provisions like these or the ones in the *Act* unconstitutional,

and Parliament could not use them, the prohibition would significantly hamper the legislative enactment process.

In Re George Edwin Gray (1918), 57 SCR 150 at 176 [*Re Gray*].

94 Parliament, delegated to the executive branch under s 6 of the *War Measures Act, 1914*, the power to make orders and regulations "necessary or advisable for the security, defence, peace, order and welfare of Canada" (*Re Gray*). Parliament passed the legislation due to World War I. The delegation provision was constitutional, with the SCC finding that Parliament can delegate its powers, within reasonable limits, to the executive branch (*Re Gray*). The SCC stated that nothing in the Constitution limits Parliament from delegating the power to amend or repeal laws (*Re Gray*).

Re Gray, *supra* para 93 at 156, 157.

95 Compared to the wording of the delegation provision in the *War Measures Act, 1914*, the delegation clauses in the *Act* are narrower and more specific. Instead of permitting the executive branch to make orders and regulations "necessary or advisable for the security, defence, peace, order and welfare of Canada", the delegation clauses in the *Act* are constrained. Section 168(2) of the *Act* permits the Governor in Council to specifically make regulations regarding the fuel charge system (*Act*). Under s 168(3) of the *Act*, the Governor in Council may adapt or modify any provision in Part 1 and Part 1 of Schedule 1 and Schedule 2 of the *Act* (*Act*). Unlike the powers granted under the *War Measures Act, 1914*, which did not restrict the areas or legislation that the Governor in Council could modify, the *Act* restricts the Governor in Council's powers to specific areas, such as the fuel charge system, and specific legislation, namely the *Act*.

Act, *supra* para 26 at s 168(2)-(3).

96 Second, the delegation clauses within the *Act* should be read in a manner harmonious with the *Act*'s scheme, the *Act*'s object, and Parliament's intention. The SCC has determined the following approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu*). Therefore, this Honourable Court should not read the delegation provisions as granting wide powers, but instead read the delegation provisions as granting powers within the *Act*'s object and Parliament's intention, to wit: establishing minimum national standards of price stringency to reduce GHG emissions.

Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42 at para 26 [*Bell ExpressVu*].

97 Third, as the SCC Majority stated, aggrieved parties are entitled to bring an application for judicial review to check any abuses of discretion (SCC Decision). Judicial review is available to ensure that the Governor in Council does not exceed the scope of its delegated powers.

SCC Decision, *supra* para 30 at para 73.

98 Lastly, Parliament has authority to revoke delegated powers at any time with appropriate legislation (*Re Gray*). If Parliament is of a mind to restrict the scope of the executive branch's delegated powers, Parliament can amend the *Act* accordingly.

Re Gray, *supra* para 93 at 170.

99 In summary, the power delegated to the executive branch by Parliament, through the *Act*, is constitutional and does not bear on the fuel charges' validity. Parliament can constitutionally delegate major legislative powers to the executive branch.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

100 The Government of Canada does not seek costs and requests that no costs be awarded against Canada.

PART V -- ORDERS SOUGHT

101 Canada requests the Court declare that the entire *Act* is validly enacted under Parliament's POGG powers in respecting the establishment of minimum national standards of GHG price stringency to reduce GHG emissions, as a matter of national concern.

102 In the alternative, Canada requests the Court declare that the entire *Act* is validly enacted under Parliament's POGG powers in respecting the establishment of minimum national standards of GHG price stringency to reduce GHG emissions, as a matter of national emergency.

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

[redacted]

[redacted]

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PART VI -- TABLE OF AUTHORITIES

Thomas F Pedersen & Stewart Elgie, "A template for the world: British Columbia's carbon tax shift" in Larry Kreiser et al, eds, *Carbon Pricing: Design, Experiences and Issues*, (Cheltenham: Edward Elgar Publishing Limited, 2015).	13
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PART VII -- LEGISLATION AT ISSUE

LEGISLATION	SECTIONS
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186.	1-270

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

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