Docket: CACV3239

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*, BILL C-74, PART 5

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

FACTUM OF CANADA'S ECOFISCAL COMMISSION (INTERVENOR)

Stewart A.G. Elgie
Barrister & Solicitor
Faculty of Law
University of Ottawa
57 Louis Pasteur St.
Ottawa, ON K1N 6N5
T. 613-562-5800 ext. 1270
Stewart.elgie@uottawa.ca

Nathalie J. Chalifour
Barrister & Solicitor
Faculty of Law
University of Ottawa
57 Louis Pasteur St.
Ottawa, ON K1N 6N5
T. 613-562-5800 ext. 3331
Natchali@uottawa.ca

Counsel for Canada's Ecofiscal Commission

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PART I - FACTS

1. Canada's Ecofiscal Commission (the "Commission") is an independent, non-partisan, national research organization. Its work is directed and authored by 13 Commissioners, who include some of Canada's most respected economic experts. The Commission's mission, expertise and work focus on how market-based approaches to environmental protection, particularly pollution pricing, can achieve environmental goals at the lowest economic cost and stimulate innovation. Since 2015, it has released eight in-depth research reports on different aspects of carbon pricing.[1]

2. The Commission accepts the facts set out in the Attorney General of Canada's factum.

PART II - ARGUMENTS

3. The Commission submits that the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*) is *intra vires* the Parliament of Canada. Both Parliament and the provincial legislatures have authority to legislate for the purpose of controlling greenhouse gas (GHG) emissions in general, and putting a price on GHG emissions in particular. Meeting Canada's GHG emissions reduction commitments requires effective, coordinated measures by governments across the country.

4. Parliament's authority to enact the *GGPPA* arises principally under the power over Peace, Order and Good Government (POGG), particularly the National Concern branch. Global climate change, caused by GHG emissions, is the quintessential example of a serious, international environmental problem. If it is not a matter of National Concern, it is difficult to imagine what kind of trans-boundary pollution problem ever would be.

Peace, Order and Good Government – National Concern Branch

5. The Attorney General of Canada ("Canada") argues that the **pith and substance**, **or matter** of this Act is *to ensure that a minimum emissions price applies throughout Canada to incentivize the behavioural changes necessary to reduce GHG emissions*. The intervenor accepts this characterization.

[1] Affidavit of Christopher Ragan, Ecofiscal Commission Record, Tab 2, paras 5-9, 11-12, 14, 22, 26-29.

6. Alternatively, the *GGPPA*'s subject matter could be characterized more simply as "*the control of extraprovincial and international air pollution caused by GHG emissions.*"[2] This framing is consistent with the *GGPPA*'s preamble.[3] It also reflects what makes GHGs a matter of national concern: they cause serious international impacts, i.e. global climate change. It is in line with how the Supreme Court of Canada (SCC) characterized the Act's subject matter in *Crown Zellerbach,* for POGG purposes: "the control of pollution by the dumping of substances in marine waters",[4] and also with the substantial body of authority supporting "interprovincial and international pollution" as a matter of National Concern.

7. By contrast, the pith and substance proposed by the Attorney General of Saskatchewan – "to increase the cost of certain fuels by imposing pricing mechanisms" – completely ignores the purpose of the *GGPPA*: to reduce GHG emissions that cause global climate change.

8. Regardless of which version of the *GGPPA*'s subject matter is chosen – the one proposed by Canada or by the Commission – they both satisfy the four elements of the National Concern test from Crown Zellerbach (see para 70 of Canada's Factum).

9. **New matter:** Human-caused climate change is a new problem, unknown at the time of confederation.[5] In any event it has become a problem of utmost national and global concern.

10. **Single, distinct, indivisible:** The GGPPA apples to the same, specific group of greenhouse gases that are covered by the *UNFCCC*.[6] They are a limited, distinct and indivisible group of pollutants, all of which must be regulated in order to address climate

[2] Or, the matter of national concern could be framed even more simply as: "the control of extraprovincial and international air pollution" – with this Act focused one very serious type of such pollution: GHG emissions.
[3] The preamble states: *"Whereas the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries"* [emphasis added]
[4] *R v Crown Zellerbach Canada Ltd.,* [1988] 1 SCR 401 at para 37 [*Crown Zellerbach*].
[5] See para 87 in Canada's factum, and the authorities cited therein
[6] The fact that an international treaty targets a specific problem is strong evidence that the problem is a single, distinct and indivisible matter. *Crown Zellerbach,* at paras 37-39

change. By contrast, the *Ocean Dumping Act*, upheld under the POGG power in *Crown Zellerbach*, covered *any type* of material dumped into the ocean.[7]

11. **Provincial inability**: The failure of one or more provinces to effectively control GHG emissions would have very serious impacts on other provinces and countries, and on Canada's ability to meet its national targets and international commitments.

12. Saskatchewan's factum mischaracterizes this "provincial inability" test. The issue is not whether provinces have the "ability" to regulate GHGs – if that were the test, almost nothing would meet it.[8] The issue, as the SCC clearly articulated, is "what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter".[9] [emphasis added]

13. Climate change is the prototypical example of a global problem. GHG emissions, regardless of where they originate, have a global impact.[10] The failure of a province to effectively regulate them would cause environmental impacts that are predominantly extra-provincial. The significance of these global impacts is evidenced by the series of increasingly stringent international agreements over the past 27 years to address them – the latest being the *Paris Agreement*, which has been signed by 179 countries plus the EU.[11]

14. There is a close analogy between the control of GHG emissions and the control of atomic energy – a matter with serious global impacts. In *Ontario Hydro*, the SCC reasoned:

> There can surely be no doubt that the production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power. [emphasis added][12]

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[7] *Crown Zellerbach*, at paras 28-32; See also Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax (2016) 36:2 NJCL 331 at 365 [Chalifour, "Canadian Climate Federalism"].

[8] Provinces are 'able' to regulate nuclear power, airports, narcotics, and ocean pollution (within provincial marine waters), yet they are all matters of national concern, because of their extra-provincial impacts.

[9] *Crown Zellerbach*, at para 33

[10] Factum of Canada, at paras 9, 71, 86, 96.

[11] Affidavit of John Moffet, Record of the Attorney General of Canada, Tab 1, at para 42.

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

15. The Court used similar language in *Crown Zellerbach*, at para 37: "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole." [emphasis added] Like ocean pollution, GHG emissions affect a 'global commons' (the atmosphere), a problem which requires coordinated action by the nations of the world to address.

16. In addition to *Crown Zellerbach*, there is a substantial body of authority supporting Parliament's authority to address extra-provincial and international pollution under the National Concern power. For instance:

- In *Interprovincial Co-operatives*, the SCC held that Parliament has authority over the pollution of interprovincial rivers.[13]
- In *Crown Zellerbach*, the dissenting judges reasoned that Parliament's jurisdiction "extends to the control of deposits in fresh water that have the effect of polluting outside a province."[14] [emphasis added].
- In *Hydro-Quebec*, the four dissenting judges reasoned that the 'matter' of the Canadian Environmental Protection Act was not single, distinct and indivisible, under the National Concern test, because "the impugned legislation is not limited to substances having interprovincial effects."[15] [emphasis added].
- In *Canada Metal Co.*, the Court held that controlling international air pollution qualified as a matter of National Concern, in upholding the federal *Clean Air Act*.[16]
- Based on this body of authority, Professor Hogg concludes: "The national concern branch of the [POGG] power will support measures to control pollution of air or water that are beyond the capacity of provinces to control."[17] He also concludes that a federal

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[13] *Interprovincial Co-operatives Ltd. v Dryden Chemicals Ltd.*, [1976] 1 SCR 477 at pp 511-515 (three of the four majority judges found the authority over inter-provincial pollution in the National Concern power). *Crown Zellerbach*, at para 36, summarized the *Interprovincial Co-operatives* decision, and clarified "that in referring to the pollution of interprovincial rivers Pigeon J. had in mind pollution that crossed provincial boundaries."

[14] *Crown Zellerbach* at para 59. The majority judges did not disagree on this point.

[15] *R v Hydro Quebéc*, at para 68. See also paras 74 (the Act fails to target "toxic substances ... which move across interprovincial or international borders."), and 75 (does not distinguish "between types of toxic substances … on the basis of their extraprovincial aspects.") The majority judges did not address this issue.

[16] *Canada Metal Co. and The Queen* [1982] 144 DLR (3d) 124 at para 18 (Man. QB).

[17] Peter W Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2015, release 1), ch 30 at 30-21 [Hogg, *Constitutional Law of Canada*].

law concerning the control of greenhouse gases would fall under the national concern branch of POGG (as well as the Criminal Law power).[18]

17. In addition to environmental impacts, there is also a risk of extra-provincial *economic* effects. If one province does not effectively regulate GHG emissions, other provinces must undertake additional effort and incur additional cost to meet Canada's GHG commitments.[19]

18. **Impact on provincial jurisdiction:** The approach taken by Parliament in the GGPPA is designed to achieve its objectives while *minimizing impacts on areas of provincial jurisdiction* as much as possible, in several ways:

(a) The use of price-based regulation *minimizes any costs* to provincial economies. Economic research, and actual experience, consistently show that pricing is effective at reducing emissions, and does so at the lowest possible cost.[20] The Commission's economic modeling shows that using price-based regulation, rather than prescriptive regulations, to meet Canada's 2020 GHG targets would result in costs savings equal to approximately 3.4% of Canada's GDP.[21] This equates to an estimated saving of $70 billion per year to provincial economies across Canada.

(b) The use of price-based regulation gives *maximum flexibility* to businesses and households over how and how much to reduce emissions. Traditional regulations *prescribe* how to reduce emissions – either the amount of reduction or the technologies to use. In contrast, pricing allows a business or household to decide for itself the best way to reduce emissions – which maximizes flexibility and minimizes cost.[22]

(c) In addition, the use of on *output-based approach* for large industrial emitters, in Part 2 of the Act, further reduces costs and strengthens their competitiveness, while

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[18] Peter Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 Alta L Rev 507 at p 516

[19] Canada's Ecofiscal Commission, *The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions* (Montreal: McGill University, 2015) at pp 11-13, Exhibit N to the Affidavit of John Moffet ("*The Way Forward*")

[20] *The Way Forward* at p 21; *Clearing the Air: How Carbon Pricing Helps Canada Fight Climate Change* (Montreal: McGill University, 2018) at pp 5-10, Exhibit O to the Affidavit of John Moffet ("*Clearing the Air"*)

[21] *The Way Forward,* at p 28.

[22] *The Way Forward*, at pp 9, 28.

maintaining the full incentive to innovate to reduce GHG emissions.[23]

(d) The use of a *'backstop' approach*, deferring to equally stringent provincial pricing laws, allows provinces to develop their own carbon pricing systems tailored to the needs of their economies. This approach maximizes flexibility and minimizes any impacts on provincial jurisdiction.[24] Provinces remain free to bring in any other types of complementary climate laws they wish, within their jurisdiction.

(e) Further, by requiring that all *pricing revenues stay in the province they came from* – either by deferring to equivalent provincial laws, or by returning revenues generated under the backstop[25] – the *GGPPA* allows provinces to use those revenues to minimize any impacts that may arise from the carbon price.[26]

Saskatchewan's 'watertight compartments' argument

19. Saskatchewan argues that upholding the *GGPPA* under POGG would **"**displac[e] provincial powers altogether", and render provincial carbon pricing laws *ultra vires.*[27] This argument harkens back to the Privy Council's "watertight compartments" view of the division of powers from the first half of the last Century – which has long been rejected by the SCC, in favour of a more flexible, cooperative approach to federalism.[28] Indeed, most of the cases cited in Saskatchewan's reply factum are from that earlier era.

20. It is trite law that the Constitution gives "exclusive authority" to federal and provincial governments to legislate under their respective heads of power, and that identifying a matter as being of National Concern has a similar effect. However, it is <u>not</u> the case that provinces are precluded from addressing a matter within their jurisdiction that also falls within federal jurisdiction – under National Concern or any other power. For decades, Canada's courts have

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[23] *The Way Forward*, at p 41; *Clearing the Air*, at pp 27-28.
[24] *The Way Forward*, at pp 18-23.
[25] Where a province does not have an equivalent pricing system, or request the backstop, then the revenues may be returned directly to households and businesses in the province, *GGPA*, SC 2018, c 12, s. 165(1).
[26] *Clearing the Air*, at p. 28; *The Way Forward*, at pp 20-21.
[27] Reply Factum of Saskatchewan at para 3.
[28] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 16-19; *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134 at para 70 ("*PHS Community Services"*).

repeatedly found that there may be substantial overlap between federal and provincial laws, as long as each is properly grounded in a head of power – except if they 'conflict', which is very rare.[29] This is part of the long-recognized "double aspect doctrine", which, tellingly, is not mentioned in either of Saskatchewan's facta.

> Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another.[30]

The jurisdiction that POGG confers is no more, or less, exclusive than any other head of power in section 91.

21. There are many examples of provincial laws whose application overlaps substantially with areas of federal jurisdiction, including under POGG:[31]

- Although 'marine pollution' is a matter of federal jurisdiction under POGG (*Crown Zellerbach*), provinces also regulate the discharge of pollution into the ocean from many sources, including sewage from coastal cities such as Victoria.[32]
- Although regulating 'development and improvement of the National Capital Region is a matter of National Concern,[33] the City of Ottawa takes the lead in municipal planning and development approval, acting under provincial legislation.[34]
- Federal environment assessment legislation has been upheld under a combination of POGG and other powers,[35] yet new development projects frequently undergo both a federal and provincial environmental impact assessment, one addressing the

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[29] *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at para 75 [*Canadian Western Bank*]; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161; *Alberta (AG) v. Moloney* (2015) 3 SCR 327, 2015 SCC 51.
[30] *Reference re Securities Act*, [2011] 3 SCR 837 at para 66 [*Reference re Securities*].
[31] *Law Society of B.C. v. Mangat*, [2001] 3 S.C.R. 113, para 49 [listing many areas of federal-provincial overlap]
[32] The *Municipal Wastewater Regulations* BC Reg 97/2012 ("MWR") (prescribe standards of municipal wastewater quality for marine water or fresh water discharge). Capital Regional District, "Wastewater Treatment Project Charter" 2018 at 1-2, online CRD Wastewater Treatment Project, Plans Reports and Agreements <https://www.crd.bc.ca/docs/default-source/wastewater-planning-2014/2017-04-04-sr-cawtpb-approvalofthedraftprojectcharter-appendixa.pdf?sfvrsn=c8d13cca_6; British Columbia, Ministry of Environment Lands and Parks, "Re: Waste Management Permits PE-00270 (Macaulay Point Outfall) and PE-01877 (Clover Point Outfall) – Marine Monitoring Programs" (1999) at pp. 1-4.
[33] *Munro v Canada (National Capital Commission)*, [1966] SCR 663 at pp. 671-672
[34] City of Ottawa Official Plan, *A Component of Ottawa 20.20, the City's Growth Management Strategy*, Publication 1-28 (Ottawa, By-Law No. 2003-203) at 1-1 to 1-2.
[35] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at paras 99-101

provincial impacts, the other the federal (including extra-provincial) impacts.[36]

- Other heads of power operate exactly the same way. For example, discharging pollution into water is typically regulated under both the federal *Fisheries Act* and provincial water pollution laws. One addresses the federal concern (impacts on fish), the other addresses the provincial concern (provincial environmental impacts), but they routinely regulate the same emissions from the same sources.[37]

22. GHG emissions are no different. All GHGs have significant extra-provincial and global effects, and only the federal government can ensure Canada's national emission levels address these trans-boundary impacts and meet our international commitments. At the same time, GHGs and climate change have provincial impacts – both environmental and economic – which provinces can address, using an array of Constitutional powers[38] to price GHG emissions or regulate activities such as electricity, transportation, buildings, oil and gas, forestry, etc.[39] Upholding the *GGPPA* under POGG will not prevent provinces from using these powers (except in very rare cases of direct conflict).[40] The *GGPPA* has been designed to complement, not displace, provincial carbon pricing and climate laws.[41]

Saskatchewan's 'backstop' argument

23. Saskatchewan's argument against the *GGPPA*'s 'backstop' provisions – which defer to provinces with an equally stringent carbon price – suffers from the same fallacy as above. The fact that provinces are constitutionally able to price carbon, Saskatchewan argues, means that it cannot be a matter of national concern. But this argument, again, ignores the extra-provincial effects and the double aspect doctrine. Provinces are indeed able to address the intra-provincial aspects of GHG emissions through pricing and other means. What they are

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[36] *Alberta Wilderness Assn. v. Cardinal River Coals*, [1999] 3 FC 425 (joint federal-provincial panel); ***Mining Watch Canada v. Canada (Fisheries and Oceans)***, [2010] 1 SCR 6 (separate federal and provincial reviews)

[37] For example see Capital Regional District, "Wastewater Treatment Project Charter" at 1-2

[38] Relevant powers include: property and civil rights (92(13)), local works and undertakings (92(10)), public lands (92(16)), licensing (92(9)), direct taxation within the province (92(2)), natural resources (92A), etc.

[39] See Chalifour N, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22 NJCL 119 pp 156-172 [provincial carbon pricing schemes are *intra vires* of the provinces].

[40] *Rothmans,* at para 14; *Canadian Western Bank*, at para 75 (paramountcy where laws 'conflict' or 'frustrate')

[41] Even a provincial law that set a *lower* price on carbon than the GGPPA could still co-exist: that price would just be in addition to the federal price in the GGPPA – much like sales taxes or income taxes work.

unable to do is ensure that Canada-wide GHG emissions address extra-provincial impacts and meet our international commitments; that is the matter of National Concern.

24. Saskatchewan's "fundamental objection" to the *GGPPA* is that it includes a backstop mechanism, which it argues is "unprecedented in Canadian history".[42] To the contrary, it is quite common. Similar mechanisms – whereby federal rules can be applied only where Cabinet determines that a province does not have equivalent or effective measures of its own[43] – are found in many federal environmental laws, such as: the *Canadian Environmental Protection Act ("CEPA")* (upheld in *Hydro-Quebec*)[44], the *Species At Risk Act*[45], the *Fisheries Act*[46], the *Canada Water Act*[47], and the *Canadian Environmental Assessment Act.*[48] Similar 'backstop' provisions are also found in other federal laws, such as the *Personal Information Protection and Electronic Documents Act*.[49]

25. In *Furtney*, the SCC upheld an analogous provision in the *Criminal Code,* specifying that its prohibitions against gaming do not apply where an organization is operating under a provincial licence. The Court ruled that Parliament "may limit the reach of its legislation by a condition, namely the existence of provincial legislation." The courts also have consistently held that federal laws need not apply uniformly across the country.[50]

26. The SCC also has recognized that the *GGPPA*'s approach of setting "national standards that could be supplemented by local legislation" is effective, particularly for environmental problems that are "regional or even global in scale."[51]

27. In sum, this Act, and its subject matter, fall within Parliament's authority under the National Concern branch of the POGG power, in particular because: (a) the *GGPPA* targets only those specific GHGs covered by international climate treaties; (b) the failure of one or

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[42] Saskatchewan Factum, paras 11, 39.
[43] Or vice-versa: the federal rules may be suspended where a province *does* have equivalent measures.
[44] *Canadian Environmental Protection Act*, SC 1999, c 33, s. 10(3) [*CEPA*].
[45] *Species At Risk Act,* SC 2002, c 29, ss. 34, 61, 78.
[46] *Fisheries Act* , RSC 1985, c F-14 s 4.1, 4.2.
[47] *Canada Water Act,* RSC 1985 c C-11, ss. 6, 13.
[48] *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52, ss 32-37
[49] *Personal Information Protection and Electronic Documents Act,* SC 2000, c 5, s. 26(2).
[50] *R v Furtney* [1991] 3 SCR 89 at para 34 [*Furtney*]; Chalifour, "Canadian Climate Federalism" at 372.
[51] *Hydro Quebec*, at para 126 (citing the World Commission on Environment and Development report).

more provinces to effectively price GHG emissions would have substantial effects on other provinces and countries, and on Canada's ability to meet its international obligations; (c) the *GGPPA*'s regulatory approach – using pricing, and a 'backstop' – is an example of cooperative federalism that minimizes any impacts on areas of provincial jurisdiction; and (d) upholding the *GGPPA* and its subject matter under the National Concern power will not restrict provinces' ability to address the provincial aspects of GHGs and climate change under their heads of power. It is consistent with "the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism", and away from watertight compartments.[52]

Treaty Implementation and the POGG power

28. The *GGPPA* is intended, in part, to implement Canada's obligations under international climate change treaties (as the preamble states). Section 132 of the *Constitution Act, 1867* gave the federal government full power to implement 'empire treaties' signed by the U.K. on Canada's behalf. In 1926, Canada gained the power to sign its own treaties. In 1937, the Privy Council held in *Labour Conventions* that the power to implement treaties no longer rested with the federal government, but with whichever level of government had jurisdiction over the particular subject-matter at issue. [53]

29. Since then, several SCC justices have questioned the *Labour Conventions* reasoning, and said the issue may need to be reconsidered.[54] The decision has also been the subject of many academic articles, almost all critical of it.[55] Professor Hogg concludes that *Labour Conventions* "has impaired Canada's capacity to play a full role in international affairs".[56]

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[52] *PHS Community Services,* at para 70.

[53] *A-G Can. v A-G Ont. ("Labour Conventions"),* [1937] A.C. 326 at paras 14-15

[54] See, for example, *MacDonald v Vapor Canada Ltd.* [1977] 2 SCR 134 at 167-172; for a list of other cases see, S. Elgie, "Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)" (2008) 13:1 Review of Constitutional Studies 67 at 92 [Elgie, "Kyoto and the Constitution"].

[55] For a list of 15 such articles see Elgie, "Kyoto and the Constitution" at 90, 92-93.

[56] Hogg, *Constitutional Law of Canada,* ch. 11 at 11-16.

30. This precedent leaves Canada as virtually the *only country in the world* whose federal government is unable to implement its commitments under international climate treaties (unless legislative power is found under POGG or elsewhere in s. 91).[57]

31. Australia's High Court, by comparison, has interpreted its federalist constitution to include federal treaty implementing authority, despite the lack of such an explicit power.[58]

32. This case does not require the Court to determine if a full federal treaty implementing power exists. However, it does raise the question of what role the existence of a treaty – the *UNFCCC*, supplemented by the *Paris Agreement* – plays in determining if an implementing statute falls within POGG. In *Crown Zellerbach* (para 38), the SCC cited international treaties in finding that the *Ocean Dumping Act's* subject matter was 'single, distinct and indivisible' and upholding it under POGG. Scholars have gone further, proposing that Parliament should have authority to implement certain *types* of treaties.[59]

33. In any event, the fact that the *GGPPA* is meant in part to implement a treaty – one that deals with a problem that is global in nature – is *at the very least* strong evidence that the matter is of national concern and falls within the POGG power.

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[57] Torsten Strom & Peter Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules", 25 Ottawa L. Rev. 39 (1993) at 60 [***"Canada is the only federal state with its treaty implementation power rigidly divided on the basis of the respective federal and provincial legislative jurisdictions."***]; John Trone, *Federal Constitutions and International Relations*" (St Lucia, Univ. of Queensland Press, 2001) at pp 85-86 and 114 [***"In most federal states the national government possesses the power to give effect in domestic law to all bona fide treaties to which it is party[1], including those concerning matters which would otherwise be beyond federal jurisdiction.*** *This is the case in Australia, the United States, India, Malaysia, and Austria. This is clearly the ordinary federal model in relation to the implementation of treaties."*] In addition, both Germany and Switzerland have stronger federal authority than Canada to implement treaties (Trone, 86, 113.) (A comprehensive search on the position of *every* federalist country in the world is not feasible, for linguistic reasons. Therefore, out of caution, this factum says that Canada is "virtually" the only country in the world without this power.)

[58] *Commonwealth v Tasmania*, [1983] 158 CLR 1.

[59] Hogg, *Constitutional Law of Canada*, c. 11 at 17 [Parliament should have power to implement treaties "under which states undertake reciprocal obligations to each other" (like the *Paris Agreement*)]; W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworth's, 1981) c. 19 at 358. [when a treaty-implementing statute addresses a matter outside of normal federal jurisdiction, Parliament should be restricted to doing only what is necessary to implement the treaty (e.g. reducing GHG emissions)]

The GGPPA is a valid exercise of Parliament's Criminal Law power

34. The Commission submits in the alternative that the *Act* is valid under Parliament's criminal law power (s. 91(27)). To qualify as federal criminal law, a law must have three elements: (1) a prohibition; (2) a penalty; and, (3) a valid criminal purpose, which together must not be used colourably. The Courts have interpreted the criminal law power expansively, noting that its reach has always been broadly defined and that it is not frozen in time. [60] As such, it *authorizes many laws, such as the Tobacco Products Control Act, the Firearms Act and the Food and Drug Act.*[61] Environmental laws have been upheld under the criminal law power numerous times.[62]

35. The criminal law power is described as "plenary…in the widest sense".[63] Unlike the POGG power, it does not require any 'balancing test' to consider the degree of intrusion on provincial powers. If the law meets the 3-part test and is not colourable, then it is valid.

36. The **pith and substance** of the *GGPPA* for criminal law purposes is to prohibit non-payment of the GHG emissions priced according to the *Act*, in order to mitigate the very serious harms of climate change. The *Act* meets the 3-part Criminal Law test.

37. **Reducing GHGs is a *legitimate criminal purpose*:** GHG emissions are impacting the thermal features of the atmosphere that allows life on Earth to exist, creating atmospheric concentrations of $C0^2$ not seen in 3-5 million years.[63] There is no human activity that is having a more consequential impact on the global environment. Regulating GHG emissions to avoid further damage is one of the most important public purposes of our time.

38. The SCC has held that environmental protection is a valid criminal law purpose[64]. In *Syncrude,* at para 62, the Federal Court of Appeal ("FCA") unanimously held that: "[i]t is

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[60] *Reference re Firearms Act* [2000] 1 SCR 783 at para 27 [*Firearms Reference*]; *Hydro-Québec* at paras 34-35, 119; *RJR MacDonald Inc. v Canada (AG),* [1995] 3 SCR 199 at para 28 [*RJR-Macdonald Inc.*]; *Groupe Maison Candiac Inc. v Canada (AG),* 2018 FC 686 at paras 99-100 [*Groupe Maison Candiac*].

[61] *Firearms Reference*, at paras 29; *RJR Macdonald Inc.,* at para 57; *R v Wetmore (County Court Judge),* [1983] 2 SCR 284 at pp 288-289; *Standard Sausage Co. v Lee*, [1933] 4 DLR 501 at paras 78-79.

[62] *Hydro Québec*, at para 160 [upholding federal controls on *toxic pollution*]; *Syncrude Canada Ltd. v Canada (Attorney General)* [2016] FCJ No 572 at para 101[*Syncrude*] [upholding standards for *renewable fuels*]; *Groupe Maison Candiac*, at paras 4-5 [upholding protection for *species at risk*].

[63] *Hydro Québec,* at para. 120.

[63] Affidavit of John Moffet, Record of the Attorney General of Canada, Tab 1, Exhibit A, at pp 8.

[64] *Hydro Quebec* at para 43 ["protection of the environment is itself a legitimate basis for criminal legislation"]

uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power." [emphasis added]

39. **The *GGPPA* creates a prohibition and penalties.** The *Act* is aimed at reducing GHG emissions by pricing them, in order to forbid free emissions that harm the environment and human health. For instance, Part 1 of the *Act* prohibits the free GHG emissions from a defined set of sources, by applying a price per tonne of C02e. Sections 132 to 133 enforce the obligation to pay, making it a criminal offence to, *inter alia*, avoid reporting emissions, evade compliance, file a deceptive report, obtain a rebate to which one is not entitled, etc. Part 2 of the *Act*, which applies to large industrial emitters, prohibits the free emissions of GHGs beyond a set level. It has offence provisions similar to Part 1 (ss. 232 to 243).

40. These prohibitions and penalties are prosecutable summarily or upon indictment, with penalties of fines or imprisonment; they are directly aimed at addressing climate change, since the sole purpose of pricing is to forbid free GHG emissions, to reduce them.

41. The criminal law power does not require the *GGPPA* to prohibit emissions *completely*. It is sufficient that it *reduces* emissions using the criminal law form of prohibition and penalty. In *Hydro Québec,* the SCC upheld provisions of *CEPA* that prohibit the discharge of toxic substances other than in accordance with limits set under that Act. The Court did not require that the emissions be treated as an "evil" that must be fully prohibited; criminal law can achieve its goals by prohibiting emission that do not comply with certain restrictions. This is precisely what the *GGPPA* does, prohibiting not *all* GHG emissions, but those that do not comply with the pricing mechanism established in the *Act*.

42. In *RJR-Macdonald Inc*., the SCC upheld regulations on advertising, promotion and sale of tobacco products as valid criminal law, noting that Parliament need not criminalize tobacco itself, but can regulate related activities in a way that discourages smoking: "that Parliament has chosen a 'circuitous path' to accomplish this goal does not in any way lessen the constitutional validity of the goal".[65]

[65] *RJR-Macdonald Inc.,* at para 51. See also Peter Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 Alta L Rev 507 at pp 514-515.

43. It is settled law that the criminal law power may be used to prohibit GHG emissions that do not comply with regulated requirements. In *Syncrude*, the FCA upheld *CEPA* regulations that require a minimum content of renewable fuels in diesel and gas. The Court held unanimously that the regulations achieve their criminal law purpose of reducing GHG emissions by prohibiting fuels that do not meet the prescribed renewable requirement. The criminal law power can support laws that shift market conditions to reduce GHG emissions, noting that "all criminal law seeks to deter or modify behaviour". Modifying behaviour to address the harms of GHG emissions is precisely what the *GGPPA* does.[66]

44. Saskatchewan advances **no argument or evidence that the *GGPPA* is a colourable attempt to invade provincial powers**, therefore that test is met.

45. Moreover, the 'backstop' nature of the legislation does not affect its constitutionality. There is no requirement for federal laws to apply uniformly across the country. There are many examples in and outside of criminal law where federal laws impose different rules on different jurisdictions,[67] or use backstop mechanisms similar to the *GGPPA*'s.[68] As the SCC has held, Parliament can make the application of criminal law contingent on the existence of a provincial law—which is what the *GGPPA* backstop does.[69]

46. The SCC has recognized that there is a broad area of concurrency between federal and provincial powers in areas subjected to criminal prohibitions, and the courts have been alert to the need to permit adequate breathing room for the exercise of jurisdiction by both levels of government." [emphasis added] For the environment, in particular, the Court has noted that the criminal law power "in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action."[70] It continued:

> This type of approach [concurrency] is essential in dealing with amorphous subjects like health and the environment. …

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[66] *Syncrude*, at para 69.
[67] Hogg, *Constitutional Law of Canada*, ch 17 at 17-13. Chalifour, "Canadian Climate Federalism" at pp. 372-374.
[68] See the examples at para 24 of this factum
[69] *Furtney* at paras 31-34.
[70] *Hydro-Québec*, para 131.

> In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces… control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power."[71] [emphasis added]

47. In sum, the *GGPPA* establishes a system of charges to reduce GHG emissions and protect health and the environment from the dangers of climate change – a valid criminal purpose. The Act prohibits emissions that do not comply with its system of charges, backed by penalties. As such, the *Act* is *intra vires* of Parliament's authority under s. 91(27). Both the criminal law power, and the *GGPPA*'s design, foster coordination with provincial carbon pricing and climate laws.

PART III – RELIEF REQUESTED

48. For all of these reasons, the Commission submits that the reference question should be answered that the *GGPPA* is Constitutional, in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, January 25, 2019.

Stewart A.G. Elgie
University of Ottawa, Faculty of Law

Nathalie J. Chalifour
University of Ottawa, Faculty of Law

Of Counsel for Canada's Ecofiscal Commission

[71] *Hydro-Québec*, at paras 153-154.

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APPENDIX 1 – AFFIDAVIT OF CHRISTOPHER RAGAN