

# THE PROBLEM

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The competition case is an appeal to the Supreme Environmental Moot Court of Canada of the Supreme Court of Canada's ("SCC") decision in the *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11. The Supreme Environmental Moot Court of Canada is a Canadian appellate court of last resort. The doctrines of precedent and *stare decisis* apply as if it were the Supreme Court of Canada.

## INSTRUCTIONS:

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In 2018, Canada passed the *Greenhouse Pollution Pricing Act* (the "Act"). The Act seeks to mitigate the effects of climate change by establishing a minimum national price on greenhouse gas ("GHG") emissions in two parts:

- ◆ Part 1 of the Act imposes a charge on GHG-producing fuels and combustible waste; and
- ◆ Part 2 puts in place an output-based performance system ("OBPS") for large industrial facilities that are obliged to pay compensation for GHG emissions exceeding their allocated emission limits.

Between 2019 and 2020, the Attorney Generals of Ontario, Saskatchewan and Alberta initiated steps to contest the Act's constitutional validity.

Before the Ontario Court of Appeal ("ONCA"), Ontario argued that Canada could not rely on its enumerated taxation powers.<sup>1</sup> Ontario argued that the Act effectively imposed a tax instead of merely functioning as a regulatory statute.<sup>2</sup> Ontario also argued the regulatory charges imposed by the Act offends s. 53 of the *Constitution Act, 1867*.<sup>3</sup> This argument was advanced on the basis of the regulatory charges not having a nexus with the purposes of the Act.<sup>4</sup>

The ONCA held that the Act was constitutional. The ONCA found that that the pith and substance of the Act was to "establish minimum national standards to reduce GHG emissions", a matter that is within Parliament's jurisdiction to legislate in relation to matters of national concern under the Peace, Order, and

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<sup>1</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, at paras 147 and 148.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, at paras 150 and 152.

<sup>4</sup> *Ibid.*



Good Government ("POGG") clause of s. 91 of the *Constitution Act, 1867*. Further, the Court held that the charges imposed by the Act on greenhouse gas-producing fuels and combustible waste were regulatory charges, not taxes.

Similarly, the Attorney General of Saskatchewan argued before the Saskatchewan Court of Appeal ("SKCA") that the Act violates the principle of federalism and offends s. 53 of the *Constitution Act, 1867*.<sup>5</sup> This argument was made on the basis of the Governor in Council having the authority to determine where the impugned taxes apply.<sup>6</sup> Saskatchewan also submitted that the Act infringed their exclusive authority over property and civil rights and other matters of purely local nature.<sup>7</sup>

The SKCA held that the Act was constitutional. Similarly, the SKCA found that the pith and substance of the Act was "the establishment of minimum national standards of price stringency for GHG emissions", a matter that falls under the national concern branch of the federal POGG power. The Court further found that the levies imposed by the Act were regulatory charges.

On reference to the Alberta Court of Appeal ("ABCA"), Alberta argued that the Act is wholly unconstitutional and does not fall within the national concern branch of the federal government's POGG powers.<sup>8</sup> This argument was premised on the Act's pith and substance infringing provincial authority over matters concerning natural resources, local matters, taxation and property and civil rights.<sup>9</sup>

The ABCA held that Parts 1 and 2 of the Act are unconstitutional. The regulation of GHG emissions within provincial jurisdiction falls under heads of powers assigned to the provinces under ss. 92A, 92(2), 92(10), 92(13) and 109 of the *Constitution Act, 1867*. Since the regulation of GHGs falls under enumerated heads of provincial power, rather than the provinces' residual power in s. 92(16), the regulation of GHGs cannot be transformed into a matter of national concern falling within exclusive federal jurisdiction.

The Attorney General of British Columbia, who had intervened at the ABCA, the Attorney General of Saskatchewan and the Attorney General of Ontario appealed the three respective provincial Court of Appeal decisions to the Supreme Court of Canada.

On appeal to the SCC, the SCC held that the Act was constitutional under the federal POGG power. The Court found that the true subject matter of the Act was establishing minimum national standards of GHG price stringency to reduce

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<sup>5</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at para 8.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, at para 10.

<sup>8</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, at paras 25 to 30.

<sup>9</sup> *Ibid.*



GHG emissions. Further, the Court found that the fuel and excess emission charges imposed under the Act are regulatory charges used to advance the Act's regulatory purpose.

The Attorney Generals of Alberta, Saskatchewan and Ontario have appealed the decision of the SCC.

The Supreme Environmental Moot Court of Canada granted leave to appeal the decision of the Supreme Court of Canada on the following questions:

- 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?

For the purposes of this Moot, the Provinces of Ontario, Alberta, and Saskatchewan have jointly appealed this decision of the SCC and have jointly retained counsel.