SCC Files No. 38663/38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

THE *GREENHOUSE GAS POLLUTION PRICING ACT*, Bill C-74, Part V
A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012, SS 2012, c C-29.01*.

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT

and

ATTORNEY GENERAL OF CANADA

RESPONDENT

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA *ET AL*.

INTERVENERS

FACTUM OF THE INTERVENER, THE ASSEMBLY OF MANITOBA CHIEFS #38663 and #38781

(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*)

(style of cause continued on the next page **38781**)

Counsel for the Interveners

PUBLIC INTEREST LAW CENTRE
200-393 Portage Avenue
Winnipeg, MB R3B 3H6

Joëlle Pastora Sala
Byron Williams
Katrine Dilay
Phone: (204) 985-8540
Fax: (204) 985-8544
Email: jopas@pilc.mb.ca
bywil@pilc.mb.ca
kadil@pilc.mb.ca

Agent for the Interveners

POWER LAW
1103-130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette
Phone: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

Table of Contents

PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS....1
A. Overview of Position....1
B. Statement of Facts....2
PART II. THE AMC POSITION ON THE QUESTION IN ISSUE....2
PART III. STATEMENT OF ARGUMENT....3
1 - Clarify the Need to Respect First Nations Laws....3
A. Clarification is needed that First Nations and Euro-Canadian laws are distinct but equal. .4
B. This Court ought not to apply First Nations laws....6
2 - Correct the Narrative of Canada as a Bi-juridical Country....6
PART IV. SUBMISSIONS ON COSTS....10
PART V. ORDER SOUGHT....10

PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS

The simple answer is the tapestry requires the golden thread of [First Nations] laws and legal orders. You want to consider the tapestry, what has the tapestry excluded. It's excluded [First Nations] laws. [...] And that's where I think we're going to find the richest source of solutions.[1]

A. Overview of Position

1. Narrowly construed, these appeals address the question of which level of government has *sole* jurisdiction over carbon pricing. But the backdrop to these appeals is an enduring constitutional tension relating to Canada's failure to take meaningful steps to address climate change, to achieve reconciliation between First Nations and settlers and to acknowledge and respect the golden thread of the First Nations laws that underpin the treaty relationship.
2. Reconciliation demands otherwise. Climate change is "one of the great existential issues of our time."[2] It is too important to be addressed without reference to the constitutional order of the original peoples and caretakers of these lands.
3. While First Nations laws tell us it is a sacred responsibility to protect Mother Earth for current and future generations, the submissions of the Provincial and Federal Crowns effectively deny First Nations' responsibilities. They perpetuate the flawed narrative of Canada as a bi-juridical country (civil and common law), contrary to reconciliation and their responsibilities as treaty partners. The lack of judicial clarity on the constitutional relationship between First Nations and settlers has perpetuated uncertainty and conflict between First Nations, settlers, newcomers and in the Euro-Canadian judicial system.
4. Guidance is required from this Court to: (1) *clarify* the need to respect the constitutional order of First Nations as distinct from Euro-Canadian laws as a necessary element of reconciliation; and (2) *direct* governments to engage on a nation-to-nation basis with First Nations as a necessary step to *return* to the original spirt and intent of the treaties.
5. A reconciliation lens must be applied to these appeals. Unlike the other First Nations interveners in this appeal, the AMC asserts that engaging with First Nations on a nation-to-nation basis requires moving beyond the narrow Euro-Canadian lens of constitutional division of powers and section 35. While the *Crown Zellerbach* analysis may clarify which level of Canadian government has jurisdiction over carbon pricing, it is unable to address the role of First Nations laws in contemporary debates. Once the appropriate 'jurisdictional partner' is

---

1 Caleb Behn, cited in Canada, Expert Panel: Review of Environmental Assessment Processes, Building Common Ground: A New Vision for Impact Assessment in Canada (Ottawa, 2017) at 29 [Canada, *EA Review*].

2 *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40 at para 4 [*SK Reference*].

identified, treaties offer an appropriate framework for constitutional coordination. In this era of reconciliation and nation-to-nation relationships, honouring First Nations laws will affect both how we identify the means of addressing fundamental contemporary concerns and how treaty partners work together to address them.

B. Statement of Facts

6. The treaties intended First Nations and newcomer laws to be respected as equals for the "mutual promise of building a better future together" through nation-to-nation relationships.[3]
7. The issue before this Court is of fundamental importance to Canada. The future of all children and all living beings is at stake. The constitutional validity of the *Greenhouse Gas Pollution Pricing Act*[4] (the "GGPPA") was brought as a Reference to the Saskatchewan and Ontario Courts of Appeal. Both courts held that the *GGPPA* is constitutionally valid.[5] But neither the Federal or Provincial governments acknowledged the existence of First Nations laws or the implications of this constitutional debate on nation-to-nation relationships and reconciliation.
8. The AMC is aware of the impacts of the continued and unilateral imposition of Euro-Canadian laws upon First Nations including effects on their exercise of stewardship over Mother Earth.
9. First Nations people and laws "have always been here". These laws continue to govern First Nations' relationships with the Creator, Mother Earth and all living beings. They are grounded in mutual respect and underpin the treaty relationship.[6] They constitute Canada's first constitutional order alongside the French Civil Law and English Common Law.[7] First Nations know that nature is giving us signs that human beings are behaving out of balance, and First Nations laws provide clear guidance on climate change.[8]

PART II. THE AMC POSITION ON THE QUESTION IN ISSUE

10. The AMC takes no position on the outcome of this appeal. Instead, it addresses**:**

- the need to respect First Nations constitutional orders as distinct but equal to the Euro-

3 Joe Hyslop cited in James Cote et al, *Gakina Gidagwi'igoomin Anishinaabewiyang – We Are All Treaty People: Treaty Elders' Teachings Volume 4* (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2016) at 13 **[AMC TAB 1]**.

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

5 *SK Reference*, supra note 2 at para 3; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 2 [*ON Reference*].

6 Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, "Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law" (Turtle Lodge, 2016) [*Great Binding Law*].

7 James Cote et al, *supra* note 3 at 14 – 15, 70 – 71.

8 *Great Binding Law*, *supra* note 6.

Canadian laws as a necessary element of reconciliation and nation-to-nation relationships;
- the need to correct the flawed narrative that Canada is a bi-juridical country; and
- the need to direct governments to engage on a nation-to-nation basis with First Nations as a necessary step to *return* to the original intent of treaties.

PART III. STATEMENT OF ARGUMENT

[I]f indigenous traditions are not regarded as useful in tackling contemporary concerns and recognized as applying in current circumstances, then they are nothing but the dead faith of living people.[9]

1 - *Clarify* the Need to Respect First Nations Laws

11. This Court has been asked to determine the constitutional validity of the *GGPPA* which offers one tool to address the climate crisis. While it may be tempting to focus narrowly on the *Crown Zellerbach* analysis, the urgency and necessity of applying a reconciliation lens to the appeal is made evident by fundamental social, legal and environmental tensions in Canada. These include pipeline blockades, violence, police actions,[10] increased frequency and severity of extreme events including floods, droughts, wild fires[11] and the changing of wildlife migration patterns.[12]

12. These appeals contemplate a fundamental constitutional issue. But the blindered perspective of the Provincial and Federal Crowns does not acknowledge that First Nations were "given [...] ways of loving and taking care of Mother Earth" through laws, languages, teachings and stories.[13]

13. Other First Nations interveners in these appeals[14] have argued for the inclusion of First Nations perspectives on climate change as well as the ***integration*** of section 35 and treaty rights ***into*** the analysis of the constitutional division of power, including in the interpretation of the *Crown Zellerbach* test.[15] None proposed an analysis which recognized the existence of First Nations constitutional orders as distinct but equal to Euro-Canadian laws. Unlike these other interventions, the AMC submits that clarity is required from this Court on the need to respect First Nations laws as distinct but equal to Euro-Canadian laws and on the direct link between

---

9 John Borrows, "Recovering Canada: The Resurgence of Indigenous Law" (Toronto: University of Toronto Press, 2007) at 147 **[TAB 10]**.

10 *Daniels v Canada (Minister of Indian Affairs and Northern Development),* 2013 FC 6 at para 351; *Coastal GasLink Pipeline Ltd. v Huson,* 2019 BCSC 2264 at paras 1 – 4 [*Huson*].

11 *SK Reference*, supra note 2 at para 16; *ON Reference, supra* note 5 at para 11.

12 Canada, *EA Review, supra* note 1 at 85.

13 *Great Binding Law*, *supra* note 6.

14 The Athabasca Chippewyan First Nations (ACFN), Assembly of First Nations (AFN) and the United Chiefs and Councils of Mnidoo Mnising (UCCMM).

15 See, for example, ACFN Factum filed in the ON Reference at para 33; UCCMM Factum filed in the ON Reference at paras 20 – 22; AFN Factum filed in the SK Reference at para 21.

the respect of First Nations laws and the implementation of reconciliation.

A. Clarification is needed that First Nations and Euro-Canadian laws are distinct but equal

14. Although First Nations laws have been recognized by this Court, recent lower court decisions have sent contradictory signals about the appropriate relationship between Euro-Canadian laws and First Nations laws. The references by Canadian courts to First Nations laws are imprecise at best and cause violence to First Nations at their worst. This lack of clarity has led to a patchwork of inconsistent decisions which:

- rely on principles such as *terra nullius*, the doctrine of discovery and the Papal bulls to justify the assertion of sovereignty *over* First Nations;[16]
- acknowledge pre-existing legal traditions;[17]
- impose Euro-centric values as a means of discounting[18] or diminishing First Nations laws;[19]
- suggest that First Nations laws were absorbed within the Canadian Constitution;[20] and
- provide equal weight to First Nations laws as distinct from Euro-Canadian laws.[21]

15. The doctrine of discovery and the principle of *terra nullius*[22] have caused inter-generational

---

16 Karen Drake, "The Impact of St Catherine's Milling" (2018) Osgoode Hall Articles and Book Chapters at 2, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3684&context=scholarly_works>. See especially *Guerin v The Queen,* [1984] 2 SCR 335 at 378; *R v Van der Peet*, [1996] 2 SCR 507 at paras 35-36 [*Van der Peet*]; *Mitchell v MNR*, 2001 SCC 33 at paras 112-113, [2001] SCR 911 (Binnie J minority opinion) [*Mitchell v MNR*]. See also *R v Sparrow,* [1990] 1 SCR 1075 at 1103; *St Catherines Milling and Lumber Co. v R*, (1887) 13 SCR 577 at 580 [*St. Catherines Milling*]; *R v Bloom*, 2016 ONCJ 8 at paras 12, 13, [2016] OJ No 24.

17 *Connolly v Woolrich,* [1867] QJ No 1 at para 23, (1867) 11 LCJ 197 [*Connolly*]**[TAB 3]**; The 'Marshall Trilogy': *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823) **[TAB 4]**, *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) **[TAB 5]**, and *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) **[TAB 6]**; *Delgamuukw v The Queen*, [1997] 3 SCR 1010 at para 148, 153 DLR (4th) [*Delgamuukw*]; *Pation v Dene Tha' First Nation*, 2018 FC 648 at para 8, [2018] 4 FCR 467. See *Wewayakum Indian Band v Canada,* [1991] 3 FC 420 at 430 **[TAB 7]** regarding a Band's authority to sue in members' names. In the context of Band elections, see *McLeod Lake Indian Band v Chingee,* (1998) 165 DLR (4th) 358. In the context of adoption, see *Casimel v Insurance Corp of British Columbia,* (1993) 82 BCLR (2d) 387. See also *Campbell v British Columbia,* 2000 BCSC 1123 at paras 35, 45 [*Campbell*].

18 *Van der Peet, supra* note 16 at paras 40, 44; *Alderville First Nation v Canada,* 2014 FC 747 at para 40.

19 According to former United States Chief Justice Marshall, the right of First Nations peoples to govern themselves had been "*diminished* but not extinguished."(emphasis added): *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [**TAB 4**]cited in *Campbell*, *supra* note 17 at para 90; *Delgamuukw, supra* note 17 at para 148.

20 *Van der Peet, supra* note 16 at paras 44, 49; *Mitchell v MNR*,*supra* note 16 at para 9.

21 *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 12, 13 [*Restoule*].

22 Drake, *supra* note 16 at 1.

trauma for First Nations.[23] Both are rooted in a deep sense of superiority over First Nations people, governments and laws. Scholars have noted a significant disconnect between the doctrine of discovery and the actions of the British government which entered into nation-to-nation relationships with First Nations.[24]

16. These tensions are reflected in two recent cases – the *Restoule* decision of the Ontario Superior Court and the *Wet'suwet'en* decision of the British Columbia Supreme Court (the "BCSC"). In Wet'suwet'en, the BCSC concluded that Wet'suwet'en customary laws were not authoritative because they had not been integrated into domestic law.[25] Failing to grasp the direct connection between First Nations laws (i.e., customary law) and the responsibility of First Nations to sustain relationships with Mother Earth,[26] the BCSC concluded that "[t]here is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation."[27] Rather than accepting teachings of Wet'suwet'en customary law, the BCSC relied on the fact that "reconciliation of the common law with Indigenous legal perspectives is still in its infancy."[28]

17. By contrast, the *Restoule* decision applied a reconciliation lens by honouring the significant procedural and substantive differences between First Nations and Euro-Canadian laws, respecting them as equal.[29] The decision explicitly recognized that evidence from Anishinaabe and Euro-Canadian perspectives must be treated on equal footing.[30] In doing so, the Court was gifted with teachings about Anishinaabe law and worldview by Knowledge Keepers which it was asked to respect as part of the Anishinaabe perspective, without "applying" the law.[31] The Court followed protocols to receive this knowledge and concluded by thanking all involved for working together to "make this trial a proceeding of respect and an exercise in reconciliation."

18. These decisions embody two distinct approaches to the treatment of First Nations laws. One

---

23 It has been described by some authors as the "national shame" see: Drake, *supra* note 16 at 2.

24 Drake, *supra* note 16 at 3. Also see generally: John Borrows "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Ascha, ed, Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference (Vancouver: UBC Press, 1997) **[TAB 8].**

25 *Huson*, supra note 10 at para 127.

26 Great Binding Law, *supra* note 7.

27 *Huson*, supra note 10 at para 155.

28 *Huson*, supra note 10 at para 139. See also *Beaver v Hill*, 2018 ONCA 816 at para 29 citing *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras 32, 35, [2013] 2 S.C.R. 227.

29 *Restoule, supra* note 21 at paras 12, 21.

30 *Ibid* at para 9.

31 *Ibid* at para 13.

honours them as equal and distinct. The other, contrary to reconciliation, discounts their value and relevance further damaging the relationship between First Nations and settlers.

B. This Court ought not to apply First Nations laws

19. In arguing for the equal respect of First Nations law as separate and distinct from Euro-Canadian laws, the AMC does not advocate for this Court to apply or define First Nations laws. As the Nunavut Court of Appeal cautions:

> there is a danger that "in retaining and imposing our ideas of what constitutes 'law' [...] we may inadvertently give weight only to those elements of a [First Nations] legal system which are recognized in Canadian law [...]. At the same time, we may fail to perceive essential elements of these legal orders. At the very least, we must question our assumptions; at most, we must unlearn them.[32]

20. One example of the risks can be found in this Court's definition of 'First Nations laws' as "those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples".[33] In contrast, the *Restoule* decision observes that "Anishinaabe law and systems of governance were *pimaatiziwin* (life), where everything is alive and everything is sacred [...]".[34] It recognizes First Nations laws as a way of living and being rather than a historic artifact frozen in time and passed down through generations.

2 - *Correct* the Narrative of Canada as a Bi-juridical Country

21. Without respecting First Nations laws, "we are just rearranging deck chairs on the Titanic."[35] These appeals offer an opportunity for a paradigm shift in the relationship between First Nations and non-First Nations. By questioning our assumptions, we can usher in a more meaningful implementation of reconciliation –grounded in the spirit and intentions of treaties.

22. This Court has the necessary foundations within existing case law[36] to clarify that First Nations laws existed prior to the arrival of Europeans; are central to the First Nations - settler relationship; and, are one of the three constitutional orders underpinning the treaties.

23. It is incumbent upon this Court to correct misconceptions which do not align with the goals of

---

32 *R v Ippak*, 2018 NUCA 3 at para 85.Also see Aaron Mills, "Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) McGill LJ 847 at 856-857 [**TAB 9**].

33 *Van der Peet, supra* note 16 at para 40.

34 *Restoule, supra* note 21 at paras 21, 56, 57.

35 John Borrows, "Fourword: Issues, Individuals, Institutions and Ideas" (2002) 1 Indigenous LJ vii at xvi [**TAB 10**]. See also Harry Laforme, "Resetting the Aboriginal Canadian Relationship: Musings on Reconciliation" (Paper delivered at the Ontario Bar Association's Institute Conference, 7 February 2013) at 11 (unpublished), cited in Drake, *supra* note 16 at 21.

36 *Connolly, supra* note 17 at para 23 [**TAB 3**]; *Campbell, supra* note 17 at para 86; *R v Marshall; R v Bernard*, 2005 SCC 43 at paras 127, 131 [2005] 2 SCR. 220; *R v Sparrow, supra* note 16 at 1103.

reconciliation. The narrative of Canada as a bi-juridical country has created significant barriers for meaningful and consistent consideration of First Nations laws. Clear guidance is required on the meaning of 'reconciliation' to offer a framework for the required paradigm shift.

24. Reconciliation has been framed variously as a project[37], goal[38], objective[39], principle,[40] promise[41] and something to be "achieved."[42] It has been described as synonymous for "merging" and "bringing together".[43] This has led to confusion by Canadian courts regarding its meaning and intent, perpetuating the narrative of Canada as a bi-juridical country. For example, this Court has described reconciliation as a "process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982* [arising from] the Crown's *sovereignty over* an Aboriginal people and *de facto* control of land and resources that were formerly in the *control of* that people."[44]

25. Any suggestion that reconciliation arises from sovereignty *over* and *control of* First Nations must be corrected. This notion causes profound harm and perpetuates erroneous premises about First Nations' history, culture and laws.[45] It reinforces the doctrine of discovery and the principle of *terra nullius* which have been rejected by this Court.[46] It promotes the notion that Canada was inhabited by "uncivilized" First Nations in need of legal structures.[47] It is contrary to the spirit and intent of the treaty relationship to conclude that First Nations would have

---

37 *Manitoba Metis Federation v Canada (AG),* 2013 SCC 14 at para 99, [2013] 1 SCR 623 [*MMF*]; *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para 23, [2014] 2 SCR 256 [*Tsilhqot'in*].

38 *Van der Peet, supra* note 20 at para 40; *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 35, [2004] 3 SCR 511 [*Haida*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para 33, [2005] 3 SCR 388 [*Mikisew*]; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34, [2010] 2 SCR 650; *MMF*, *ibid* at paras 137, 140; *Tsilhqot'in*, *ibid* at para 82; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 89, [2017] 2 SCR 386 [*Ktunaxa*].

39 *Mikisew, ibid* at para 50; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 91, 103, 107, 203, [2010] 3 SCR 103 [*Beckman*].

40 *MMF*, *supra* note 42 at para 143.

41 *R v Kapp*, 2008 SCC 41 at para 121, [2008] 2 SCR 483.

42 *Ktunaxa supra* note 38 at para 86.

43 *Mitchell v MNR, supra* note 16 at para 129; *Van der Peet, supra* note 16 at para 31 [emphasis added].

44 *Haida, supra* note 38 at para 32 [emphasis added].

45 James Cote et al, *supra* note 3 at 70 – 71, 72 – 73 [**TAB 1**].

46 *Tsilhqot'in, supra* note 37 at para 69.

47 Canada, Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 1.

"surrendered" their sacred stewardship responsibilities towards Mother Earth. This conclusion contradicts guidance from the Truth and Reconciliation Commission (TRC) which defines 'reconciliation' as "an ongoing process of establishing and maintaining respectful relationships."[48]

26. The impacts of these erroneous understandings of reconciliation are readily seen in these appeals. The arguments at the lower courts were cemented in the mistaken notion that Canada is a bi-juridical country, providing evidence that colonialism is contemporary.[49]

27. The *Campbell v British Columbia* decision offers a useful precedent to correct this misconception.[50] It clarified that First Nations self-government was not extinguished by the *British North America Act*[51] and that a constitutional amendment was not required for the respectful treatment of First Nations laws.[52]

28. Moving beyond *Campbell*, the AMC submits that the continued existence of First Nations laws is far more than an "unwritten underlying value of the Constitution."[53] Relying on the definition of 'reconciliation' from the TRC, the AMC observes that establishing and maintaining relationships between First Nations and non-First Nations requires respect for First Nations laws as equal and distinct from Euro-Canadian laws.[54] It calls for recognition of First Nations as protectors of Mother Earth.[55] It requires acknowledging that from a First Nations perspective "Mother Earth is alive" and "has a living spirit [that] is sacred".[56] It requires a return to the spirit and intent of the treaty relationships on which Canada was built.[57]

---

48 Canada, Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queens University Press, 2015) vol 6 at 11–12.

49 Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (Ph.D. Thesis, University of Victoria Faculty of Law, 2019) at 244 [unpublished] at 2 [*Mills, Miinigowiziwin*].

50 *Campbell*, *supra* note 17.

51 *Ibid* at paras 68, 64 65. See also *AG Ontario v AG Canada* [1912] AC 571 at 5 [**TAB 11**].

52 *Campbell*, *supra* note 21 at paras 71 – 77 and in particular para 76. Also see para 78 which says "the division of powers in ss. 91 and 92 between the federal government and the provinces was not to extinguish diversity (or aboriginal rights)".

53 *Campbell*, *supra* note 21 at para 81.

54 Mills, *Miinigowiziwin*, *supra* note 49 at 212.

55 Great Binding Law, *supra* note 6; D'Arcy Linklater et al, *Ka'Esi Wahkotumahk Aski – Our Relations with the Land: Treaty Elders' Teachings Volume 2* (Winnipeg: Treaty Relations Commission of Manitoba and Assembly of Manitoba Chiefs Secretariat, 2014) at 27 [**TAB 12**].

56 Great Binding Law, *supra* note 6.

57 According to *Kakfwi*, reconciliation has a connotation of "a pact arrived at by the giving and taking of both parties, of a mutual understanding worked out through concessions and

3- *Direct* Governments to engage with First Nations on a Nation-to-Nation Basis

29. Treaties offer a "means of constitutional coordination"[58] and "constitutional dialogue."[59] The Federal Government has recognized the need for a "renewed, nation-to-nation relationship with Indigenous people" based on "respect, co-operation, and partnership."[60] Canada is a full supporter [61] of the *United Nations Declaration on the Rights of Indigenous Peoples*, which protects the right of First Nations to distinct legal institutions.[62] These appeals, whether acknowledged or not, are happening within this context. They highlight the need to direct governments to engage with First Nations on a nation-to-nation basis, returning to the original spirit and intent of treaties.

30. There are two competing approaches to understanding the significance of treaties.[63] The first is rooted in colonial doctrines and argues that treaties can be used to justify the First Nations' 'surrender' of sovereignty and land.[64] Alternatively, and consistent with a reconciliation lens, "treaties can be understood as agreements to share the land on a nation-to-nation basis."[65] According to First Nations Knowledge Keepers, the:

> original intent of the Treaty relationship between [First Nations] and [newcomers] at the time of Treaty making . . . was based on a mutual understanding of respect and responsibility. [...] There was an understanding by [First Nations] that we would share the benefits.[66]

31. The existence and strength of First Nations' own governance and legal systems was acknowledged by settlers from the beginning.[67] Within this understanding of treaties, each nation had their own unique gifts (language, custom and culture) as well as responsibilities

---

compromise, and is therefore a word closely related to treaty." : *Canada v Kakfwi*, [2000] 2 FC 241 at para 10, [1999] FCJ No 1407; affirmed in *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2005 MBCA 22 at paras 97, 110 [2005] 2 CNLR 155.

58 Mills, *Miinigowiziwin*, *supra* note 49 at 231.

59 *Ibid* at 193.

60 Rt Hon. Justin Trudeau, P.C., M.P, Prime Minister of Canada, "Minister of Crown-Indigeneous Relations and Northern Affairs Mandate Letter" (2017).

61 Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017-08-03).

62 *United Nations Declaration on the Rights of Indigenous Peoples,* 13 September 2007, A/61/295 at Article 5. Also see: Canada, Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (Ottawa: Library and Archives Canada, 2015) at 27, 28, 45, 50, 86, 92.

63 Drake, *supra* note 16 at 4.

64 Haida, *supra* note 38 at paras 20, 25; also see *Beckman*, *supra* note 39 at para 8.

65 Drake, *supra* note 16 at 4.

66 James Cote et al, *supra* note 3 at 13 [**TAB 1**].

67 *Ibid* at 23.

towards each other.[68] The very existence of treaties with First Nations are based on the assumption that both nations were equal and legitimate.[69] In order to fulfill the original intent of treaty, it is necessary to acknowledge that the story told about treaty has been manipulated by one nation.[70] A proper consideration of treaties must consider both the Crown and First Nations perspectives flowing from their written or oral traditions.[71]

32. Looking at the climate crisis through a reconciliation lens requires acknowledging that both settler and First Nations worldviews and laws can meaningfully inform contemporary policy. It means working together to identify appropriate processes and recommended approaches, including relying on First Nations protocols.

33. Parallel to this process, there may be federal and provincial debates, including through the application of the *Crown Zellerbach* test, to identify which level of government will engage with First Nations as their constitutional partner. Consistency in applying the reconciliation lens requires direct and ongoing engagement between First Nations and settler nations to identify the appropriate approach(es) to address contemporary issues.

34. The golden thread of First Nations laws can no longer be excluded when the future of all our children and all living beings is at stake. The existential crisis of climate change, like all contemporary challenges, is too complex for one treaty partner and one legal tradition. First Nations laws can assist in restoring environmental and constitutional balance.

PART IV. SUBMISSIONS ON COSTS

The AMC does not seek costs and should not be liable to pay costs to any party.

PART V. ORDER SOUGHT

The AMC takes no position regarding the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2020.

Joëlle Pastora Sala, Byron Williams & Katrine Dilay

68 James Cote et al, *supra* note 3 at 51 – 52, 69 [**TAB 1**].
69 *Ibid* at 23.
70 *Ibid* at 62.
71 In *Restoule*, *supra* note 25 at para 411, the Court identified that a proper analysis of the Treaties must take into account both the Crown and Anishinaabe perspectives.

CASE LAW	
Alderville First Nation v Canada, 2014 FC 747	14
Beaver v Hill, 2018 ONCA 816	16
Behn v. Moulton Contracting Ltd., 2013 SCC 26	16
Campbell v British Columbia, 2000 BCSC 1123	14, 21, 27, 28
Casimel v Insurance Corp of British Columbia, (1993) 82 BCLR (2d) 387	14
Coastal GasLink Pipeline Ltd. v Huson, 2019 BCSC 2264	11
Daniels v Canada (Minister of Indian Affairs and Northern Development), 2013 FC 6	11
Delgamuukw v The Queen, [1997] 3 SCR 1010	14
Guerin v The Queen, [1984] 2 SCR 335	14
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73	24, 30
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54	24
Manitoba Metis Federation v Canada (AG), 2013 SCC 14	24
McDiarmid Lumber Ltd. v God's Lake First Nation, 2005 MBCA 22	28
McLeod Lake Indian Band v Chingee, (1998) 165 DLR (4th) 358	14
Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69	24
Mitchell v MNR, 2001 SCC 33	14, 24
Pastion v Dene Tha' First Nation, 2018 FC 648	14
Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544	9, 11, 13
Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40	2, 9, 11, 13
Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43	24
Restoule v Canada (Attorney General), 2018 ONSC 7701	16, 17, 20, 31
R v Bernard, 2005 SCC 43	24
R v Bloom, 2016 ONCJ 8	14
R v Ippak, 2018 NUCA 3	19
R v Sparrow, [1990] 1 SCR 1075	24
R v Van der Peet, [1996] 2 SCR 507	14, 20, 24
St Catherines Milling and Lumber Co. v R, (1887) 13 SCR 577	14
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44	24, 25
LEGISLATION, PARLIAMENTARY DEBATE, AND OTHER LEGAL INSTRUMENTS	
Greenhouse Gas Pollution Pricing Act, SC 2018, c 12 s 186	7
SECONDARY SOURCES	
Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism*	26, 28, 29
Canada, Royal Commission on Aboriginal Peoples, *Volume 2: Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996)	27
Canada, Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal & Kingston: McGill-Queens University Press, 2015) vol 6	25

Caleb Behn, cited in Canada, Expert Panel: Review of Environmental Assessment Processes, Building Common Ground: A New Vision for Impact Assessment in Canada (Ottawa, 2017) at 29	1
Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017-08-03)	29
Karen Drake, "The Impact of St Catherine's Milling" (2018) Osgoode Hall Articles and Book Chapters at 2, online: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3684&context=scholarly_works>	*passim*
Oshoshko Bineshiikwe – Blue Thunderbird Woman et al, "Ogichi Tibakonigaywin, Kihche Othasowewin, Tako Wakan: The Great Binding Law" (Turtle Lodge, 2016)	*passim*
Rt Hon. Justin Trudeau, P.C., M.P, Prime Minister of Canada, "Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter" (2017)	29
United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/61/295	29

Court File No. 38663 and 38781

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION ACT,*
Bill C-74, Part V

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012,* SS 2012, c C-29.01

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

APPELLANT

-and-

ATTORNEY GENERAL OF CANADA

RESPONDENT

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF QUÉBEC

INTERVENERS

(Title of Proceeding continued on next page)

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF MANITOBA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

ATTORNEY GENERAL OF MANITOBA
Legal Services Branch, Constitutional Law Section
1230 - 405 Broadway
Winnipeg MB R3C 3L6

Michael Conner / Allison Kindle Pejovic
Tel: (204) 391-0767/(204) 945-2856
Fax: (204) 945-0053
Michael.Conner@gov.mb.ca
Allison.Pejovic@gov.mb.ca
Counsel for the Intervener

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
Suite 2600, 160 Elgin Street
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Lynne.Watt@gowlingwlg.com

Ottawa Agent for the Intervener

TABLE OF CONTENTS

Page No.

PART I – OVERVIEW AND STATEMENT OF FACTS 1

A. Manitoba's Approach to Carbon Pricing 2

B. The Federal Benchmark and Backstop 4

PART II – QUESTIONS IN ISSUE 6

PART III – ARGUMENT 7

A. Overview of Argument 7

B. Pith and Substance of the GGPPA 8

C. Classification: The GGPPA Does Not Fall Within the National Concern Branch of POGG 9

i. Defining the subject matter of national concern 9

ii. The requirement for uniformity is an essential feature of POGG 11

iii. The GGPPA does not impose a uniform, national standard of carbon pricing 13

D. Conclusion 19

PART IV – ORDER SOUGHT CONCERNING COSTS 20

PART V – ORDER SOUGHT 20

PART VII – LIST OF AUTHORITIES 21

PART I – OVERVIEW AND STATEMENT OF FACTS

1. This appeal strikes at the heart of federalism. It provides this Court with an opportunity to further delineate the parameters of the test for the national concern branch of peace, order and good government (POGG), as set out in *Crown Zellerbach* over 30 years ago.

2. No one disputes that climate change and the reduction of greenhouse gas (GHG) emissions are of paramount importance. The issue is whether Parliament has exclusive jurisdiction to impose its preferred policy choice on the provinces. Manitoba agrees with the Appellants' submissions that reducing GHG emissions lacks the singleness, distinctiveness and indivisibility necessary to support an exercise of the POGG power. If Parliament were to have jurisdiction under POGG to impose national standards to reduce GHG emissions as a matter of national concern, there would be virtually no limit to Parliament's ability to legislate in areas of provincial jurisdiction, given the breadth of activities that create GHG emissions. This would substantially disrupt the balance of federalism.

3. Manitoba will argue that the *Greenhouse Gas Pollution Pricing Act* (GGPPA or the Act) suffers from an additional fatal defect: it lacks the uniformity that is a quintessential feature of the national concern branch of POGG. The GGPPA does not ensure that carbon pricing meets a uniform, minimum national standard throughout Canada. Rather, it delegates to the Governor in Council the sole discretion to decide whether a particular provincial or territorial carbon pricing policy is adequate. The Act does not prescribe a national standard of stringency. Nor is stringency the only consideration Cabinet may take into account in determining whether to apply the federal backstop in a particular jurisdiction. The result is an uneven application of the federal benchmark and backstop, leading to a regional patchwork of carbon pricing regimes of varying stringency. Allowing federal Cabinet to pass judgment on provincial climate plans is inimical to the principle of federalism. More importantly, the disparate application of the federal benchmark undercuts the fundamental rationale for the extraordinary exercise of the POGG power and renders the GGPPA unconstitutional.

A. MANITOBA'S APPROACH TO CARBON PRICING

4. Manitoba relies on the facts set out by the Appellants and highlights the following.

5. In the Vancouver Declaration, federal, provincial and territorial First Ministers committed to transition to a low carbon economy by adopting a broad range of domestic measures, adapted to each province's and territory's specific circumstances. The Declaration was clear that provinces and territories would have the flexibility to design their own policies to meet GHG emissions reductions targets, including their own carbon pricing mechanisms. The Pan-Canadian Framework on Clean Growth and Climate Change recognized that provinces and territories have been leaders in the fight against climate change through a variety of policy measures, and reiterated the federal government's commitment to allow the provinces and territories the flexibility to design their own policies and carbon pricing mechanisms.[1]

6. Manitoba is fully committed to reduce GHG emissions and agrees that all governments must play a role and work cooperatively to implement effective solutions to combat and mitigate climate change. Climate change is one of the main pillars of Manitoba's Climate and Green Plan, 2017 (Climate Plan), which aims to reduce GHG emissions, invest in clean energy and adapt to the impacts of climate change.[2]

7. When first introduced, Manitoba's Climate Plan included carbon pricing as one among many tools to help reduce GHG emissions. It recognized that free-market forces could be used together with smart regulation to tackle climate change and make meaningful emission reductions. In addition to other measures, Manitoba proposed to introduce a flat $25 per tonne carbon tax. The proposed carbon tax would start at more than double the initial federal price of $10 per tonne, and would remain constant at $25 from 2018 to 2022.

8. The proposed carbon tax was tailored to fit Manitoba's unique economic and environmental circumstances, including its emissions profile. For example, it reflected the reality

---

[1] Vancouver Declaration, Ontario Record ("OR"), Tab 15 at 621-622; Pan-Canadian Approach to Pricing Carbon Pollution, OR, Tab 16 at 695

[2] A Made-in-Manitoba Climate and Green Plan, OR, Tab 12 at 1078

that about 98% of the province's electricity is already generated by clean, non-carbon emitting hydroelectric sources. Unlike in other provinces, a carbon price would not incentivize behavioural change in energy production. The government also took into account the billions of dollars already invested in building Manitoba's clean hydroelectricity grid and ongoing investments. This has a real cost. Had Manitoba chosen a different path for electricity generation, provincial GHG emissions would be approximately double what they are today.[3]

9. The Working Group on Carbon Pricing Mechanisms Final Report found that a carbon price will incentivize low cost abatement of emissions, however, such opportunities are not necessarily located uniformly across all regions. Therefore, GHG reductions will differ significantly from one province to another in response to a particular carbon price and depend on many factors.[4] Not surprisingly, this may necessitate a variety of carbon pricing mechanisms in Canada - both explicit (e.g. carbon tax) and implicit[5] (e.g. closing coal-fired plants, building codes, emission standards):

> The variety of approaches reflects the unique emissions profiles and unique economic structures of Canada's provinces and territories. Climate policy is not a one size fits all approach.[6]

10. Based on modelling of projected emissions, the Government of Manitoba estimated that by 2022, Manitoba's carbon tax would result in 80,000 tonnes fewer cumulative GHG emissions compared to the federal carbon pricing benchmark plan.[7]

11. As the Working Group on Carbon Pricing Mechanisms Final Report noted, comparing the actual or projected amount of GHG emission reductions relative to a no policy scenario is another valid approach to assessing the stringency of carbon pricing systems. It relies on modelling results rather than using price as the metric for comparing stringency.[8]

---

[3] A Made-in-Manitoba Climate and Green Plan, OR, Tab 12 at 1078
[4] Working Group on Carbon Pricing Mechanisms, Canada Record ("CR"), Vol. 4, Exhibit P at 68
[5] Working Group on Carbon Pricing Mechanisms, CR, Vol. 4, Exhibit P at 53
[6] Working Group on Carbon Pricing Mechanisms, CR, Vol. 4, Exhibit P at 83
[7] A Made-in-Manitoba Climate and Green Plan, OR, Tab 12 at 1078, 1083-1089
[8] Working Group on Carbon Pricing Mechanisms Final Report, CR, Vol. 4, Exhibit P at 86

12. Despite modelling that projected Manitoba's carbon pricing plan would result in a greater reduction of GHG emissions over a five year period than the federal benchmark price (i.e. Manitoba's plan would be more stringent in terms of reducing GHG emissions), the federal government refused to assure Manitoba that it would not impose the federal backstop in the GGPPA to raise the carbon tax above $25 per tonne. Consequently, on October 3, 2018, the Government of Manitoba announced in the Legislative Assembly that it would not proceed with its proposed carbon tax.[9] Manitoba did move forward with the remainder of its Climate Plan.

13. *The Climate and Green Plan Act*[10] received royal assent on November 8, 2018. It requires the Government of Manitoba to develop a comprehensive set of programs, policies and measures to reduce GHG emissions, address the effects of climate change, promote sustainable development and protect Manitoba's water resources and natural areas. It also establishes an expert advisory council to provide advice on GHG emissions reduction goals and the measures to be taken. For 2018-2022 and each five-year period thereafter, the minister must establish GHG emissions reduction goals.

B. THE FEDERAL BENCHMARK AND BACKSTOP

14. Canada's benchmark for carbon pricing contemplates that jurisdictions can implement either an explicit price-based system (e.g. a carbon tax) or a cap-and-trade system. Notwithstanding the assurance that provinces and territories would be entitled to adopt measures tailored to their specific circumstances, the federal benchmark was more prescriptive. It required jurisdictions opting for an explicit carbon price to start at a minimum of $10 per tonne of GHG emissions (based on CO_2 equivalent) and rise to $50 per tonne by 2022.[11]

15. In contrast, the benchmark for cap-and-trade systems was established based on projected results of GHG emissions reductions rather than by imposing a minimum price on fuel. Notably, provinces electing to implement a cap-and-trade system were not required to impose any particular

---

[9] Legislative Assembly of Manitoba, Debates and Proceedings, October 3, 2018 at p. 3338
[10] *The Climate and Green Plan Act*, S.M. 2018, c. 30, Sch. A
[11] Pan-Canadian Approach to Pricing Carbon Pollution, OR, Tab 16, Exhibit S at 695-697; Guidance on the pan-Canadian carbon pollution pricing benchmark. CR, Vol. 4, Exhibit R at 111-116; Supplemental benchmark guidance, CR, Vol. 4, Exhibit S at 118-119

carbon price. Instead, such jurisdictions had to commit to a target of reducing GHG emissions by at least 30% below 2005 levels, by 2030. Annual emissions caps had to decrease each year until 2022 to correspond to GHG emissions reductions that were estimated to be achieved by an express carbon price. The actual price incentive to reduce carbon emissions in a cap-and-trade regime depends on the market for trading emissions credits.[12] Thus, comparing the stringency of cap-and-trade pricing systems expressly relies on estimating results (that is, projected GHG reductions), regardless of price.[13]

16. A key element of the federal benchmark requires that the carbon price be applied to a common and broad scope of GHG sources. At a minimum, the carbon price must apply to substantively the same GHG sources covered by British Columbia's carbon tax. This includes, but is not limited to, any fuels that produce GHGs when combusted in transportation, heating, electricity, light manufacturing and industry.[14]

17. As will be detailed below, the Governor in Council chose not to apply the GGPPA in several jurisdictions notwithstanding that the carbon price was not imposed on all GHG emissions sources required by the benchmark. This has resulted in a disparate application of carbon pricing across Canada. Manitoba will argue that the failure of the GGPPA to impose a uniform, national minimum standard of carbon pricing substantially undermines Canada's contention that the Act falls within the federal POGG power.

---

[12] Working Group on Carbon Pricing Mechanisms, CR, Vol. 4, Exhibit P at 53

[13] Pan-Canadian Approach to Pricing Carbon Pollution, OR, Tab 16, Exhibit S at 695-697; Guidance on the pan-Canadian carbon pollution pricing benchmark. CR, Vol. 4, Exhibit R at 111-116; Supplemental benchmark guidance, CR, Vol. 4, Exhibit S at 118-119

[14] Guidance on the pan-Canadian carbon pollution pricing benchmark, CR, Vol. 4, Exhibit R at 112

PART II – QUESTIONS IN ISSUE

18. Manitoba will address the following issue:

Does the *Greenhouse Gas Pollution Pricing Act* fall within the national concern branch of the peace, order and good government (POGG) power contained in s. 91 of the *Constitution Act, 1867*?

19. Manitoba submits that the Act cannot be sustained under the federal POGG power.

PART III – ARGUMENT

A. OVERVIEW OF ARGUMENT

20. Manitoba endorses the Appellants' arguments that the GGPPA cannot be upheld under POGG.

21. The dominant feature of the GGPPA is the regulation of GHG emissions by creating a cost incentive to change behaviour in order to reduce emissions.

22. Unlike the enumerated heads of power in ss. 91 and 92, the POGG power is residual in nature.[15] Thus, at the classification stage, the court must first define the subject matter that is said to be of national concern. The matter of national concern here is "climate change" or "the reduction of GHG emissions." The particular tool chosen to reduce GHG emissions (carbon pricing) does not inform the subject of national concern. Similarly, adding the words "minimum national standards" does little to illuminate the subject matter of POGG. By definition, all federal legislation is national.

23. While climate change and the reduction of GHG emissions are undoubtedly of serious concern, Manitoba agrees with the Appellants that including this matter under the national concern branch of POGG would grossly intrude into the sphere of provincial jurisdiction and disrupt the balance of federalism.

24. In any event, contrary to Canada's submissions, the Act does not impose a minimum national standard for carbon pricing. The GGPPA only serves as a backstop if the Governor in Council decides, in its discretion, to apply the Act to a province or territory, primarily taking into account the stringency of a provincial pricing mechanism for GHG emissions. Stringency is not defined in the Act, nor is it the only factor for consideration. Cabinet's discretion is not constrained by any specific benchmark or minimum standard.[16] Therefore, the GGPPA lacks the uniformity that is a quintessential feature of the POGG power. By allowing federal Cabinet to be the sole judge as to whether provincial policies are sufficiently stringent, the Act permits an uneven application of the federal benchmark, resulting in a regional patchwork of carbon pricing regimes.

---

[15] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327; *R. v. Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401 (*"Crown Zellerbach"*) at para. 34

[16] *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (GGPPA), ss. 166 and 189

The GGPPA undermines the fundamental premise of the POGG power: that the regional diversity inherent in federalism must be subordinated to and displaced by a uniform national response in order to address a matter of national concern.

B. PITH AND SUBSTANCE OF THE GGPPA

25. The pith and substance of legislation must be identified with precision. Legislation should not be characterized in overly vague and generalized terms, such as health or environment, because this could distort the division of powers analysis.[17] Conversely, legislative purpose must not be defined too narrowly such that it becomes a recapitulation of the means employed to achieve its end. The purpose must be kept distinct from the tools adopted to achieve it.[18] Legislative purpose should be stated precisely and succinctly but at an appropriate level of generality.

26. The dominant purpose of the Act is the reduction of GHG emissions. Pricing carbon is not an end in itself. It is merely an indirect tool to achieve the Act's overriding purpose: to reduce GHG emissions.

27. The legal and practical effect of the GGPPA is to create a cost incentive to reduce GHG emissions. Part 1 of the Act imposes a charge on GHG producing fuels and waste, which makes it more expensive for consumers and businesses to use fuels that produce GHG emissions. This creates an economic incentive to change behaviour. Likewise, Part 2 of the Act regulates GHG emissions by imposing a charge on emissions that exceed prescribed limits. This creates an economic incentive for large industry to reduce GHG emissions below such limits.

28. Manitoba submits the pith and substance of the Act is the regulation of GHG emissions by creating a cost incentive to alter behaviour in order to reduce GHG emissions.

---

[17] *Reference re Assisted Human Reproduction Act,* 2010 SCC 61 at 190-191

[18] *R. v. Moriarity*, 2015 SCC 55 at para. 26-27; *Ward v. Canada (A.G.)*, 2002 SCC 17 at para. 25; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 190 per Lebel and Deschamps JJ.; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 ("*Ontario Reference*") at paras. 207-211 per Huscroft JA (dissenting)

29. We disagree with Canada that the Act's essential character relates to establishing "minimum national standards integral to reducing nationwide GHG emissions".[19] First, the Act does not establish a minimum national standard for carbon pricing. As will be detailed further below, the GGPPA provides Cabinet full discretion whether to add a province to the backstop based on its own assessment of stringency, among other factors. Secondly, adding the words "minimum national standards" and "nationwide" does not assist in elucidating the essential character of the Act. As Justice Slatter remarked in the 2011 *Securities Reference*, national standards to achieve nationwide goals are inherent in all federal legislation.[20] Characterizing the pith and substance in this manner is circular and dictates the outcome of the constitutional analysis.

C. CLASSIFICATION: THE GGPPA DOES NOT FALL WITHIN THE NATIONAL CONCERN BRANCH OF POGG

30. Once the true essence of a statute is determined, the next step is to classify the law under the appropriate head of power. Ordinarily, this task refers to the enumerated powers in sections 91 and 92 of the *Constitution Act, 1867*. However, in the present case, Canada relies on its residual POGG power contained in the opening words of s. 91 to make laws in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures. As a residual power, POGG has no specific content. To date, we know that POGG includes jurisdiction over matters of aeronautics, atomic energy, marine pollution, radio communications and the national capital region. Thus, a preliminary question is how to properly define the subject matter of national concern that Canada asserts falls within POGG.

i. Defining the subject matter of national concern

31. Classification is a distinct exercise from characterization. The subject matter of national concern under POGG cannot simply be a recapitulation of the pith and substance of the statute in question. This would result in circular reasoning and constitutionalize a particular statute. A matter of national concern also cannot be defined by the particular legislative tool chosen to address a problem. Rather, the subject of national concern becomes a new head of power under

---

[19] Canada's factum, paras. 56, 59-61
[20] *Reference re Securities Act (Canada)*, 2011 ABCA 77 at para. 17

POGG, which is capable of supporting any enactment that is, in pith and substance, in relation to that subject matter.[21]

32. For example, jurisdiction over marine pollution under POGG is not restricted to laws in relation to dumping substances at sea. Parliament has also enacted laws in relation to marine conservation and the prevention of pollution in arctic waters.[22] Jurisdiction over atomic energy is not limited to labour relations in nuclear facilities but covers all manner of regulations related to nuclear safety, liability, security and waste to name a few.[23] Parliament may regulate such diverse matters as animals, traffic and property in the National Capital region.[24] Similarly, the field of aeronautics encompasses safety and security, zoning, aerodromes and liability, among many other topics.

33. Manitoba submits the subject matter of national concern here is climate change, or alternatively, the reduction of GHG emissions.

34. Further, no meaningful distinction exists between "establishing minimum national standards integral to reducing nationwide GHG emissions" and more simply, "the reduction of GHG emissions". By analogy, describing the national concern as "establishing minimum national standards integral to reducing nationwide inflation" would not change the essential matter of national concern: the containment and reduction of inflation.[25] If it were otherwise, adding the words "national standards" and "nationwide" could transform any subject falling within provincial jurisdiction into one of national concern.

---

[21] *Ontario Reference*, para. 224 per Huscroft J.A. (dissent); Saskatchewan's factum, paras. 54-58.
[22] *Crown Zellerbach; Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18; *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12
[23] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327; *Nuclear Fuel Waste Act*, S.C. 2002, c. 23; *Nuclear Safety and Control Act,* S.C. 1997, c. 9; *Nuclear Energy Act*, R.S.C. 1985, c. A-16; *Nuclear Liability and Compensation Act,* S.C. 2015, c. 4, s. 120
[24] *Munro v. National Capital Commission*, [1966] SCR 663; *National Capital Commission Animal Regulations*, SOR/2002-164; *National Capital Commission Traffic and Property Regulations*, C.R.C., c. 1044
[25] *Re: Anti Inflation Act*, [1976] 2 SCR 373

ii. The requirement for uniformity is an essential feature of POGG

35. Once a subject matter qualifies as a national concern within POGG, Parliament has exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.[26] In other words, that subject matter is permanently added to the heads of federal jurisdiction. For this reason, courts must be very circumspect before expanding Parliament's jurisdiction under POGG.

36. As recognized by this Court in *Crown Zellerbach*, an essential feature of the national concern branch of POGG is that the subject matter requires a uniform, national legislative response, which cannot realistically be addressed by the provinces.[27]

37. Manitoba accepts that as a general proposition, there is no constitutional requirement for all federal legislation to apply uniformly across the country, although it may be a practical necessity in some cases.[28] However, the POGG power stands on a different footing. The requirement for a uniform national response to a matter of national concern is inextricably linked to the notion of provincial inability and is a fundamental premise underlying POGG. Professor Hogg rightly criticizes *Russell*[29], an early POGG case that upheld a local-option temperance scheme, because the court found that uniform legislation was merely desirable to address a problem of general concern.[30] If that were the law, there would be no limit to the reach of federal POGG power. Uniform legislation may be desirable on many important topics but that cannot be sufficient to usurp provincial jurisdiction and negate the diversity inherent in a federal system. As Professor Hogg explains:

> There are, however, cases where uniformity of law throughout the country is not merely desirable, but essential, in the sense that the problem "is beyond the power of the provinces to deal with it". This is the case when the failure of one province to act would injure the residents of the other (cooperating) provinces. This "provincial inability" test goes a long way towards explaining the cases. …

---

[26] *Crown Zellerbach* at 433
[27] *Crown Zellerbach* at 431, 433-434
[28] *Ordon Estate v. Grail*, [1998] 3 SCR 437 at paras. 71, 89; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 69
[29] *Russell v. The Queen* (1882), 7 A.C. 829 (PC)
[30] P. Hogg, *Constitutional Law of Canada* (5th ed., Looseleaf) at 17-9

…

> In the *Crown Zellerbach* case, Le Dain J. for the majority of the Court relied on the provincial inability test as a reason for finding that marine pollution was a matter of national concern. "It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment." It seems, therefore, that the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces. A subject-matter of legislation which has this characteristic has the necessary national concern to justify invocation of the p.o.g.g. power. [Emphasis added].[31]

38. One can draw an analogy with the *Securities Reference*, where this Court explained what it means for a matter to be of genuine national importance and scope in the context of the general trade and commerce power. Parliament has jurisdiction to legislate in respect of systemic risk because the "absence of a uniform set of rules applicable throughout the country" would render the capital market vulnerable. Addressing systemic risk requires "common standards" throughout Canada. Such regulations must, by their nature, be respected by all provinces in order to achieve the underlying objectives of the legislation.[32]

39. In a contemporary Canadian federation, where the dominant tide is flexibility and coordination among jurisdictions,[33] Parliament cannot be permitted to exercise its residual POGG power to displace provincial jurisdiction over a subject matter unless a uniform, national standard is truly essential, not merely desirable. Indeed, Canada repeatedly argues that its fundamental rationale for enacting the GGPPA is to ensure that carbon pricing meets minimum national standards of stringency that apply throughout Canada.[34]

40. However, and without conceding that reducing GHG emissions requires a single legislative treatment, the GGPPA, as drafted, does not impose a uniform national standard. The Act does not

---

[31] P. Hogg, *Constitutional Law of Canada* (5th ed., Looseleaf) at 17-13 to 17-14; *Re: Anti-Inflation Act* per Laskin J. at 400, 415; *Ontario Reference* at para. 121 per Strathy CJO; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 ("*Saskatchewan Reference*") at para. 411-414, 438-441 per Ottenbreit and Caldwell JJ.A. (dissenting)
[32] *Reference re Securities Act*, 2011 SCC 66 at para. 87, 104; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 127
[33] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 36, 45
[34] Canada factum at para. 118

require all provinces to comply with a uniform benchmark for carbon pricing. The Governor in Council can exercise its discretion to impose different levels of stringency of carbon pricing and as will be discussed further below has done so, whether for economic, political or other reasons. This undercuts Canada's reliance on the POGG power to justify the constitutionality of the GGPPA.

iii. The GGPPA does not impose a uniform, national standard of carbon pricing

41. The GGPPA could easily have been drafted to impose a minimum, uniform, national price and prescribe a common scope of coverage for fuels that generate GHG emissions. It was not. Instead, it provides a wide discretion to the Governor in Council to determine which provinces and territories will be subject to the federal backstop for the purpose of ensuring that pricing of GHG emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate. There is no requirement to apply the same national standard of carbon pricing to all provinces.

42. Under s. 166 of the Act, the Governor in Council has the discretion to determine if and when the federal fuel charge under Part 1 will apply to a province or territory or area. Section 189 is substantially similar in relation to the application of Part 2 of the Act to large industrial emitters. Under both provisions, in deciding whether to add a province to the backstop, Cabinet must take into account, as the primary factor, the "stringency of provincial pricing mechanisms for GHG emissions". Significantly, however, Cabinet is free to consider other factors as well.

43. Section 166(4) of the Act also confers full discretion on Cabinet to set a price for GHG emissions at levels it considers appropriate. The carbon charges are set out in Schedule 2 of the Act. Again, the Governor in Council is under no obligation to establish a minimum price that applies uniformly across the country to the same GHG emitting sources and, as discussed below, it has not done so.

44. Importantly, "stringency" is not defined in the Act. The GGPPA does not prescribe that provincial pricing mechanisms must meet the requirements of the federal benchmark. Therefore, contrary to Canada's assertion, the Governor in Council is not bound to apply the federal

benchmark as the minimum national standard for assessing the stringency of provincial systems.[35] Even if a provincial carbon pricing mechanism fails to comply with the standards contemplated in the benchmark, Cabinet remains the sole arbiter of whether a provincial pricing plan is adequate.

45. There are a number of ways to compare the stringency of carbon pricing systems. One option identified by the Working Group on Carbon Pricing is to compare the projected GHG emission reductions based on modelling.[36] Manitoba submits this meaning of stringency is most consistent with the dominant purpose of the Act, which is to reduce GHG emissions. Regardless of the actual carbon price, a mechanism that achieves comparable or better results in terms of actual or projected GHG emissions reductions should be considered at least as stringent. Notably, the federal benchmark for cap-and-trade systems does not prescribe any minimum fuel price. Rather, cap-and-trade systems must be designed to achieve projected GHG emission reductions that meet a target, regardless of the carbon price. That is, stringency is based on estimated results not price. Stringency should have a consistent meaning in the Act, regardless of the pricing system.

46. If "stringency" of carbon pricing systems under the GGPPA is properly understood in terms of projected GHG emission reductions, based on modelling, Manitoba's carbon pricing plan was projected to achieve greater GHG reductions than the federal benchmark over a five-year period.[37] Therefore, Manitoba's carbon tax was at least as stringent, if not more stringent than the federal pricing plan. Yet the federal government refused to accept Manitoba's plan.

47. On the other hand, Canada appears to rely solely on the pricing level as the appropriate measure of stringency. Of course, as the Saskatchewan Court of Appeal majority correctly observes, price stringency must assess not just the price per unit of GHG emissions but also the scope or breadth of application of the charge in terms of the types of fuels, operations and activities to which the charge applies.[38] A carbon price that exempts important sources of GHG emitting fuels is necessarily less stringent than one that includes all such fuels. For that reason, the federal

---

[35] Canada's factum, para. 59
[36] Working Group on Carbon Pricing Mechanisms Final Report, CR, Vol. 4, Exhibit P at 84-86
[37] A Made-in-Manitoba Climate and Green Plan, OR, Vol. III, Tab 12-39 at 1078, 1083-1089
[38] Canada's factum, para. 61; *Saskatchewan Reference* at para. 139

benchmark requires jurisdictions opting for an explicit carbon price to apply the price, at a minimum, to substantively the same sources as are covered by British Columbia's carbon tax.[39]

48. Even if this Court accepts Canada's view that "stringency", as that term is used in the Act, must be understood in terms of the level of the carbon price and its scope of coverage, it is apparent that the Governor in Council has not applied a minimum standard of "stringency" uniformly in practice.

49. In October 2018, the federal government announced that the GGPPA backstop would apply in Manitoba, Ontario, New Brunswick and Saskatchewan[40] beginning in 2019. At the same time, it announced that the pricing systems in place in Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Quebec, Prince Edward Island and the Northwest Territories met the federal benchmark. The GGPPA would not apply in those jurisdictions.[41] Below, we highlight several examples where the Governor in Council elected not to apply the federal backstop in the GGPPA, notwithstanding that the provincial pricing mechanism contained significant exemptions from the provincial carbon price. In other words, the provincial carbon price was not applied to a minimum, common set of GHG emitting sources as required by the federal benchmark.

Alberta

As of October 23, 2018, Alberta had a hybrid pricing system consisting of a carbon tax and an output-based pricing system for large facilities with 100,000 tonnes or more of GHG emissions (called specified gas emitters). The carbon tax component of Alberta's pricing system was subsequently repealed, effective May 30, 2019.[42] However, the important point is that the Governor in Council assessed the carbon tax in force at the time as sufficiently stringent, notwithstanding that Alberta's regulations provided a significant exemption for fuel used in the oil and gas production sector until 2023.[43] Among others,

---

[39] *Carbon Tax Act*, SBC 2008, c. 40, ss. 8-11, 14(2)(b), (f), 22, Schedule 1; *Carbon Tax Regulation*, BC Reg 125/2008, ss. 7, 11, 18, 18.1, Part 4

[40] GGPPA, Part 2 only partially applied in Saskatchewan to fill gaps in the provincial system for large emitters.

[41] CR, Vol. 4, Exhibit X at 166-167

[42] *An Act To Repeal The Carbon Tax*, SA 2019, c. 1

[43] Alberta's Carbon Levy Exemptions Fact Sheet provides a convenient summary of exemptions

facilities involved in activities integral to the operation of oil and gas wells and batteries, gas processing facilities, compressor facilities, gas fractionation plants, gas gathering systems and oil production sites could emit up to 100,000 tonnes of GHG emissions without paying any carbon tax.[44] No similar exemption exists for conventional oil and gas producers under the federal benchmark or backstop. Oil and gas producers in B.C., Saskatchewan and Manitoba are subject to the carbon price.

Newfoundland and Labrador

Newfoundland and Labrador also has a hybrid carbon pricing system, which imposes a carbon tax under the *Revenue Administration Act* and performance standards for large industrial facilities that emit at least 25,000 tonnes of GHG emissions annually, under the *Management of Greenhouse Gas Act.*[45] The province's pricing plan exempts various emissions that are covered under the federal benchmark and backstop. Such exemptions include fuel used for: intra-provincial aviation; heating such as light fuel oil, kerosene, propane, butane or naphtha; the generation of electricity to be fed into a public or private grid; locomotives; offshore mineral and petroleum exploration; forestry and logging activities; and fuel used by the provincial government.[46] Under the federal benchmark and backstop, the carbon charge applies on these fuels and activities in Manitoba, Saskatchewan, Ontario and New Brunswick, but not in Newfoundland and Labrador.

---

[44] *Climate Leadership Act*, SA 2016, c. C-16.9, s. 15; *Climate Leadership Regulation*, Alta Reg 175/2016, s. 1(1)(bb), (gg), s. 11; *Carbon Competitiveness Incentive Regulation*, Alta Reg 255/2017, s. 3; National Inventory Report, GHG Emission Summary for Alberta, OR, Vol. 2, Tab 33 at 631

[45] *Revenue Administration Act*, SNL 2009, c. R-15.01, Part III.1; *Management of Greenhouse Gas Act,* SNL 2016 c. M-1.001

[46] *Revenue Administration Regulations,* NL Reg. 73/11, s. 16.1, 19, 19.1. For a convenient summary of the exemptions contained in the regulations, see the Backgrounder published on the provincial government's website.

Prince Edward Island

PEI's *Climate Leadership Act* sets its carbon levy at $0 for furnace oil and propane used for home heating.[47] In contrast, neither the federal benchmark nor the backstop under the GGPPA exempts Manitoba or any of the other listed provinces from the application of the carbon price to home heating fuel.[48] Further, PEI's carbon levy on gasoline introduced under its *Climate Leadership Act* was largely offset by decreases in its gasoline tax from 13.1¢/L in 2018 to 9.68¢/L in 2019 to 8.47¢/L in 2020, such that the net price increase on gasoline was only 1¢/L, far less than required under the federal benchmark.[49] Yet the federal government chose not to impose its backstop.

Territories

The federal government has provided full relief from the carbon charge for aviation fuel used in flights within the territories. Similar relief was not provided for intra-provincial aviation travel in Manitoba or the other listed provinces.[50]

First Nations Reserves

The federal backstop applies the carbon price to First Nations reserves in Manitoba, Ontario, Saskatchewan and New Brunswick. In contrast, the provincial carbon levy does not apply on reserves in B.C., Alberta, Newfoundland and Labrador, PEI or the Northwest Territories, again leading to disparate results.[51]

---

[47] *Climate Leadership Act*, RSPEI 1988, c. C-9.1, Table 1 of the Schedule.
[48] GGPPA, Schedule 2. See the charges on propane and light fuel oil.
[49] *Gasoline Tax Act*, RSPEI 1988, c G-3, s. 3 and Schedule
[50] "How We're Putting a Price on Carbon Pollution", CR, Vol. 4, Exhibit X at 167; *Petroleum Products and Carbon Tax Act,* RSNWT 1988, c. P-5, s. 2.1; GGPPA, Schedule 2 sets the charge for aviation fuel at $0 for the Yukon and Nunavut compared to $0.0498/litre in listed provinces.
[51] *Carbon Tax Regulation*, B.C. Reg. 125/2008, s. 41.2(1)(a); *Climate Leadership Regulation*, Alta Reg. 175/2016, s. 12; *Climate Leadership Act*, RSPEI 1988, c. C-9.1, s. 23; *Revenue Administration Regulations,* NL Reg. 73/11, ss. 16(2), 16.1(4); *Petroleum Products and Carbon Tax Act,* RSNWT 1988, c. P-5, s. 2.1

50. The federal government stated that the backstop would supplement or "top up" systems that did not fully meet the benchmark.[52] Thus, the Governor in Council partially applied the GGPPA backstop to Saskatchewan's output-based pricing system for large industry – assessed as not meeting the federal benchmark - in order to "fill in the gaps in that province by covering the electricity and natural-gas pipeline sectors".[53] The Governor in Council did not take the same approach in respect of Alberta, Newfoundland and Labrador or Prince Edward Island to fill in the gaps in the scope of coverage of GHG emissions, notwithstanding that the provincial pricing mechanisms fell short of the federal benchmark.

51. The above examples illustrate that stringency was not the only factor the Governor in Council considered in determining whether to list a province under the Act. Cabinet may have been motivated by any number of considerations, including political, economic, social or partisan factors.[54] Ultimately, we do not know what considerations led the Governor in Council to approve provincial plans that did not meet the benchmark in terms of the scope of coverage or price. What we do know is that, in law and in fact, the GGPPA does not establish a uniform, minimum national standard of carbon price stringency throughout Canada.[55] Therefore, the Act cannot be sustained under POGG.

52. To be clear, Manitoba's point is not to criticize any of the exemptions provided under the various provincial carbon pricing plans. However, these examples highlight that conferring discretion on Cabinet to pass judgment on the "stringency" of provincial pricing mechanisms allows for a regional patchwork, with significant variation in the sources and activities to which carbon pricing applies across the country. It has resulted in an uneven application of the federal benchmark, not a uniform, national standard of carbon pricing in Canada.

---

[52] Technical Paper on the Federal Carbon Pricing Backstop, OR, Tab 16, Exhibit V at 792
[53] CR, Vol. 4, Exhibit X at 166-167
[54] *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 SCR 106 at 112-113
[55] *Saskatchewan Reference* at para. 383-388. Ottenbreit and Caldwell JJ.A correctly note that the backstop does not apply uniformly. The Act allows for varying degrees of stringency as determined by the federal executive branch. Without endorsing the view that there is a principle of uniformity of taxation, Manitoba submits that this lack of uniformity is fatal to POGG.

53. Manitoba's oil and gas industry would surely be dismayed to learn that the exemption allowed in Alberta was not similarly available here. Manitobans enduring long, cold winters would be equally upset to learn that they are required to pay a carbon charge on home heating fuel under the federal scheme, unlike residents of Newfoundland and Labrador and Prince Edward Island. Indigenous people living in remote fly-in communities in northern Manitoba and other provinces may similarly wonder why intra-provincial aviation fuel is exempt from a carbon levy in some parts of Canada under the federal scheme, but not here.

54. Undoubtedly, there may be a variety of legitimate social, economic, environmental or political reasons that could lead to establishing different carbon pricing in different regions of the country. Carbon pricing may adversely affect the economies of some provinces more than others. The sources and intensity of GHG emissions also differ across Canada. However, once it is acknowledged that regional and economic diversity justifies differences in the level or coverage of carbon pricing, it seriously undermines Canada's rationale for relying on POGG to justify the constitutionality of the Act. It can no longer be maintained that Canada requires or is imposing a uniform, minimum, national standard of carbon pricing to address a matter of national concern.[56] Since this fundamental feature of the national concern branch of POGG is absent, the GGPPA cannot be upheld.

D. CONCLUSION

55. The POGG power raises profound issues respecting the federal structure of our Constitution. If not carefully circumscribed, POGG has the potential to irrevocably upset the division of powers. This is particularly true in a field as all-pervasive as GHG emissions. In a modern federation, diversity and the need for cooperation and coordination among provincial and federal governments remains the norm in environmental matters.[57] For the reasons identified by the Appellants, reducing GHG emissions is not a suitable subject matter for exclusive federal jurisdiction under POGG. In any event, the GGPPA fails to prescribe uniform, minimum national standards that Canada says are imperative to reduce GHG emissions as a matter of national concern. Conferring broad discretion on the federal Cabinet to assess the adequacy of provincial

---

[56] *Saskatchewan Reference*, dissenting opinion at para. 383-388, 411, 451
[57] *R. v. Hydro-Quebec*, [1997] 3 SCR 213 at para 110, 115-116, 153-154

policies on a case by case basis is not a recipe for peace, order and good government. It fosters significant discord, disharmony and deep division in the federation. The GGPPA cannot be upheld under POGG and is unconstitutional.

PART IV – ORDER SOUGHT CONCERNING COSTS

56. Manitoba does not seek costs and requests that no costs be awarded against Manitoba.

PART V – ORDER SOUGHT

57. Manitoba requests this Court provide an advisory opinion that Parts 1 and 2 of the GGPPA are unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 27, 2020.

Michael Conner
for the Attorney General of Manitoba

Allison Kindle Pejovic
for the Attorney General of Manitoba

PART VII – LIST OF AUTHORITIES

Cases:	**Cited in factum at paragraph no.**
Canadian Western Bank v. Alberta, 2007 SCC 22	39
Munro v. National Capital Commission, [1966] SCR 663	32
Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 SCR 327	22, 32
Ordon Estate v. Grail, [1998] 3 SCR 437	37
R. v. Crown Zellerbach Canada Ltd, [1988] 1 SCR 401	1, 22, 32, 35, 36
R. v. Hydro-Quebec, [1997] 3 SCR 213	55
R. v. Moriarity, 2015 SCC 55	25
Re: Anti-Inflation Act, [1976] 2 SCR 373	34, 37
Reference re Assisted Human Reproduction Act, 2010 SCC 61	25
Reference re: Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544	25, 31, 37
Reference re: Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40	37, 47, 51, 54
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48	38

Reference re Same-Sex Marriage, 2004 SCC 79	37
Reference re Securities Act, 2011 SCC 66	38
Reference re Securities Act (Canada), 2011 ABCA 77	29
Russell v. The Queen, (1882), 7 App. Cas. 829	37
Thorne's Hardware Ltd. v. The Queen, [1983] 1 SCR 106	51
Ward v. Canada (A.G.), 2002 SCC 17	25

Legislation:	**Cited in factum at paragraph no.**
An Act To Repeal The Carbon Tax, SA 2019, c.1	49
Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12	32
Canada National Marine Conservation Areas Act, S.C. 2002, c. 18	32
Carbon Competitiveness Incentive Regulation, Alta Reg 255/2017, s. 3	49
Carbon Tax Act, SBC 2008, c. 40, ss. 8-11, 14(2)(b), (f), 22, Schedule 1	47
Carbon Tax Regulation, BC Reg 125/2008, ss. 7, 11, 18, 18.1, Part 4, s. 41.2(1)(a)	47

Climate Leadership Act, RSPEI 1988, c. C-9.1, Table 1 of the Schedule, s. 23	49
Climate Leadership Act, SA 2016, c. C-16.9, s. 15 (repealed)	49
Climate Leadership Regulation, Alta Reg 175/2016, s. 1(1)(bb), (gg), s. 11, s. 12 (repealed)	49
Gasoline Tax Act, RSPEI 1988, c. G-3, s. 3 and Schedule (current version) and s. 3 in force as of December 31, 2018	49
Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186	24, 27, 41, 42, 43, 44
Management of Greenhouse Gas Act, SNL 2016 c. M-1.001	49
National Capital Commission Animal Regulations, SOR/2002-164	32
National Capital Commission Traffic and Property Regulations, C.R.C., c. 1044	32
Nuclear Energy Act, R.S.C. 1985, c. A-16	32
Nuclear Fuel Waste Act, S.C. 2002, c. 23	32
Nuclear Liability and Compensation Act, S.C. 2015, c. 4, s. 120	32
Nuclear Safety and Control Act, S.C. 1997, c. 9	32
Petroleum Products and Carbon Tax Act, RSNWT 1988, c. P-5, s. 2.1	49

Revenue Administration Act, SNL 2009, c.R-15.01, Part III.1	49
Revenue Administration Regulations, NL Reg. 73/11, s. 16.1, 16.2, 16.4, 19, 19.1	49
The Climate and Green Plan Act, S.M. 2018, c. 30, Sch. A	13

Other:	**Cited in factum at paragraph no.**
P. Hogg, *Constitutional Law of Canada*, (5th ed., Looseleaf), ch. 17.3(a), (b)	37
Legislative Assembly of Manitoba, Debates and Proceedings, October 3, 2018 at p. 3338	12