

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

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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 implicit⁵ (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 CO₂ 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 Saskatchewan⁴⁰ 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 J.J.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.

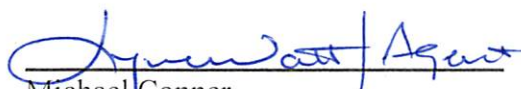
PART IV – ORDER SOUGHT CONCERNING COSTS

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

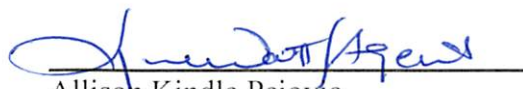
PART V – ORDER SOUGHT

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.
<i>Canadian Western Bank v. Alberta</i> , 2007 SCC 22	39
<i>Munro v. National Capital Commission</i> , [1966] SCR 663	32
<i>Ontario Hydro v. Ontario (Labour Relations Board)</i> , [1993] 3 SCR 327	22, 32
<i>Ordon Estate v. Grail</i> , [1998] 3 SCR 437	37
<i>R. v. Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	1, 22, 32, 35, 36
<i>R. v. Hydro-Quebec</i> , [1997] 3 SCR 213	55
<i>R. v. Moriarity</i> , 2015 SCC 55	25
<i>Re: Anti-Inflation Act</i> , [1976] 2 SCR 373	34, 37
<i>Reference re Assisted Human Reproduction Act</i> , 2010 SCC 61	25
<i>Reference re: Greenhouse Gas Pollution Pricing Act</i> , 2019 ONCA 544	25, 31, 37
<i>Reference re: Greenhouse Gas Pollution Pricing Act</i> , 2019 SKCA 40	37, 47, 51, 54
<i>Reference re Pan-Canadian Securities Regulation</i> , 2018 SCC 48	38

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

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

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

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

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