

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 # 2022-02

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

AND TO: ALL REGISTERED TEAMS

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 The Respondent agrees with the Appellants that climate change is a “grave and existential threat” (*Appellants Factum*). Indeed, climate change is a “global collective action problem,” manifested at the national and international levels. Climate change and greenhouse gas (“GHG”) emissions have no political or geographic boundaries. No one province or territory, independent of another, can effectively combat climate change on its own. Like the effects of atomic energy or marine pollution, GHG emissions transcend provincial boundaries and are a threat to both the environment and human life (*Re GGPPA*; *Hydro-Quebec*; *Ontario Hydro*).

Factum of the Appellants: Attorney General of Alberta, Attorney General of Saskatchewan and Attorney General of Ontario, Team # 2022-01, S.E.M.C.C. File Number: 03-04-2022 at para 2 [*Appellants Factum*].

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11 at para 138 [*Re GGPPA*].

R v Hydro-Québec, 1997 3 SCR 213 at 66-67 [*Hydro-Quebec*].

Ontario Hydro v Ontario (Labour Relations Board), 1993 3 SCR 327 at 84 [*Ontario Hydro*].

2 The *Greenhouse Gas Pollution Pricing Act* (the “GGPPA”) sets minimum national standards of GHG price stringency to reduce GHG emissions. Pursuant to the peace, order, and good government (“POGG”) power of the *Constitution Act, 1867*, Parliament retains the jurisdiction to enact the GGPPA as a matter of national concern.

3 Chief Justice Wagner, writing for the majority at the Supreme Court of Canada (“SCC”), correctly identifies the pith and substance of the GGPPA: establishing minimum national standards of GHG price stringency to reduce GHG emissions (*Re GGPPA*). The GGPPA is *intra vires* Parliament on the basis of the national concern doctrine: the Act is of sufficient concern to Canada; is single, distinct, and indivisible; provincial inability is made out; and, its scale of impact is reconcilable with the division of powers. Finally, the levies imposed by Parts 1 and 2 of the GGPPA are inherently “regulatory charges whose purpose is to advance the GGPPA’s regulatory purpose by altering behavior” (*Re GGPPA*).

Re GGPPA, *supra* para 1 at para 80, 219.

4 Chief Justice Wagner proposes a “modernized” approach to national concern that differs, in part, from existing jurisprudence. Although *stare decisis* and precedent underpin Canada’s legal system, the living tree doctrine demands a degree of jurisprudential flexibility. The law can and

does shift incrementally in accordance with societal changes. The GGPPA responds to the current climate crisis by implementing price stringency with respect to GHG emissions.

5 As The Respondent argued at the SCC, denying the federal government jurisdiction to address GHG price stringency would leave a gaping hole in the Constitution. Canada as a whole would be incapable of enforcing the measures necessary to address an existential threat.

6 The Respondent, therefore, seeks this Court’s opinion that the GGPPA as a whole is *intra vires* Parliament as a valid exercise of the POGG power to address a matter of national concern, and that the fuel charge under Part 1 of the Act is *intra vires* Parliament as a valid regulatory charge.

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

(i) The Global Climate Crisis

7 While the Appellants recognize that global climate change is a very real phenomenon, and is primarily a product of human activities, they fail to give sufficient attention to the factual matrix underpinning this appeal. Since the 1950s, the concentration of GHGs in the atmosphere has increased exponentially, with global surface temperatures steadily rising as a result (*Re GGPPA*). Climate change has massive and wide-ranging effects on all living species and the environment. “[E]xtreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne diseases” are but a few examples (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 8, 10.

8 Chief Justice Wagner recognizes the disproportionate impact climate change has on the Canadian Arctic, such as significant reductions in sea ice, permafrost thaw, and glacier loss (*Re GGPPA*). Furthermore, climate change significantly affects Indigenous communities, who rely upon subsistence hunting and fishing (*Re GGPPA*).

Re GGPPA, supra para 1 at para 11.

9 In the *Truth and Reconciliation Commission of Canada: Calls to Action* report, the Commission calls for governments all levels to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as the framework for reconciliation (Call #43). Article 29 of UNDRIP provides the following: “Indigenous peoples have the right to

the conservation and protection of the environment and the productive capacity of their lands or territories and resources,” and is affirmed by GGPPA (UNDRIP). Sustainability, conservation, and subsistence rights are all guiding principles of UNDRIP (UNDRIP). Price stringency is the vehicle by which the GGPPA seeks to mitigate climate change.

United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UNTS at 21 (entered into force 21 June 2016) [UNDRIP].

Truth and Reconciliation Commission of Canada: Calls to Action (2015), online: Government of Canada <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf

10 Furthermore, reconciliation means establishing and maintaining a reciprocal, respectful relationship between Aboriginal and non-Aboriginal peoples in Canada. For that to happen, there must be “an awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour” (*TRC Summary*). The SCC majority’s decision promotes reconciliation through climate and environmental justice. In other words, national carbon pricing standards atones for anthropogenic harm and compels a change in behaviour.

Honouring the Truth, Reconciling for the Future Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015), online: The Truth and Reconciliation Commission of Canada at 6-7 <https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf> [*TRC Summary*].

(ii) Federal and Provincial Action on Climate Change

11 Chief Justice Wagner discusses Canada’s international commitments to deal with climate change dating back to 1992 with the ratification of the *United Nations Framework Convention on Climate Change*, followed by ratification of the seminal *Paris Agreement* in 2016 (*Re GGPPA*). Prior to ratifying the *Paris Agreement*, the provinces and federal government sent all of the First Ministers to Vancouver, where the *Vancouver Declaration on clean growth and climate change* (the “Vancouver Declaration”) was adopted (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 13, 14.

12 The Vancouver Declaration resulted in the establishment of a new, federal-provincial-territorial working group, which studied the role of carbon pricing mechanisms in Canada (*Re GGPPA*).

Re GGPPA, supra para 1 at para 15.

13 Additionally, evidence has shown that carbon pricing is an integral regulatory tool to reduce GHG emissions, both in Canada and internationally (*Re GGPPA*). The history of Canada’s

efforts to combat climate change demonstrates the key role of carbon pricing strategies with respect to laws aimed at reducing GHG emissions. Furthermore, a carbon pricing mechanism to reduce GHG emission won the 2018 Nobel Prize in economic sciences (*Nobel*).

Re GGPPA, supra para 1 at paras 170, 169.

William D. Nordhaus, “Facts – 2018.” (6 February 2022), online: *The Nobel Prize* <<https://www.nobelprize.org/prizes/economic-sciences/2018/nordhaus/facts/>> [*Nobel*]

14 In October of 2016, the federal government released the *Pan-Canadian Approach to Pricing Carbon Pollution* (the “Pan-Canadian Approach”), which set a pan-Canadian centralized standard for carbon pricing (*Re GGPPA*). Provinces and territories had the option to implement one of two pricing systems with a shared scope, accompanied by a federal backstop (*Re GGPPA*).

Re GGPPA, supra para 1 at para 17.

15 Following the Pan-Canadian Approach, in December of 2016, the federal government released the *Pan-Canadian Framework on Clean Growth and Climate Change* (the “Pan-Canadian Framework”), which reaffirmed the Vancouver Declaration and Pan-Canadian Approach, solidifying the pan-Canadian benchmark for carbon pricing (*Re GGPPA*). On the date of the Pan-Canadian Framework’s release, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories (*Re GGPPA*). Manitoba followed suit in February of 2018, but Saskatchewan did not. In less than a year, Ontario, Alberta, and Manitoba all withdrew their support from the Pan-Canadian Framework.

Re GGPPA, supra para 1 at paras 18, 19.

(iii) The Architecture of the GGPPA

16 The GGPPA was introduced in Parliament as part of Bill C-74 and came into force on June 21, 2018 (*Re GGPPA*). The Act is made up of four parts and four schedules. Only the first two parts and the schedules are at issue (*Re GGPPA*). The GGPPA operates as a backstop. Provinces or territories will only be subject to Parts 1 and 2 if the Governor in Council deems that their GHG pricing scheme is insufficient (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 22, 26, 27.

17 Part 1 of the GGPPA creates a regulatory charge on prescribed fuel types, which is applied to fuel produced, delivered, or consumed in a listed province, fuel transported to a listed province from another part of Canada, and fuel imported into Canada at a location in a listed province (*Re*

GGPPA). Part 1 also delegates power to the Governor in Council to make regulations within the confines and in conformity with the purpose of the *GGPPA* (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 30, 32.

18 Part 2 of the *GGPPA* creates an “output-based pricing system” (“OBPS”) for industrial GHG emissions for large industrial facilities (*Re GGPPA*).

Re GGPPA, supra para 1 at para 34.

19 Chief Justice Wagner opines that Parts 1 and 2 of the *GGPPA* should be understood as a whole, creating a single GHG pricing scheme (*Re GGPPA*). Part 1 of the Act directly prices GHG emissions while the OBPS under Part 2 establishes an exemption to Part 1. Part 2 also prices emissions with respect to covered facilities exceeding relevant efficiency standards (*Re GGPPA*). In sum, both Parts 1 and 2 of the *GGPPA* function as a whole to price GHG emissions on a national scale.

Re GGPPA, supra para 1 at para 38.

(iv) Brief Judicial History

20 The Courts of Appeal for Saskatchewan and Ontario both determined that the *GGPPA* is constitutional, whereas the Court of Appeal of Alberta held that the *GGPPA* is unconstitutional (*Appellants Factum*). All three provinces appealed to the SCC, where the majority determined that the *GGPPA* is constitutional on the basis of the national concern doctrine (*Appellants Factum*; *ABCA*; *ONCA*; *SKCA*).

Appellants Factum, supra para 1 at para 13.

See generally *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*ABCA*].

See generally *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*ONCA*].

See generally *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*SKCA*].

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

21 The Respondent agrees with the Appellants’ statement of the questions in issue:

- (1) Is the *GGPPA* as a whole *intra vires* Parliament as an exercise of Parliament's jurisdiction to legislate for the peace, order and good government of Canada to address a matter of national concern?
- (2) Is the fuel charge under Part 1 of the Act *intra vires* Parliament as a valid regulatory charge or tax?

22 When the GGPPA is considered as a whole, the answers to these questions are both yes.

PART III -- ARGUMENT

A. Characterization of the GGPPA – Pith and Substance

23 Establishing minimum national standards of GHG price stringency to reduce GHG emissions is the pith and substance of the GGPPA.

(i) Federalism and Division of Powers

24 The first issue is whether Parliament has the constitutional authority to enact the GGPPA. To make this determination, a reviewing court should first identify the subject matter of the Act, or matter, as a whole (*Morgentaler*). Second, the Act should be classified with respect to the division of powers set out in the *Constitution Act, 1867* (*Morgentaler*).

R v Morgentaler, 1993 3 SCR 463, at 480 [*Morgentaler*].

25 In conducting its pith and substance analysis, the majority gives effect to the principle of federalism, a foundation of the Constitution. Such an analysis requires a balancing exercise where federal and provincial powers are equally respected (*Re GGPPA*).

Re GGPPA, *supra* para 1 at para 3.

26 Per the *Constitution Act, 1867*, broad powers were conferred on the provinces to ensure constitutional diversity, while reserving the federal government’s powers with respect to matters of national concern (*Canadian Western Bank*).

Canadian Western Bank v Alberta, 2007 SCC 22 at para 22 [*Canadian Western Bank*].

27 Cooperative federalism respects and promotes regional autonomy, federalism, and intergovernmental cooperation (*Re Securities*). The division of federal and provincial powers should not be conceived of as watertight compartments.

Reference re Securities Act, 2011 SCC 66, at paras 56-58 [*Re Securities*].

(ii) Pith and Substance Considerations

28 A reviewing court should analyze the purpose and effects of the impugned statute in order to identify the statute’s “pith and substance,” which results in identifying its “main thrust” or dominant characteristic (*Re GGPPA*). To determine the purpose of the statute, a reviewing court can look at both intrinsic evidence, such as the legislation’s preamble, and extrinsic evidence, such

as Hansard or committee minutes produced by Parliament (*Re GGPPA*). This characterization analysis need not be technical or excessively formal.

Re GGPPA, supra para 1 at para 51.

(iii) Intrinsic and Extrinsic Evidence

29 The intrinsic evidence supporting the Respondent’s position in this case is the GGPPA’s title and preamble, and an application of the “mischief” approach. A statute’s title can be thought of as a gateway tool for its characterization and remains helpful but not determinative of an act’s pith and substance (*Re GGPPA; Re: Anti-Inflation*). The long title of the GGPPA indicates that the pith and substance of the Act is to combat climate change through a national application of pricing mechanisms to a broad range of GHG sources. The short title also indicates that the GGPPA is concerned with pricing GHG emissions, given the use of the term “Pricing” (*Re GGPPA*). Likewise, the GGPPA’s preamble affirms that the pith and substance of the Act is minimum national GHG pricing standards (*Re GGPPA*). The “mischief” approach involves identifying the issue or ‘mischief’ a statute is intended to address (*Sullivan; Hogg*). The lack of price stringency with respect to regulating GHG emissions is the problem meant to be tackled via the GGPPA (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 58, 59, 61.

Re: Anti-Inflation Act, 1976 2 SCR 373 at 451 [*Re: Anti-Inflation*].

Ruth Sullivan, “Sullivan on the Construction of Statutes” (6th ed. 2014), at 14.25 [*Sullivan*].

P. W. Hogg, “Constitutional Law of Canada” (5th ed. Supp. (loose-leaf)), vol. 1, at 15-14 to 15-15 [*Hogg*].

30 The extrinsic evidence supporting the Respondent’s position in this case is the legislative history underpinning the Act (*Kitkatla; Hogg*). The GGPPA’s extrinsic evidence confirms that its main thrust is “establishing minimum national standards of GHG price stringency to reduce GHG emissions” (*Re GGPPA*). The *Paris Agreement*, Vancouver Declaration, Working Group, Pan-Canadian Framework, and Pan-Canadian Approach are all evidence of the federal government’s repeated recognition of carbon pricing as integral to tackling climate change and GHG emissions (*Re GGPPA*). Chief Justice Wagner also discusses the legislative debates leading up to the GGPPA, which highlight the following: pricing carbon pollution is critical to Canada meeting its climate targets per the *Paris Agreement* (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 62, 63-64, 66-68.

Hogg, supra para 29 at 15-14 to 15-15.

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31, at para 53 [Kitkatla].

31 Finally, although the majority of the Court of Appeal of Alberta found the GGPPA *ultra vires*, it conceded that Parliament was concerned with setting a minimum national GHG pricing standard (*Re GGPPA; ABCA*). Further, it held that Parliament’s focus on GHG pricing was a means to achieving its purpose (*Re GGPPA; ABCA*). The Court of Appeal of Alberta should have characterized the GGPPA’s pith and substance more precisely. A precise characterization of the GGPPA, therefore, reveals that its pith and substance is minimum national pricing stringency.

Re GGPPA, supra para 1 at para 69.
ABCA, supra para 20 at paras 213-14.

(iv) Legal and Practical Effects

32 A law’s legal effects are determined by asking “how the legislation as a whole affects the rights and liabilities of those subject to its terms” (*Morgentaler*).

Morgentaler, supra para 24 at 482.

33 The foremost legal effect of Parts 1 and 2 of the GGPPA, in jurisdictions where they apply, is to create a unitary GHG pricing scheme that prices GHG emissions in such a way that is consistent with what is done across Canada. As the majority held, “Part 1 directly prices the emissions of certain fuel producers, distributors and importers. Part 2 directly prices the GHG emissions of covered facilities to the extent that they exceed the applicable efficiency standards” (*Re GGPPA*).

Re GGPPA, supra para 1 at para 71.

34 The GGPPA does not prevent those jurisdictions to whom it applies to from performing or not performing demarcated GHG-emitting activities. The GGPPA does not advise industries on how to operate in terms of reducing their emissions. Instead, it puts a minimum price on those engaged in such activities that create GHG emissions (*Re GGPPA*).

Re GGPPA, supra para 1 at para 71.

35 Furthermore, the GGPPA is a statute that serves as a backstop, which means that the legal effects are only engaged if the Governor in Council has listed a province or territory under the Act (*Re GGPPA*). If a province or territory’s GHG pricing system is sufficiently stringent and meets emissions targets, that jurisdiction is not impacted by the GGPPA whatsoever, affirming the Act’s backstop nature.

Re GGPPA, supra para 1 at para 72.

36 Although the dissenting judges at the SCC exaggerate their concerns over the Governor in Council's role, the Governor in Council's discretion under the GGPPA is constrained both by the GGPPA's purpose and guidelines (*Re GGPPA*). Therefore, this discretion is inherently limited. Should it be necessary, Parliament may amend or repeal the GGPPA at any point in time (*Re GGPPA*).

Re GGPPA, supra para 1 at para 73-76.

37 The Respondent agrees that hypothesizing with respect to a new law's practical effects is of little value in a court of law (*Re GGPPA*).

Re GGPPA, supra para 1 at para 77.

(v) Response to the Appellants with Respect to Pith and Substance

38 The Appellants criticize the majority's opinion but undertake no pith and substance analysis of their own. The Appellants also argue that Parts 1 and 2 of the GGPPA must be characterized separately, not as a whole, without any rationale as to why and how this should be done.

Appellants Factum, supra para 1 at para 23.

39 The Appellants then refer to the SCC majority's characterization of the Act as "arbitrary and conceptually favourable to the federal government because only Parliament can legislate national standards" (*Re GGPPA*). This is circular reasoning. If a matter is of national concern, the pith and substance characterization is inherently favourable to the federal government by virtue of being a matter of national concern.

Re GGPPA, supra para 1 at para 23.

40 The constitutionality of the GGPPA is dependent on whether the Act is properly cabined under a federal head of jurisdiction. Thus, by failing to adhere to the pith and substance jurisprudence, the Appellants overlook the earliest and most important step(s) to determining the constitutionality of the GGPPA.

(vi) Conclusion on Pith and Substance

41 The pith and substance of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. No broader characterization will suffice (*Re GGPPA*).

This characterization captures the intrinsic and extrinsic evidence, as well as the purpose and effects of the statute in its entirety. Despite its criticisms, “minimum national standards” are the animating force which illustrates the national backstop nature of the Act (*Re GGPPA*).

Re GGPPA, supra para 1 at paras 80, 81.

B. Classification of the GGPPA – National Concern

42 The GGPPA is *intra vires* the federal government on the basis of the national concern doctrine.

43 At the classification stage of the division of powers analysis, the pith and substance of an impugned statute must be “described as precisely as possible” and may incorporate the legislative choice of means (*Re GGPPA*). Existing jurisprudence demands that the characterization and classification stages of the analysis must, however, be kept distinct.

Re GGPPA, supra para 1 at paras 52-53.

(i) The Modernized National Concern Test

44 Having established that the pith and substance of the GGPPA is setting minimum national standards of price stringency to reduce GHG emissions, Chief Justice Wagner undertakes the next step in the division of powers analysis and ultimately classifies the GGPPA as a matter of federal jurisdiction under national concern jurisprudence.

45 Determining whether a matter is of national concern involves a three-step analysis, as enumerated by Chief Justice Wagner which in his application modernizes rather than departs from the test set forth in *Crown Zellerbach*. The three prongs of the modernized test are: threshold question; singleness, distinctiveness, and indivisibility; and scale of impact (*Crown Zellerbach*).

R v Crown Zellerbach Canada Ltd, 1988 1 SCR 40 at 431-434 [*Crown Zellerbach*].

(ii) The Threshold Question

46 As a matter of threshold, the question of whether a matter is of “sufficient concern to Canada as a whole to warrant consideration” is a “common sense inquiry,” which limits the application of the national concern doctrine (*Crown Zellerbach*; *Re GGPPA*). Implementing this threshold is an appropriate and incremental development in the law, which ensures that the doctrine itself is properly constrained (*Re GGPPA*).

Crown Zellerbach, supra para 44 at 436.
Re GGPPA, supra para 1 at para 142-143.

47 The majority is correct in stating that establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine.

48 The seriousness of the existential crisis that is climate change is not disputed (*Re GGPPA*). There is no other way to qualify an existential crisis and a threat to every human life in Canada than as a matter of grave national concern.

Re GGPPA, supra para 1 at para 168.

(iii) Singleness, Distinctiveness, and Indivisibility

49 The first principle informing the singleness, distinctiveness and indivisibility inquiry is that the “proposed federal matter must be specific and readily identifiable” (*Re GGPPA*). A matter must, therefore, be sufficiently specific and qualitatively different from provincial matters. The second principle to consider is that federal jurisdiction should be found only where provincial inability is made out (*Re GGPPA*).

Re GGPPA, supra para 1 at para 147, 164.

50 Treaty obligations and international agreements may also be relevant to establishing singleness, distinctiveness and indivisibility. Such instruments are helpful in highlighting the national dimension of a particular matter, and discerning whether it exhibits singularity or is an aggregate of provincial concern (*Re GGPPA*).

Re GGPPA, supra para 1 at para 149.

51 Establishing price stringency to reduce GHG emissions is a specific and readily identifiable matter qualitatively different from matters of provincial concern: “GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects... [which] might appropriately be regulated on the basis of the national concern doctrine” (*Re GGPPA*).

Re GGPPA, supra para 1 at para 173.

52 The GGPPA is narrowly concerned with the reduction of GHG emissions, specifically through price stringency standards. The GGPPA does not attempt to prevent climate change broadly, nor to reduce all harmful emissions. The pollutants that make up GHGs are also precisely

identifiable – both their sources and harmful effects (*Re GGPPA*). Additionally, GGPPA does not reach beyond price stringency, nor does it descend into the detailed regulation of all aspects of emissions regulation (*Re Securities*).

Re GGPPA, supra para 1 at para 173.

Re Securities, supra para 27 at para 114.

53 GHG emissions are qualitatively different from matters of provincial concern. Climate change and GHG emissions were not considered at Confederation, and only so relatively recently.

54 Further, even if GHG price stringency did at one time fit under a provincial head of power, the current environmental crisis has brought out the national character of the matter. Recent improvements to our understanding of GHG emissions indicate that they are extraprovincial and international in character.

55 How the court treated the matter of atomic energy in *Ontario Hydro* is informative. Before World War II, the dominant characteristic would have come within an enumerated provincial head of power (*Re GGPPA; Ontario Hydro*). However, the discovery of atomic energy brought out the inherently national character of uranium mining because of the risk of catastrophic interprovincial harm associated with it (*Re GGPPA; Ontario Hydro*). As such, the discovery of atomic energy enabled Parliament to exercise its POGG power under the national concern doctrine (*Re GGPPA*).

Re GGPPA, supra para 1 at para 138.

Ontario Hydro, supra para 1 at 84 [*Ontario Hydro*].

56 Provincial inability may occur only where: (1) the matter is of a nature that the provinces jointly or severally would be constitutionally incapable of addressing; (2) the failure of one or more provinces or localities to address the matter would jeopardize the successful responses to the matter in other parts of the country; and, (3) a province's failure to address the matter would have grave extraprovincial consequences, including actual or serious risk of harm (*Re GGPPA*). Provincial inability should be treated as a strong constraint rather than as a mere optional indicium (*Crown Zellerbach; Re GGPPA*).

Re GGPPA, supra para 1 at para 152-153, 156.

Crown Zellerbach, supra para 44 at para 35.

57 The provinces have demonstrated that they are not capable of independently establishing GHG emissions price stringency. Saskatchewan refused to partake in the Pan-Canadian Framework and refused to enact a sufficiently stringent pricing scheme of its own. Ontario,

Alberta, and Manitoba were also historically unable to meet targets and withdrew from the previous cooperative scheme.

58 Recent evidence has shown that between 2005 and 2016 the decreases in GHG emissions in Ontario, Canada’s second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada’s five largest emitting provinces, Alberta and Saskatchewan (*Re GGPPA*).

Re GGPPA, supra para 1 at para 24.

59 Should any of the provinces and/or territories which contribute to a large portion of the GHGs fail to do their part, those who produce the lowest GHG emissions will suffer the harmful effects which they took no part in producing. Prince Edward Island, for example, should not pay the environmental price for Alberta and Saskatchewan’s disregard for the climate crisis.

60 Short of building a wall around provincial borders that reaches into the stratosphere, there is no way to contain GHGs within provincial borders. GHG emissions are free flowing between provinces, between countries, and between continents.

(iv) Scale of Impact

61 The scale of impact analysis balances the intrusion upon provincial autonomy and the potential for harmful effects resulting from provincial inability. Identifying a new matter of national concern will be justified only if the latter outweighs the former (*Re GGPPA*).

Re GGPPA, supra para 1 at para 160.

62 The backstop nature of the GGPPA ensures the provinces retain the autonomy to regulate GHG price stringency in accordance with the GGPPA. Should each province enact a sufficiently stringent GHG pricing scheme, the GGPPA will fulfill its purpose without any federal intrusion. The GGPPA will only apply to provinces which are unable to meet price stringency.

63 In addition, the limited federal intrusion into provincial powers by the GGPPA is markedly less than federal intrusion was in *Crown Zellerbach*, where the legislation prohibited all marine dumping, “virtually prevent[ing] a province from dealing with certain of its own public property without federal consent” (*Crown Zellerbach; Re GGPPA*).

Crown Zellerbach, supra para 44 at 458.

Re GGPPA, supra para 1 at para 201.

64 Intrusion into provincial powers may easily be remedied by the double aspect doctrine. The double aspect doctrine “recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power” (*Re GGPPA*). The recognition of a matter of national concern such as this will inevitably result in a double aspect situation.

Re GGPPA, supra para 1 at paras 125-126.

65 The Respondent recognizes that it may be argued that Canada and the provinces are exercising their jurisdiction in relation to different matters rather than to different aspects of the same matter. However, that is only if *Western Bank* is read narrowly (*Re GGPPA*). *Desgagné’s Transport* supports a broader interpretation (*Re GGPPA; Desgagné’s Transport*). The court must be satisfied that Canada in fact has a “compelling interest” in enacting legal rules over the federal aspect of the activity at issue and that the “multiplicity of aspects is real and not merely nominal” (*Re GGPPA*).

Re GGPPA, supra para 1 at para 130, 131.

Desgagnés Transport Inc. v Wärtsilä Canada Inc., 2019 SCC 58 at para. 84 [*Desgagnés Transport*].

(v) Response to the Appellants with Respect to National Concern

66 The Appellants’ hard stance regarding watertight spheres of provincial and federal jurisdiction is acceptable, if not completely accurate, for existing matters enumerated by heads of power in sections 91 and 92; however, this stance does not align with the living tree doctrine (*Persons Case*). Constitutional interpretation must be read in a broad and progressive manner so as to adapt to the changing times and realities (*Persons Case; Radio Control; Re RTA; Comeau*); and these are indeed changing times.

Reference re British North America Act, 1867 s. 24, 1929 J.C.J. No. 2 at para 44 [*Persons Case*].

See also *Reference re Regulation and Control of Radio Communication*, 1931 SCR 541 [*Radio Control*].

See also *Reference re Amendments to the Residential Tenancies Act (N.S.)*, 1996 1 SCR 186 at 27 [*Re RTA*].

See also *R v Comeau*, 2018 1 SCR 342 at 33 [*Comeau*].

(vi) Conclusion on National Concern

67 The Respondent submits that the GGPPA is *intra vires* the federal government on the basis of the national concern doctrine (*Re GGPPA*). Therefore, the GGPPA was correctly characterized

and classified by the majority at the SCC. Affirming the lower court’s decision is but one step and direction towards climate justice and reconciliation.

Re GGPPA, supra para 1 at para 207.

C. Fuel Charge

68 The fuel charge levy prescribed by Part 1 of GGPPA is correctly classified as a regulatory charge and is not a tax.

(i) Relationship Between the Levy and the GGPPA

69 The dominant purpose of a tax is to raise government revenue. The dominant purpose of the levy is to influence behaviour of GHG producers and “to mitigate climate change through the pan-Canadian application of pricing mechanisms to a broad set of greenhouse gas emission sources,” not to generate revenue for the government (*Re GGPPA*). Influencing behaviour is a well-established and valid purpose for a regulatory charge (*620 Connaught*).

Re GGPPA, supra para 1 at para 58, 215.

620 Connaught Ltd. v Canada (Attorney General), 2008 SCC 7, at para 20 [*620 Connaught*].

70 The Respondent does not dispute that the levy may have some characteristics of a tax.

71 In the majority’s decision, the Chief Justice applies the appropriate test for characterizing a levy with the characteristics of a tax as a regulatory charge. To be considered a regulatory charge, a governmental levy must be connected to a regulatory scheme, which is satisfied by a two-step test (*Re GGPPA; Westbank; 620 Connaught*).

Re GGPPA, supra para 1 at para 213.

Westbank First Nation v British Columbia Hydro and Power Authority, 1999 3 SCR 134, at para 43 [*Westbank*].

620 Connaught, supra para 69, at para 24.

72 The first step is to identify the existence of a relevant regulatory scheme. The existence of the regulatory scheme, the GGPPA, is not in dispute. If a scheme is found to exist, the second step is to determine the relationship between the charge and the scheme itself (*Re GGPPA; Westbank; 620 Connaught*).

Re GGPPA, supra para 1 at para 213.

Westbank, supra para 71 at para 44.

620 Connaught, supra para 69, at paras 25-27.

73 There is a sufficient relationship between the levy and the regulatory scheme, here the GGPPA. The Appellants correctly state that a reviewing court should look for the presence of some

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

Westbank, supra para 71 at para 44.

74 The Appellants came to the incorrect conclusion when applying the test. The GGPPA is a complete, complex, and detailed code of regulation. The GGPPA seeks to affect a behaviour, namely “raising the cost of fuel to promote behaviour that indirectly reduces anthropogenic GHG emissions,” (*Appellants Factum*). The costs prescribed by the GGPPA are real and fluctuate given a province's compliance/emissions. The ‘person’ the GGPPA is regulating is the producers of GHG emissions who fail to comply with the minimum national standard of GHG emissions pricing stringency.

Appellants Factum, supra para 1 at para 80.

(ii) Response to the Appellants with Respect to Fuel Charge

75 The Appellants incorrectly argue that the levy contravenes s. 35 of the *Charter*, which prevents the Crown from enacting a levy without the authority of Parliament (*Appellants Factum*). The GGPPA was enacted by Parliament. The enacting body’s taxation is irrelevant (*Hogg*).

Appellants Factum, supra para 1 at para 94.

Hogg, supra para 29 at 31-2 to 31-3.

76 The Appellants speculate that the levy will not serve to recover costs of implementation, rendering the levy unconstitutional. This argument fails on two grounds. First, speculating about what the collected levies will be and what they will be used for is not a justiciable question or issue. Second, where a piece of legislation’s implementation costs has exceeded the levies generated the legislation is not automatically deemed unconstitutional. There have been many costly statutes passed by Parliament that failed to recoup their implementation costs. The long gun registry, for example, created under the *Firearms Act* had significant implementation costs. The registry was eventually repealed by a new government seventeen years later because it was costly, *not* because the registry was unconstitutional.

See generally *Firearms Act*, SC 1995, c 39.

77 Additionally, the Appellants’ characterization of the levy as a “sin tax” is without merit (*Appellants Factum*). Sin taxes are designed to keep a consumer from personally harming themselves. The levy is designed to dissuade producers of GHG emissions from harming the environment/climate, something that all Canadians, and all humans on this planet, share.

Appellants Factum, supra para 1 at para 88.

(iii) Conclusion on Fuel Charge

78 Therefore, for the reasons stated above, the SCC majority made no error in classifying the fuel charge prescribed in Part 1 of the GGPPA as a regulatory charge and not a tax.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

79 The Respondent does not seek costs and requests that no costs be awarded against them.

PART V -- ORDER SOUGHT

80 The Respondent respectfully requests that the Appellants’ appeal be dismissed and/or seeks declarations from this Court that (1) the GGPPA as a whole is *intra vires* Parliament as an exercise of Parliament’s jurisdiction to legislate for the peace, order and good government of Canada to address a matter of national concern and that (2) the fuel charge under Part 1 of the Act is *intra vires* Parliament as a valid regulatory charge or 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

Case Law	Paragraph No.
<i>620 Connaught Ltd v Canada (Attorney General)</i> , 2008 SCC 7	69, 71, 72
<i>Canadian Western Bank v Alberta</i> , 2007 SCC 22	26, 65
<i>Desgagnés Transport Inc. v Wärtsilä Canada Inc.</i> , 2019 SCC 58	65
<i>R v Hydro-Québec</i> , 1997 3 SCR 213	1
<i>Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)</i> , 2002 SCC 31	30
<i>Ontario Hydro v Ontario (Labour Relations Board)</i> , 1993 CanLII 72 (SCC), 1993 3 SCR 327	1, 55
<i>R v Comeau</i> , 2018 1 SCR 342	66
<i>R v Crown Zellerbach Canada Ltd</i> , 1988 1 SCR 40	45, 46, 56, 63
<i>R v Morgentaler</i> , 1993 3 SCR 463	24, 32
<i>Re: Anti-Inflation</i> , 1976 2 SCR 373, 68 DLR (3d)	29
<i>Reference re Amendments to the Residential Tenancies Act (N.S.)</i> , 1996 1 SCR	66
<i>Reference re British North America Act, 1867 s. 24</i> , 1929 J.C.J. No. 2	66
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 ONCA 544	1, 31
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 SKCA 40	1
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2020 ABCA 74	1, 31
<i>Reference re Securities Act</i> , 2011 SCC 66, 2011 3 SCR 837	27, 52
<i>References re Greenhouse Gas Pollution Pricing Act</i> , 2021 SCC 11	1, 3, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 29, 25, 28, 29, 30, 31, 33, 34, 35, 36, 37, 39, 41, 43, 46, 48, 49, 50, 51, 52, 55, 56, 58, 61, 63, 64, 65, 66, 67, 71, 72

<i>Westbank First Nation v British Columbia Hydro and Power Authority</i> , 1999 3 SCR 134, ACS no 38	71, 72, 72
Secondary Sources	
<i>P. W. Hogg, Constitutional Law of Canada</i> (5th ed. Supp. (loose-leaf)), vol. 1	29, 30, 75
<i>Pan-Canadian Approach to Pricing Carbon</i> , Environment and Climate Change Canada, October 3, 2016 (online)	
<i>R Sullivan, Sullivan on the Construction of Statutes</i> (6th ed. 2014)	65
<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , 13 September 2007, UNTS at 21 (entered into force 21 June 216)	9, 25
<i>Truth and Reconciliation Commission of Canada: Calls to Action</i> (2015), online: <i>Government of Canada</i> < https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf >	9, 10
<i>Vancouver Declaration on clean growth and climate change</i> , Canadian Intergovernmental Conference Secretariat, March 3, 2016 (online)	
Legislation	
<i>Constitution Act, 1867</i> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5	
<i>Firearms Act</i> , SC 1995, c 39	
<i>Greenhouse Gas Pollution Pricing Act</i> , SC 2018, c 12, s 186	

PART VII -- LEGISLATION AT ISSUE***Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12, s. 186.******Preamble***

Whereas there is broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change;

Whereas recent anthropogenic emissions of greenhouse gases are at the highest level in history and present an unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity;

Whereas impacts of climate change, such as coastal erosion, thawing permafrost, increases in heat waves, droughts and flooding, and related risks to critical infrastructures and food security are already being felt throughout Canada and are impacting Canadians, in particular the Indigenous peoples of Canada, low-income citizens and northern, coastal and remote communities;

Whereas Parliament recognizes that it is the responsibility of the present generation to minimize impacts of climate change on future generations;

Whereas the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries;

Whereas Canada has ratified the United Nations Framework Convention on Climate Change, done in New York on May 9, 1992, which entered into force in 1994, and the objective of that Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system;

Whereas Canada has also ratified the Paris Agreement, done in Paris on December 12, 2015, which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change;

Whereas it is recognized in the Pan-Canadian Framework on Clean Growth and Climate Change that climate change is a national problem that requires immediate action by all governments in Canada as well as by industry, non-governmental organizations and individual Canadians;

Whereas greenhouse gas emissions pricing is a core element of the Pan-Canadian Framework on Clean Growth and Climate Change;

Whereas 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 is necessary for effective action against climate change;

Whereas the 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;

Whereas greenhouse gas emissions pricing reflects the “polluter pays” principle;

Whereas some provinces are developing or have implemented greenhouse gas emissions pricing systems;

Whereas the absence of greenhouse gas emissions pricing in some provinces and a lack of stringency in some provincial greenhouse gas emissions pricing systems could contribute to

significant deleterious effects on the environment, including its biological diversity, on human health and safety and on economic prosperity;

And whereas 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;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1 This Act may be cited as the Greenhouse Gas Pollution Pricing Act.

Annual net fuel adjustment - rail carrier

33 If, at any time in a particular calendar year, a person is a registered specified rail carrier or registered rail carrier in respect of a type of fuel, the annual net fuel adjustment of the person for the particular calendar year, for that type of fuel and for a listed province is the amount determined by the formula;

A – B

Where

A is the total of all quantities, each of which is a quantity of fuel of that type that is (a) used by the person in a locomotive in the listed province at any time in the particular calendar year when the person is a registered specified rail carrier or registered rail carrier in respect of that type of fuel, or (b) a prescribed quantity of fuel of that type, or a quantity of fuel of that type determined in prescribed manner, for the particular calendar year and the listed province; and

B is the total of all quantities, each of which is a quantity of fuel of that type that is (a) the total determined for A in section 29 or 31 for a reporting period of the person in the particular calendar year, for that type of fuel and for the listed province, or (b) a prescribed quantity of fuel of that type, or a quantity of fuel of that type determined in prescribed manner, for the particular calendar year and the listed province.

Charge — annual net fuel adjustment

35 If the annual net fuel adjustment, determined under section 33, of a person for a particular calendar year, for that type of fuel and for a listed province is a positive amount, the person must pay to Her Majesty in right of Canada a charge in respect of that annual net fuel adjustment and the listed province in the amount determined under section 40. The charge becomes payable on June 30 of the calendar year following the particular calendar year.

Staff Personnel

94 (1) The persons that are necessary to administer and enforce this Part are to be appointed, employed or engaged in the manner authorized by law.

Definition of net amount

165 (1) In this section, net amount in respect of a province or area and a period fixed by the Minister means the charges levied by Her Majesty in right of Canada under this Part in respect of the province or area and that period less any amounts in respect of the charges that are rebated, refunded or remitted under this Part or any other Act of Parliament in that period.

- (8)** The Governor in Council may make regulations
- (a) prescribing the time and manner of paying any distribution under subsection (2); and
 - (b) generally to carry out the purposes of this section.

Regulations

- 166 (1)** The Governor in Council may make regulations
- (f) generally to carry out the purposes and provisions of this Part.

Definition of fuel charge system

168 (1) In this section, fuel charge system means the system under this Part, Part 1 of Schedule 1 and Schedule 2 providing for the payment and collection of charges levied under this Part and of amounts paid as or on account of charges under this Part and the provisions of this Part relating to charges under this Part or to rebates in respect of any such charges, or any such amounts, paid or deemed to be paid.

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

-and-

ATTORNEY GENERAL OF CANADA

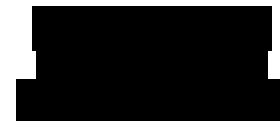
RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

**FACTUM OF THE RESPONDENT
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