Federal Court  Cour fédérale

Date: 20211021

Docket: T-685-19

Citation: 2021 FC 1115

Ottawa, Ontario, October 21, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Applicant

and

ATTORNEY GENERAL OF CANADA
and ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF SASKATCHEWAN,
ATTORNEY GENERAL OF ALBERTA

Respondents

and

ASSEMBLY OF FIRST NATIONS

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This is a challenge on administrative law grounds to the Governor in Council's (federal Cabinet's) decision to include Manitoba on the list of provinces in Schedule 1 of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (the GGPPA or the Act). It was heard prior to

the release of the Supreme Court of Canada's decision in the *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 (*Reference Decision)*, but not decided pending further submissions from the parties. In the *Reference Decision* released on March 25, 2021, the Supreme Court upheld the constitutionality of the Act under Parliament's jurisdiction over matters of national concern under the peace, order and good government (POGG) clause of s 91 of the *Constitution Act, 1867.*

[2] In this application, Manitoba seeks judicial review of Order in Council P.C. 2019-218, making *Regulation Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act,* SOR/2019-79 (the Part 1 Regulations), which adds Manitoba to the list of provinces in which the fuel charge under Part 1 of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 *(*GGPPA) operates. The Applicant seeks an order declaring that Order P.C. 2019-218 and Regulation SOR/2019-79 are invalid or unlawful.

[3] The Applicant submits that the Governor in Council (GIC) acted unreasonably and arbitrarily by including Manitoba within Order P.C. 2019-218 and Regulation SOR/2019-79 by:

(i) Imposing a fuel charge backstop in some provinces while permitting other provinces and territories to implement greenhouse gas pricing plans that were less stringent than the minimum pricing standard set by the benchmark; and

(ii) Imposing the fuel charge backstop in Manitoba without considering the stringency of Manitoba's proposed carbon pricing regime in terms of reducing greenhouse gas emissions.

[4] To frame the matter slightly differently, the Applicant challenges both of the decisions of the Governor in Council to add Manitoba to Part 1 of Schedule 1 of the Act, making the fuel charge in Part 1 of the Act apply in the Province of Manitoba. In its Notice of Application, Manitoba challenged only the Part 1 Regulations, not the Part 2 Order (SOR/2018-212), but included both in its written and oral arguments. The Applicant asserts that its challenge applies equally to the GIC's decision to add Manitoba to the list of provinces in Schedule 1 to which Part 2 of the Act, the output-based pricing system (OPBS) under the federal backstop and the Part 2 Order, so both will be addressed.

[5] For the reasons that follow, this application is dismissed**.**

II. **Facts**

A. *Background to the GGPPA*

[6] There is no dispute between the parties that climate change is a "serious global issue", an "urgent threat to humanity", one that is "happening now and is having real consequences on people's lives throughout Canada and globally" as they state in their memoranda. This was recently acknowledged by two provincial Courts of Appeal in the reference cases on the GGPPA: see *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544, at paras 6-21 (the Ontario Reference) and *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, at paras 14-17 (the Saskatchewan Reference) and by the Supreme Court at paras 7-12 of the *Reference Decision*. The threat was underscored by the report of the United Nations Intergovernmental Panel on Climate Change (IPCC) released on August 8, 2019.

[7] Climate records show that atmospheric concentrations of carbon dioxide (CO2), the most abundant greenhouse gas emitted by human activity, are higher today than at any time in the past million years and continue to rise. IPCC has found that global net human-caused (anthropogenic) greenhouse emissions must fall rapidly by 2030 and reach "net zero" around 2050 to avoid significantly more deleterious impacts of climate change. Some of the existing and anticipated impacts of climate change in Canada include:

- Changes in extreme weather events such as droughts, floods, longer fire seasons and increased frequency and severity of heat waves, causing illness and death;
- Degradation of soil and water resources;
- Expansion of the ranges of life-threatening vector-borne diseases such as Lyme disease and West Nile virus; and
- Melting permafrost in the Canadian Arctic, which will undermine infrastructure (foundations) and winter roads and jeopardize the lifestyles, safety and living conditions of Canada's Northern Indigenous peoples.

B. *Canada's International Climate Change Obligations*

[8] In 1992, emerging international concern about the risks associated with climate change caused by greenhouse gas emissions (GHGs) led to the adoption of the *United Nations Framework Convention on Climate Change* (*UNFCCC*). The *UNFCCC*'s objective is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system:" (Art 2). To implement this goal, a decision-making body was created under the *UNFCCC* called the Conference of the Parties

(COP). All State Parties to the *UNFCCC* are represented at the COP, which oversees the implementation of the *Convention* and makes decisions "necessary to achieve its objectives".

[9] Canada signed and ratified the *UNFCCC* in December 1992. It came into force domestically and internationally on March 21, 1994. Under the *UNFCCC*, Canada committed itself internationally to mitigating GHG emissions.

[10] In December 2015, the COP adopted the *Paris Agreement*, which committed its signatories to strengthening the global response to the threat of climate change by "holding the increase in the global average temperature to well below 2 [degrees] Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 [degrees] Celsius above pre-industrial levels:" (art 2, para 1(a) and art 4). The signatories acknowledged that

> climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions.
>
> Moffet Affidavit, Exhibit M (*Paris Agreement*), RAR vol. 2 at p 464.

[11] Canada ratified the *Paris Agreement* on October 5, 2016, after consulting with the provinces.

[12] The *Paris Agreement* requires its signatories to establish, report and account for their progress toward achieving their nationally determined contribution of global greenhouse gas emissions reduction. Canada first communicated its intended nationally determined contribution

prior to ratifying the *Agreement*. On May 15, 2015, Canada announced that its intention was to reduce Canada's GHG emissions by 30% below 2005 levels by 2030. When Canada became a Party to the *Agreement*, it reaffirmed that target. Along with the other State Parties, Canada must communicate its next, more ambitious target by 2025.

[13] Under the *UNFCCC* Reporting Guidelines, Canada is required to prepare annual GHG inventory reports. Canada's 2019 National Inventory Report (NIR) reported Canada's emissions estimates between 1990 and 2017 and showed that Canada's 2017 GHG emissions had decreased by 2% from 2005 levels.

[14] Between 2005 and 2017, GHG emissions increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador and Nunavut. Emissions decreased in all other provinces and territories. Alberta and Saskatchewan were the provinces with the largest percentage increase and the highest GHG emissions during the reporting period. Ontario's emissions decreased by 22% during this period, due largely to the closure of coal-fired electricity plants.

C. *The Vancouver Declaration*

[15] Before Canada signed the *Paris Agreement*, Prime Minister Justin Trudeau met with all provincial and territorial premiers in Vancouver to discuss climate actions. Collectively, the First Ministers committed to implementing GHG mitigation policies in line with Canada's *Paris Agreement* target. To this end, on March 3, 2016, the First Ministers entered into the *Vancouver Declaration on Clean Growth and Climate Change*.

[16] The signatories to the *Vancouver Declaration* committed to implementing GHG emission policies in support of Canada's 2030 target of a 30% reduction of GHG emissions below 2005 levels. The First Ministers agreed to work together to develop an integrated pan-Canadian framework on clean growth and climate change.

[17] The *Vancouver Declaration* expressed the intent of the signatories that provincial and territorial legislatures would have legislative flexibility to design their own policies to meet emissions reduction targets.

[18] Four joint Federal-Provincial-Territorial working groups were created out of the *Vancouver Declaration*, including a Working Group on Carbon Pricing Mechanisms. The mandate of this group was to "provide a report with options on the role of carbon pricing mechanisms in meeting Canada's emission reduction targets, including different design options taking into consideration existing and planned provincial and territorial systems".

[19] The Working Group's *Final Report* was prepared on a consensus basis among all participants. Important takeaways from the *Final Report* include the following:

- Many experts see carbon pricing as a necessary policy tool for efficiently reducing GHG emissions, meaning there is a direct correlation between carbon pricing and GHG emission reductions: *Final Report* at p 5 (Section 1.3);

- Provincial governments have developed a variety of approaches to carbon pricing, both explicit (e.g. carbon tax or cap-and-trade system) and implicit (e.g. caps on

emissions, closing coal-fired power plants; clean energy standards and other regulatory measures): *Final Report* at p 2;

- Carbon pricing modelling showed that widespread carbon pricing in Canada would significantly reduce GHG emissions at a national level; and

- There is "no clear best option" to compare the stringency of carbon pricing mechanisms: *Final Report* at p 3.

[20] Manitoba points out that another of the working groups created under the *Vancouver Declaration*, the Specific Mitigation Opportunities group, examined other options for achieving ambitious GHG reductions in key sectors, including how such mitigation opportunities might interact with carbon pricing regimes. The report stated that, while carbon pricing is regarded as one of the most efficient policy tools for reducing GHG emissions, alternative policy tools (e.g., regulations) could be designed to achieve similar outcomes as a carbon price.

D. *The Pan-Canadian Approach to Pricing Carbon Pollution*

[21] On October 3, 2016, Canada announced its approach to carbon pricing by releasing the *Pan-Canadian Approach to Pricing Carbon Pollution*, a document based on the final recommendations of the Carbon Pricing Working Group.

[22] Rather than imposing a single carbon pricing system throughout Canada (including the four provinces with then-existing systems, British Columbia, Alberta, Ontario and Quebec), the *Pan-Canadian Approach* articulated a commitment to ensuring a consistent approach to carbon

pricing across Canada that accommodated for carbon pricing policies already implemented or in development by provinces and territories.

[23] The approach and its accompanying document presented the pan-Canadian Benchmark for carbon pricing (the Benchmark) and its underlying principles. According to the Respondents in this matter, the Benchmark "provides guidance on the core set of carbon pricing stringency criteria adopted by the Government of Canada, including legislated increases in stringency."

[24] The Benchmark also provided that the Government of Canada would implement an explicit price-based carbon pricing system throughout the country as a "backstop" (the Backstop). The Backstop would apply in jurisdictions that do not develop a system that at least meets the Benchmark criteria, or where a province or territory requested it. The Backstop would also apply to "top up" provincial and territorial systems that do not meet the Benchmark criteria, such as by expanding the sources covered by a provincial or territorial system or by increasing the price of emissions.

E. *The Pan-Canadian Framework on Clean Growth and Climate Change*

[25] On December 9, 2016, the First Ministers adopted the *Pan-Canadian Framework on Clean Growth and Climate Change* (the Framework). The Framework is a First Ministers' agreement that commits the federal, provincial and territorial governments of Canada to taking action to reduce GHG emissions. It was developed collaboratively by the Canadian federal, provincial and territorial governments, with input from Indigenous nations, businesses, and non-governmental organizations.

[26] Pricing carbon pollution is one of the four main pillars of the Framework. The other pillars are: (1) complementary actions to further reduce emissions across the economy; (2) measures to adapt to the impacts of climate change and build resilience; and (3) actions to accelerate innovation, support clean technology and create jobs.

[27] The Framework included a federal Benchmark for carbon pricing in Annex 1. The Benchmark for carbon pricing includes the following elements:

- Common scope: Pricing will be applied to a common and broad set of GHG sources;
- Two systems: Jurisdictions can implement (i) an explicit price-based system (e.g., a carbon tax) or (ii) a cap-and-trade system;
- Legislated increases in stringency of carbon reduction mechanisms, based on modeling, to contribute to the national target and provide market certainty:
    - Explicit price-based systems must start at a minimum of $10/tonne of CO2 in 2018 and rise by $10 each year to $50/tonne in 2022;
    - Cap-and-trade systems must have (i) a target to reduce GHG emissions to at least 30% below 2005 levels by 2030; and (ii) declining annual caps that correspond to the projected emission reductions from the carbon price in price-based systems.

[28] On December 9, 2016, all three territories and eight provinces (all but Manitoba and Saskatchewan), adopted the *Framework*. Manitoba adopted the *Framework* on or about February 23, 2018, but expressly rejected the price schedule set out in the Benchmark on the basis that it did not meet the Government of Canada's commitment to flexibility for provinces to design their own policies.

F. *Additional Pre-Enactment Benchmark Guidance*

[29] In August and December 2017, the Government of Canada published two new documents about the *Framework*: the *Guidance on the Pan-Canadian Carbon Pollution Pricing Benchmark* and a manual titled *Supplemental Benchmark Guidance*. The purpose of these documents was to provide further guidance on the carbon pollution pricing Benchmark to support governments' efforts to have carbon pollution pricing in place throughout Canada in 2018. Other purposes of the documents were to clarify (1) the scope of GHG emissions to which carbon pricing should apply, (2) the minimum legislated increases in stringency for both explicit price-based systems and cap-and-trade systems, and (3) on the approach to further review.

[30] In late 2017, the federal Ministers of Environment and Climate Change and Finance wrote to their provincial counterparts. The letter outlined the process the federal government would follow to assess whether provincial pricing plans met the Benchmark, as well as the next steps from January 2018 onwards towards pricing carbon.

G. The *Greenhouse Gas Pollution Pricing Act*

[31] The GGPPA was enacted on June 21, 2018, when the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, in which it was included, received Royal Assent.

[32] The Respondents claims that Parliament's objective in passing the Act was to reduce Canada's nationwide GHG emissions by encouraging behavioural change, citing evidence including Hansard from the House of Commons debates and Parliamentary Committees, and testimony by the Minister of the Environment and Climate Change before the Standing Senate Committee on Energy, the Environment and Natural Resources.

[33] According to the Respondents, "the Act provides the enabling authorities to ensure that carbon pricing that is consistent with the Benchmark stringency criteria applies broadly throughout Canada and the legal framework for the federal backstop carbon pricing system."

[34] The GGPPA requires all Canadian provinces and territories to legislate towards reducing annual GHG emissions output in accordance with the stringency standards set out in the federal Benchmark. The Benchmark requires that all Canadian provinces and territories price their emissions at a rate of $10/tonne of CO2 in 2018, $20/tonne in 2019, increasing in price to $50/tonne in 2022.

[35] The GGPPA does not prescribe a legislative method for reducing GHG emissions. The legislative design choice is left to provinces and territories. However, Parts 1 and 2 of Schedule 1 of the Act impose a "backstop" on provinces and territories that pass emissions reduction legislation which does not meet the federal stringency standards set out in in the Benchmark. If

the legislation does not meet the Benchmark stringency requirements, the Governor in Council can list that jurisdiction in Parts 1 and 2 of Schedule 1 of the Act, making the GGPPA itself apply within that province or territory.

[36] The Act is divided into two parts. Part 1 implements the fuel charge. Part 2 provides the framework for the output-based pricing system (OBPS) and establishes the excess emissions charge for large industrial emitters. Either part may apply in whole or in part to any province listed by the Governor in Council in Schedule 1. Together, Parts 1 and 2 of the Act provide a system for pricing GHG emissions from a broad set of emissions sources.

[37] Parts 1 and 2 of the Act apply in three scenarios: First, where a province or territory requests it; second, in any province or territory that passes GHG reduction legislation that fails to meet the Benchmark stringency requirements, per ss 166 and 189 of the Act; and third, to "top up" provincial emissions reduction legislation that fails to meet the Benchmark, such as by extending the application to additional fuel sources.

[38] Under ss 166 and 189 of the Act, the Governor in Council is empowered to add provinces or territories to Parts 1 or 2 of Schedule 1 of the Act, being the lists of non-federal jurisdictions to which the Act applies. The Governor in Council must make listing decisions "for the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate": *Act*, ss 166(2) and 189(1). The Act requires the GIC to "take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions:" *Act*, ss 166(3), 189(2).

[39] Parts 1 and 2 function as follows. Part 1 creates a fuel charge that applies to GHG-emitting fuels produced, delivered or used in a “listed province,” brought to a listed province from another place in Canada, or imported into Canada at a place in a listed province. The fuels and their charge rates are set out in Schedule 2 of the Act. The charge rate for each fuel represents $20 per tonne of CO2 emitted from each fuel in 2019, rising to $50 per tonne in 2022, consistent with the Benchmark price trajectory for explicit price-based systems. Part 1 applies “most commonly” to fuel producers or wholesale level fuel distributors. The Government of Canada anticipates that importers, producers and distributors to which Part 1 applies will pass the cost on to consumers, but the Act does not require them to do so.

[40] Certain fuels and uses are exempt from the fuel charge, such as gasoline and diesel used for agriculture. Industrial facilities subject to the OBPS are exempted from the fuel charge because their excess GHG emissions are priced under Part 2.

[41] Part 2 of the Act sets out the main powers and authorities for the output-based pricing system for GHG emissions of large industrial facilities. It applies to “covered facilities” and sets out registration and emissions reporting requirements. Covered facilities are required to determine the quantity of GHGs they emit and compare this against the prescribed emissions limit. Covered facilities are required to pay for the portion of their GHG emissions that exceed the applicable limit set for their specific industry or activity. The output-based standards represent a percentage of the average quantity of GHGs emitted by facilities conducting a particular activity. Schedule 3 lists the GHGs to which Part 2 applies, as defined by the *UNFCCC*, and their global warming potential. The excess emissions charge rates are set out in

Schedule 4 of the Act and are equivalent to the escalating fuel charge rates in Schedule 2 of the Act.

[42] Part 2 entitles covered facilities to which it applies to earn or retain “credits” if their yearly GHG output falls below the prescribed emissions limit. In this circumstance, the facility may receive surplus credits, which it can use to satisfy future compliance obligations or sell to other regulated facilities. This system is designed to incentivize continuous emissions reductions. By contrast, if a covered facility’s emissions exceed the prescribed emissions limit in a given year, it may compensate for those excess emissions in three ways: It may (1) submit surplus credits it earned in the past or that it acquired from other facilities; (2) submit other prescribed credits that it acquired; or (3) pay an excess emissions charge. The end result of this system is that the more a covered facility emits above its emissions limit, the more it will have to pay, while the more a facility reduces its GHG emissions below the prescribed limit, the more it will be able to earn by selling credits.

[43] According to the Respondents, the framework of Part 2 of the Act is intended to create a pricing incentive to reduce competitiveness impacts and the risk of carbon leakage for industries that engage in trade with cross-border aspects. The Respondents submits that the OBPS in Part 2 is designed to complement the fuel charge system in Part 1 by exempting covered facilities from paying the fuel charge, and instead requiring them to pay for excess emissions determined as a percentage of the quantity of GHGs emitted on average by facilities conducting a particular activity (e.g., the production of a product).

H. *Manitoba's Plan for Reducing GHG Emissions*

[44] On October 27, 2017, Manitoba released its Made-in-Manitoba Climate and Green Plan (the Manitoba Plan). On November 8, 2018, Manitoba enacted the *Climate and Green Plan Act*, CCSM, c C134.

[45] The Manitoba Plan was a hybrid model that consisted of a $25/tonne carbon tax from 2018-2022 and an OBPS for large industrial emitters. The Plan also contained other initiatives to reduce GHG emissions besides carbon pricing.

[46] Manitoba points out that its carbon tax ($25/tonne from 2018 to 2022) was higher than the federal Benchmark for the years 2018 and 2019. After that, Manitoba's carbon price would fall below the Benchmark, which requires pricing stringency to increase to $30/tonne in 2020, $40/tonne in 2021 and $50/tonne in 2022.

[47] According to Manitoba, setting the tax at $25 per tonne as opposed to following the federal Benchmark reflected two important features of Manitoba's emissions profile. First, the province generates approximately 99% of its electricity from non-emitting renewable sources, such as hydroelectricity. As a result, Manitoba can achieve few GHG emissions reductions in the energy sector. However, Manitoba has the highest proportion of agricultural emissions in Canada, mostly produced through biological processes. These processes are not subject to carbon pricing under the GGPPA, and neither are marked fuels used in agriculture. Carbon pricing in Manitoba would therefore cover fewer emissions compared to other provinces and may not work in the same way to reduce GHG emissions in Manitoba.

[48] Manitoba pointed out that it has invested “billions of dollars” in creating a clean hydro-electricity grid such that escalating carbon prices would have a negligible impact on GHG emissions. In its view, its provincial emissions profile makes the federal policy ill-suited to Manitoba’s circumstances.

[49] Manitoba asserts that it conducted independent modeling, which projected that its plan (the $25/tonne carbon tax combined with the OBPS for large industrial emitters) would reduce GHG emissions in the province by 80,000 tonnes more than under the federal Benchmark price from 2018-2022. Further, Manitoba’s plan was projected to have a less intense impact on the province’s GDP than the federal Benchmark. The modeling indicated that opportunities to cost-effectively reduce carbon emissions stop below $30 per tonne, and that above that price, costs to consumers rise fast while incremental GHG emissions “fall off”.

[50] The Respondents takes issue with some of the Applicant’s factual assertions about its *Climate and Green Plan*, in particular with regards to its efficacy. The Respondents says the Applicant’s description of its plan is flawed in three ways.

[51] First, Manitoba withdrew its Plan in October 2018. The efficacy of a withdrawn plan is arguably irrelevant to the matters before this Court.

[52] Second, Manitoba relies on a misreading of its own evidence. Manitoba claims that the Manitoba Plan would reduce GHG emissions by 80,000 tonnes more than under the federal Benchmark between 2018 and 2022. But Manitoba’s own report submitted to the Government of

Canada asserts that, under Manitoba's own model, a "$50 per tonne carbon price in 2022" (the minimum price per the Benchmark for 2022) "would result in additional emissions reductions of just over 76,000 tonnes of CO2E": *Federal Benchmark Assessment Report (Including Attachments A-5)* at p 521. Furthermore, *Paris Agreement* targets are denominated annually, not cumulatively. According to Manitoba's own evidence, Manitoba's plan is 76,000 tonnes of CO2E *less* effective in 2022 than a price in accordance with the Benchmark.

[53] Third, Manitoba is not on track to reduce its emissions by 30% below 2005 levels by 2030 as required by the *Pan-Canadian Framework*. Under either the Manitoba Plan or the federal Backstop, Manitoba's 2022 forecasts for annual GHG emissions are higher than its 2005 emissions. In 2005, Manitoba's GHG emissions were 20.1 Mt CO2E. As of 2017, its emissions had increased to 21.7 Mt CO2E. The Respondents submits that Manitoba's goal is to reduce GHG emissions from 2018 to 2022 by 1 MT CO2E cumulatively, not on an annual basis, relative to the GHG emissions that would have occurred with no additional GHG emissions reduction measures. Manitoba's benchmarking submissions forecast that in 2022 its annual emissions would increase to 22.5815 Mt CO2E under the Manitoba Plan, compared to 22.5052 Mt CO2E with the federal Backstop in place. In either scenario, Manitoba's 2022 annual GHG emissions will be higher than its 2005 emissions. Manitoba is therefore a long way off to reducing its emissions to the level required in 2030 by the *Pan-Canadian Framework.*

I. *Retraction of Manitoba's Proposed Carbon Pricing Plan*

[54] On October 27, 2017, the same day Manitoba released its Made-in-Manitoba Plan, then-Minister of Environment and Climate Change (ECCC) Catherine McKenna wrote in a public

Facebook post that Manitoba's $25/tonne carbon price would meet the federal standard, set out in the Benchmark, for the first two years (2018 and 2019), but after 2019 it would no longer meet the standard.

[55] In a letter dated February 22, 2018, to Manitoba Minister R. Squires, then-Minister McKenna repeated her position that Manitoba's $25/tonne carbon tax would need to be strengthened to meet the federal Benchmark after 2019.

[56] On October 3, 2018, the Premier of Manitoba advised the Legislative Assembly that the government would withdraw its proposed carbon tax and OBPS.

[57] Manitoba asserts that the cancellation of the proposed carbon pricing plan occurred after Manitoba sought, and the Government of Canada refused to give assurances that it would not impose the Backstop despite Manitoba's claims that its Plan was "projected to reduce GHG emissions in Manitoba by 80,000 tonnes more than the federal [B]enchmark". According to Manitoba, the Premier's decision to withdraw the proposed carbon pricing plan was motivated by a desire to avoid having the Government of Canada "top up" that plan with a second layer of taxation in the province.

[58] In response to Manitoba's assertion that Canada refused to assure Manitoba that its proposed carbon pricing plan met the federal benchmark, the Respondents points out that neither the Facebook post nor the letter are the decision at issue on this application, as the Minister is not

the GIC that is charged by the Act with assessing the stringency of provincial pricing mechanisms.

J. *Federal Review of Provincial Carbon Pricing Systems and Implementation of the GGPPA in Manitoba*

[59] On April 30, 2018, the Government of Canada published *Estimated Results of the Federal Carbon Pollution Pricing System* based on a scenario in which the federal Backstop was applied in the jurisdictions that lacked a pricing system, and on existing systems that remained in place in British Columbia, Alberta, Ontario and Quebec. The analysis estimated that carbon pricing systems throughout Canada would achieve a collective reduction of 80 to 90 Mt CO2E annually in nationwide GHG reductions by 2022. Canada's target under the *Paris Agreement* is a reduction of 205 Mt CO2E by 2030, being 30% below 2005 levels. As of 2017, Canada's GHG emissions decreased from 2% from 2005.

[60] In the fall of 2018, Environment and Climate Change Canada conducted its initial stringency assessments of existing and proposed provincial carbon pricing systems, using the Benchmark stringency criteria and the two supplemental Benchmark guidance documents.

[61] On October 23, 2018, the outcome of the GIC's initial stringency assessments was announced. The OBPS under Part 2 of the Act would start applying in Manitoba and four other provinces (Ontario, New Brunswick, PEI and partially in Saskatchewan) on January 1, 2019. The fuel charge under Part 1 of the Act would start applying in Manitoba and three other provinces (Ontario, New Brunswick and Saskatchewan) on April 1, 2019. Parts 1 and 2 of the Act would start applying in Yukon and Nunavut on July 1, 2019.

[62] On October 18, 2018, one week prior to the announcement of stringency assessment results, the Governor in Council released an Order in Council amending Schedule 1 of the Act by adding Manitoba, and several other provinces and territories, to the list of provinces covered by Part 2 (the OBPS). The Order in Council applied Part 2 of the Act to industrial facilities in Manitoba. The GIC released a *Regulatory Impact Analysis Statement* to accompany PC 2018/1292.

[63] On March 25, 2019, by Order in Council PC 2019-218, the Governor in Council made *Regulations Amending Part 1 of Schedule 1 and Schedule 2 to the Greenhouse Gas Pollution Pricing Act*, SOR/2019-79, (2019) C Gaz II, 979-1043 (the Part 1 Regulations). This is the decision at issue in this application. The Regulation was published in the Canada Gazette on April 3, 2019. The Regulation added Manitoba, among other provinces and territories, to the list of jurisdictions covered by the fuel charge under Part 1 of the Act, beginning April 1, 2019.

[64] The GIC concluded that Parts 1 and 2 of the Act apply in Manitoba because after the October 3, 2018, announcement by the Premier, Manitoba no longer had a pricing system to assess using the Benchmark stringency criteria.

K. *Procedural History*

[65] The Applicant originally raised two issues on judicial review. The first concerned the constitutionality of the Act. The second was the challenge on administrative law grounds to the GIC's decision to list Manitoba in Part 1 and Part 2 of the Act. The Application for judicial review was filed on April 24, 2019.

[66] Concurrently, the governments of Ontario, Saskatchewan, and Alberta challenged the constitutionality of the Act by way of a reference to their respective Courts of Appeal. Three decisions followed: the Saskatchewan Reference, released May 3, 2019; the Ontario Reference, released June 28, 2019; and *Reference re: Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (the Alberta Reference), released February 24, 2020. The Ontario and Saskatchewan References found the Act to be constitutional, while the Alberta Reference deemed it unconstitutional.

[67] The Supreme Court of Canada granted leave to appeal to the governments of Saskatchewan and Ontario on August 23 and September 10, 2019, respectively. Leave was later granted to Alberta. All three matters were set to be heard together in March 2020. Due to the COVID-19 pandemic, the hearings were adjourned, and the matter was heard in September 2020.

[68] In view of the ongoing constitutional litigation before the Supreme Court, the Respondents in this matter brought an opposed motion pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106, to hold the application for judicial review in abeyance until the Supreme Court rendered its decision. The motion was dismissed in December 2019.

[69] In January 2020, the Respondents proposed that the judicial review be severed such that this Court would only consider the administrative law issues and not the constitutionality of the Act. The Applicant strongly opposed this suggestion. A hearing was set for December 2020 to consider both issues.

[70] On November 9, 2020, the Applicant wrote to this Court indicating that the three governments scheduled to intervene in the matter before this Court (Ontario, Saskatchewan, and Alberta) no longer intended to participate in the hearing. Furthermore, the Applicant proposed that the hearing focus solely on the administrative law issues, as the pending Supreme Court decision would clearly bind this Court on the constitutional grounds.

[71] A hearing on the administrative law grounds took place before this Court between the Applicant, the Respondents and the sole remaining intervener, the Assembly of First Nations, in December 2020.

[72] The Supreme Court issued its decision on the three provincial references in March 2021. A six-judge majority found the GGPPA to be constitutional and that Parliament has jurisdiction to enact the Act as a matter of national concern under the "peace, order and good government" [POGG] clause of s 91 of the *Constitution Act, 1867*. The pith and substance of the Act was found to be "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (para 80).

[73] In reaching that conclusion, the majority of the Court remarked that any decision assessing the stringency of provincial pricing mechanisms would be open to judicial review to ensure that the GIC has exercised its discretion consistently with the purpose of the Act and the constraints set out in ss 166 and 189: *Reference Decision* at para 73.

[74] As a result of the Supreme Court of Canada decision, and in response to an inquiry by this Court, the parties requested an opportunity to provide further written submissions and proposed a schedule which was approved. In accordance with the schedule, the parties made further written representations addressing the Supreme Court's decision on May 28, 2021 (Applicant) and June 30, 2021 (Respondents). The intervener, AFN, did not provide additional submissions.

III. **Issues**

[75] In my view, having considered the parties' submissions, the administrative law issues to be determined are as follows:

1. What is the applicable standard(s) of review?

2. Was it reasonable for the GIC to amend Schedule 1 of the Act to include Manitoba on the list of provinces and territories to which Parts 1 and 2 of the Act apply? and

3. Do the Impugned Decisions run constitutionally afoul of POGG? In particular, do they offend the POGG requirement, if one exists, that legislation promulgated under POGG must impose uniform national standards across Canada?

IV. **Relevant Legislation**

[76] Excerpts of the applicable legislation are found at Appendix A.

V. **Analysis**

Issue 1: Standard of Review

[77] The Applicant submits that the standard of review is correctness. The Respondents' and the Intervener's position is that the applicable standard is reasonableness. In my view, both apply.

[78] In *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 30 [*Vavilov*], the Supreme Court of Canada confirmed that reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision-maker's discharge of its functions. The Supreme Court's elucidation of reasonableness review retained the prior law on reviewing delegated legislation, which emphasizes that the question is primarily one of statutory interpretation to determine whether the regulation was inconsistent with the enabling statute or the scope of the statutory mandate: *Vavilov* at paras 111 and 143-144. Under the prior law, a constitutional challenge would attract correctness review: *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at paras 24-28, [*Katz*]. That has not changed under *Vavilov*; at paras 55-56.

[79] The parties generally agree that *Vavilov* has not changed the framework for judicial review of exercises of delegated legislative authority, and that those principles are applicable here. Where the parties differ is on the nature of the question at issue.

[80] In Manitoba's view, the GIC's discretion under ss 166 and 189 of the Act to add provinces to the federal backstop under the Act is constrained by the constitutional limitations of

the POGG power. Because the GIC's power under ss 166 and 189 is constrained by POGG, the GIC "cannot exercise its authority in a way that fails to apply a minimum national standard of carbon pricing uniformly across the country." Whether the GIC exercised its delegated authority in a manner that exceeds the limits of the POGG power is a constitutional question, which, under *Vavilov,* attracts a correctness review.

[81] The Respondents submits that the Applicant pled its administrative law questions as *jurisdictional* in nature, in that it asked whether the GIC exceeded its authority or acted unreasonably in interpreting and assessing stringency under the Act. In *Vavilov,* the Supreme Court expressly dispensed with correctness review for jurisdictional questions: at paras 66-67. As a result, the *Vavilov* presumption of reasonableness review applies.

[82] The intervener Assembly of First Nations ("AFN") points out that in *Vavilov,* the Supreme Court was clear that the reasonableness standard allows courts to fulfill their duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether the interpretation raises a jurisdictional issue and the need for review based on the correctness standard: *Vavilov* at paras 66-67.

[83] In general, Manitoba's arguments ask whether the Governor in Council's interpretation of the scope of its authority under the Act was lawful and whether that decision should be assessed on the reasonableness standard: *Vavilov* at paras 23, 48and 65-67. However, Manitoba's argument that the Impugned Decisions failed to apply a uniform minimum national standard of

pricing stringency for provincial GHG reduction plans across Canada contrary to POGG is a constitutional question to be addressed on a correctness standard: *Vavilov,* at paras 55-57.

Issue 2: Are the Impugned Decisions Reasonable?

(1) Applicant's submissions

[84] Manitoba submits that the GIC exceeded its jurisdiction and acted unreasonably and arbitrarily by failing to apply a minimum national standard of carbon pricing uniformly across the country. It advances two alternative grounds to challenge the GIC's decision.

[85] First, Manitoba argues that its GHG pricing plan would have reduced more cumulative GHG emissions compared to the federal Benchmark over the five-year period between 2018-2022. Therefore, assessing Manitoba's proposed carbon tax as insufficiently stringent ran contrary to the "fundamental purpose" of the GGPPA to reduce GHG emissions.

[86] Second, it was unreasonable and arbitrary for the GIC to assess the GGPPA's stringency requirement differently in relation to different provinces and territories. Manitoba submits that the GIC added Manitoba to the backstop while permitting other provinces and territories to implement GHG pricing plans that were less stringent than the minimum pricing standard set by the Benchmark. Allegedly, while the GIC claims that it always assesses stringency in relation to the Benchmark, its assessments show that it declined to add certain provinces to the list in Schedule 1 even though their proposed provincial schemes failed to meet the Benchmark criteria. The GIC therefore exceeded its statutory authority under the Act, which requires the GIC to use a uniform standard of stringency and undermined the fundamental purpose of the Act.

[87] Manitoba's first ground of unreasonableness focused on the cumulative effect of its proposed provincial GHG reduction scheme. In Manitoba's view, the GIC acted unreasonably by hinging its assessment of stringency on whether Manitoba's carbon plan included incremental increases in annual GHG reduction targets year over year, like the Benchmark, when it should have assessed the cumulative potential of the carbon plan to reduce emissions in the relevant five-year period. GHG emissions are not caused in a single year, but rather by the accumulation of emissions over time. Given that the ultimate purpose of the Act is to reduce GHG emissions, it is nonsensical to conclude that a proposed provincial plan is insufficiently stringent if that plan reduces GHG emissions in excess of the Benchmark, even if it does so on a cumulative, rather than an annual, basis. The GIC was required to exercise its discretion under ss 166 and 189 with an eye to *results*, not simply to whether the proposed provincial plan is in line with the incremental annual increases in GHG reduction outlined in the federal Benchmark.

[88] The relevant question, according to the Applicant, is how the provincial system will reduce GHG emissions relative to the federal Benchmark. If actual or modeled GHG emission reductions are equal to or greater than the federal Benchmark, then the provincial plan must necessarily be sufficiently stringent.

[89] In Manitoba's view, the *Reference Decision* supports this reading of the stringency requirement. Given the purpose of the Act, the key question is whether provincial pricing mechanisms being reviewed will achieve sufficient results in order to help Canada meet its national GHG reduction targets: see the *Reference Decision* at paras 81, 178-179, 182, 202 and 206.

[90] The GIC also ignored relevant evidence that Manitoba's Plan would reduce carbon emissions more than the federal backstop. Manitoba's independent modeling on the efficacy of its plan revealed that the plan was projected to reduce greater cumulative GHG emissions than under the backstop between 2018 and 2022. The GIC unreasonably assessed stringency based on the unit price alone, "without considering the actual or projected reductions in GHG emissions Manitoba's pricing plan would achieve."

[91] In Manitoba's view, an interpretation of the stringency requirement by reference to results, not just price, accords with the text, context and purpose of the Act. Manitoba pointed out that Parliament could have, but did not, expressly legislate a specific, escalating carbon price. Instead, Parliament preferred to leave it to the GIC to determine whether proposed plans were sufficiently stringent. The *Vancouver Declaration,* one of the bedrock agreements underlying the Act, did not prescribe a price level. Manitoba reiterated the Working Group on Carbon Pricing Mechanism's conclusion that GHG reduction opportunities are not uniformly available across all Canadian regions, and that GHG reductions will therefore differ significantly from one province to another in response to a given carbon price.

[92] Manitoba's second ground of unreasonableness challenges the GIC's application of the stringency requirement in its October 2018 stringency assessments. In Manitoba's view, the GIC assessed the stringency requirement differently in relation to different provinces and territories. This was unreasonable because the purpose of the Act – to reduce GHG emissions by setting a national "floor" for GHG emissions reduction – requires the GIC to interpret the term "stringency" and apply the stringency requirement "in a uniform and even-handed manner"

across Canada. According to Manitoba, the GIC imposed a fuel charge backstop in some provinces that is more stringent than in provinces where the GIC did not apply the backstop. Moreover, it is arbitrary for the Benchmark to require an explicit carbon price on fuel used for home heating, aviation and oil and gas facilities. It is also arbitrary for the GIC to impose that requirement in some jurisdictions while allowing other jurisdictions to exempt such sources from their pricing schemes.

[93] To support its position that the GIC interpreted and applied the term stringency in ss 166(3) and 189(2) arbitrarily, Manitoba relies on evidence of the GIC's stringency assessment of proposed plans from Alberta; Newfoundland and Labrador; PEI; Nova Scotia; Quebec; British Columbia; and the territories.

[94] In Manitoba's view, the term "stringency" in ss 166(3) and 189(2) means stringency with respect to results. It matters little if the jurisdiction in question has an escalating carbon price so long as the results are sufficient. For example, the Act's approach to cap-and-trade systems does not prescribe any level of carbon price – it simply requires that projected emissions reductions be equal to or greater than Canada's 30% reduction target for 2030 and it requires declining annual caps that correspond, at a minimum to projected GHG reductions resulting from the carbon price in explicit price-based systems. Manitoba asserts that its interpretation of stringency is in line with the Saskatchewan Court of Appeal's, which held that stringency must be taken to embrace not only the charge per unit of GHG emissions but also the scope or breadth of application of the charge in the sense of the fuels, operations and activities to which the charge applies: *Saskatchewan Reference* at para 139 (per Chief Justice Richards).

(2) Respondents' submissions

[95] The Respondents submits that the Impugned Decisions are reasonable because Manitoba withdrew its proposed pricing system. The Respondents makes three main points on reasonableness.

[96] First, the GIC decided to add Manitoba to the GGPPA backstop because Manitoba withdrew its proposed carbon pricing scheme prior to the GIC's assessment of stringency. Manitoba expressed its intention to withdraw its Plan on October 3, 2018, before the GIC made any decisions relating to its stringency. The Part 2 Order, making the OBPS backstop apply in Manitoba, was made on October 19, 2018. The Part 1 Regulations were promulgated on April 3, 2019. Therefore, at the time of the GIC's stringency assessment, Manitoba had no carbon pricing legislation in place for the GIC to assess. Given that Manitoba had retracted its proposed carbon pricing plan, the decision to list Manitoba was reasonable on *any* standard of stringency.

[97] Manitoba seeks to rely on certain communications from the former Minister of the Environment and Climate Change to her provincial counterpart in Manitoba indicating that Manitoba's plan was insufficiently stringent. The power to amend Schedule 1 of the Act rests with the GIC, not the Minister, and the Minister's public statements cannot bind the GIC: *Apotex Inc v Canada (Attorney General),* [2000] 4 FC 264 at paras 17-19.

[98] Second, even if Manitoba's retracted GHG reduction legislation were relevant—a point that Canada does not concede—the plan does not meet the Benchmark stringency criteria. Manitoba's assertion of its plan's efficacy relative to the Benchmark stringency criteria "relies

on an incomplete reading of its own evidence." Manitoba's reading of the efficacy of its Plan is premised on a *cumulative* assessment of its carbon emissions reduction from 2018-2022. But *Paris Agreement* targets are denominated *annually*, not cumulatively. Assessed annually, the Manitoba plan would see 76,000 tonnes *more* of CO2E in 2022 than a price in accordance with the Benchmark. As such, even if the GIC were required to assess Manitoba's withdrawn plan, that plan would not have met the stringency criteria the GIC was bound to apply under ss 166 and 189.

[99] Third, the GIC reasonably interpreted the term "stringency" in ss 166(3) and 189(2) of the Act. On a proper reading, the Act suggests that the correct definition of the requirement of "stringency" is carbon pricing that increases over time. The evidentiary record (extrinsic and legislative) establishes that the GIC assessed stringency based on the Benchmark: see Part 2 Order, *Regulatory Impact Analysis Statement* at pp 3761, 3763-64, and 3774-76, CSR Tab 8. The Benchmark "operationalizes the statutory standard" by explaining what the GIC views as necessary for provincial systems to be sufficiently stringent under the Act. The statutory standard applies to all provinces at all times. The GIC will schedule provinces to the Act if their pricing mechanisms are insufficiently stringent, as assessed against the Benchmark.

[100] Canada relies on the legislative history of s 166(3), the Preamble of the Act, and the Benchmark itself to support the position that "stringency" means the stringency requirements in the Benchmark:

- The RIAS accompanying SOR/2018-212 (the Part 2 Order) set out a rubric showing how provincial systems were assessed in accordance with the Benchmark stringency criteria: RMFL at para 120;

- The legislative history of s 166(3) includes a study of the bill at committee amending s 166(3) to make stringency the primary, as opposed to one of many, factors for the GIC to assess. That legislative history makes clear that the term "stringency" is to be interpreted in relation to the supplemental Benchmark guidance documents published in mid- and late 2017, the *Pan-Canadian Framework*, and in communications sent from former Ministers Morneau (Finance) and McKenna (ECCC) to their provincial counterparts: RMFL at para 122, quoting FINA No. 157 (23 May 2018) at pp 12-14, CBA Tab 47. Those supplemental guidance documents define stringency in the following ways:

    - *Pan-Canadian Approach to Pricing Carbon Pollution* dated October 3, 2016: "Carbon price increases should occur in a predictable and gradual way to limit economic impacts;" the "pan-Canadian benchmark for carbon pricing… is to ensure that carbon pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time" (emphasis added); "For jurisdictions with an explicit price-based system, the carbon price should start at a minimum of $10 per tonne in 2018 and rise by $10 per year to $50 per tonne in 2022:" Cunningham Affidavit, Exhibit 4, AMR vol 1 at pp 189-193;

    - *Guidance on the Pan-Canadian Pollution Pricing Benchmark* dated August 2017: Under the subheading "Legislated increases in stringency:" "For jurisdictions with an explicit price-based system, the carbon price should start at a minimum of $10 per tonne in 2018 and rise by $10 per year to $50 per tonne in 2022:" Cunningham Affidavit, Exhibit 9, AMR vol 2 at p 328;

    - *Supplemental Benchmark Guidance* dated December 20, 2017: Under the heading "Additional guidance to the section in the Benchmark on "Legislated increases in stringency" regarding incremental reduction requirement (applies both to explicit price-based and to cap-and-trade systems):" "Carbon pricing systems should be designed to achieve incremental GHG emissions reduction in the 2018 to 2022 period through a clear price signal flowing from the level at which caps are set or an explicit carbon price, meaning fewer emissions that would have occurred without the pricing system in place:" Cunningham Affidavit, Exhibit 9, AMR vol 2 at p 333;

- the Act's Preamble states that one of the purposes of the Act "the pricing of greenhouse gas emissions on a basis that increases over time is an appropriate and efficient way to creatives incentives for … behavioural change:" RMFL at para 123 (Canada's emphasis); and

- the Benchmark itself clearly imposes an expectation that sufficiently stringent provincial carbon emissions reduction plans will increase incrementally year-to-year: RMFL at para 122.

[101] The GIC's interpretation of the stringency requirement therefore comports with the context, text and purpose of the Act. Further, in the absence of any provincial legislation, let alone one that increases incrementally in keeping with the requirement of the Act, it was reasonable for the GIC to decide that the backstop should apply in Manitoba.

[102] Finally, Canada submits that variations between provincial pricing systems do not mean that the GIC arbitrarily assessed stringency. To the contrary, "in the complex and technical context of carbon pricing, provided provincial systems are comparably stringent, the Act achieves the necessary level of "uniformity" under POGG." Assessing the overall stringency of a provincial carbon pricing system against the Benchmark is a complex analysis. Evidence detailing that analysis for each provincial system was not put before this Court. Instead, Manitoba's "high-level identification of variations in specific details between some of these systems takes those details out of context" and is premised on a "selective reading of the intrinsic and extrinsic evidence."

[103] Manitoba's interpretation of the GIC's stringency assessment also confuses the federal Benchmark with the federal backstop. Manitoba asserts that the carbon pricing regimes in Alberta, Newfoundland and Labrador, PEI, Nova Scotia and Quebec "are not as stringent as the Benchmark," yet they were assessed as sufficiently stringent by the GIC during its October 2018 stringency assessments. Canada claims that the evidence Manitoba cites on this point (MR, Vol

3, Tab 5, Williams, paras 20-61 and 835-44, esp. paras 24, 28, 36, 39, 42 and 43) compares those provincial systems against the backstop, not the Benchmark.

[104] The backstop and the Benchmark are not the same thing. The backstop is a pricing system that meets the Benchmark criteria for stringency. However, the stringency criteria that the provinces and territories are required to meet is the criteria set out in the Benchmark. The GIC did not apply the backstop in certain provinces because each of those provincial systems were assessed as meeting or partially meeting the Benchmark: see *Regulatory Impact Analysis Statement* accompanying Part 2 Order, at CSR, Tab 8, pp 3774-76, Annex 2, Table 1.

(3) Intervener submissions

[105] AFN submits that the GIC's decision was "patently reasonable," given that Manitoba withdrew its proposed plan in advance of the GIC's stringency assessments. Ensuring that GHG emission pricing applies broadly across Canada in accordance with the Act compelled the GIC to add Manitoba to the list of provinces to which the backstop applies. In this factual context, the stringency of Manitoba's withdrawn plan was "entirely irrelevant" to the GIC's decision because it no longer existed as proposed legislation.

[106] AFN also submits that the GIC did not act arbitrarily, unreasonably or in a manner that exceeded its delegated authority by applying the federal Benchmark unevenly. The AFN points out that assessing the overall stringency of a proposed provincial GHG pricing system is a "monumental" and complex task, evidence of which is not before this Court.

(4) Applicant's Reply

[107] The Applicant notes the following in reply:

- Canada submits that the GIC's decision was reasonable because at the time of the stringency assessments, Manitoba had already withdrawn its proposed carbon reduction legislation. According to Manitoba, this submission disregards the import of communications received from the Minister of the Environment and Climate Change advising Manitoba that its proposed carbon pricing plan was inadequate;

- Canada points to evidence that Manitoba's plan would reduce GHG emissions by 76,000 tonnes less than under the federal plan in 2022. Canada ignores the import of the modeling conducted by Manitoba, which showed that between 2018-2022 the Manitoba Plan would reduce *cumulative* GHG emissions to a greater extent than under the backstop. Climate change is not caused by GHG emissions over a single year, but rather over time. It was unreasonable for the GIC to ignore the important modeling evidence and the efficacy of Manitoba's plan on a cumulative basis*;* and

- With respect to Canada's allegation that Manitoba confused the federal Benchmark with the backstop, the record shows that the pricing systems of Alberta, Newfoundland and Labrador, PEI, Nova Scotia and Quebec not only differed from the federal backstop but also failed to satisfy the Benchmark. For example, the Benchmark requires that carbon pricing apply to substantively the same sources as BC's carbon tax: Cunningham Affidavit at paras 256 and 327-328. Yet Canada does not refute that Alberta's exemptions for certain oil and gas

> facilities do not exist under the BC carbon tax. In Manitoba's view, "the GIC's approval of these provincial plans notwithstanding the failure to meet the … Benchmark cannot be brushed aside simply because other aspects of the provincial scheme may have been adequate."

(5) Analysis

[108] Under the statutory scheme, the GIC is empowered by s 166(2) of the Act to amend Part 1 of Schedule 1 by regulation, "including by adding, deleting, varying or replacing any item or table." The regulations may distinguish among classes, provinces, facilities, activities and fuels: s 166(1)(e).

[109] Subsection 166(2) qualifies that the regulations must be "for the purpose of ensuring that the pricing of [GHG] emissions is applied broadly in Canada at levels that the [GIC] considers appropriate". Subsection 166(3) requires that when making a regulation under s 166(2), the GIC "shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions."

[110] The bar for overturning challenged regulations for inconsistency with the statutory purpose is high for three reasons.

[111] First, regulations benefit from a presumption of validity. The burden rests on challengers to demonstrate their invalidity rather than on the regulatory bodies to justify them. Further, the presumption favours an interpretive approach that reconciles the regulation with its enabling

statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires*: *Katz* at para 25, quoting Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf) at 15:3200 and 15:3230.

[112] Second, both the challenged regulation and the enabling statute are to be interpreted using a "broad and purposive approach… consistent with th[e] [Supreme] Court's approach to statutory interpretation generally:" *Katz* at para 26.

[113] Third, the analysis must be limited to assessing the statutory interpretation exercise. The assessment of *vires* is not an inquiry into the underlying political, economic, social or partisan considerations that drove the enactment of the regulations. The efficacy of the regulations in achieving the statutory objective(s) also does not factor into the analysis: *Katz* at para 28. In other words, "[t]he motives for th[e] promulgation [of the regulations] is irrelevant:" *Katz*, at para 27, citing Ontario Federation of Anglers & Hunters v Ontario (Ministry of Natural Resources) (2002), 211 DLR (4th) 741.

[114] The GIC did not give reasons for its decision to pass the Part 1 Regulations and the Part 2 Order. Where no reasons have been provided, the reviewing court must look to the record as a whole to understand the decision: *Vavilov* at para 137. In this case, the record surrounding the decision includes (i) the text of the power-conferring provisions; (ii) the context in which the provisions are situated; (iii) their legislative history; and (iv) the purpose of the Act.

[115] In this instance, the text of the power-conferring provisions of the legislation is very broad. When applying the reasonableness standard to a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision maker: *Vavilov* at para 68. By contrast, more open-ended language extends the possible ambit of the decision maker's grant of discretion.

[116] The Act does not contain a definition of "stringency". This was addressed by Chief Justice Wagner for the majority in the *Reference Decision* at para 73:

> It is notable that the GGPPA does not itself define the word "stringency" used in ss. 166 and 189. But this does not mean that the Governor in Council's discretion with respect to listing is "open-ended and entirely subjective": Alta. C.A. reasons, at para. 221. Rather, the Governor in Council's discretion is limited both by the statutory purpose of the GGPPA and by specific guidelines set out in the statute for listing decisions: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 108; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24. Specifically, the discretion to list a province or territory must be exercised in a way that is consistent with the statutory purpose of reducing GHG emissions by putting a price on them. And any decision of the Governor in Council with respect to listing would have to be consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor: preamble, para. 16, and ss. 166 and 189. Moreover, because the GGPPA provides for a legal standard to be applied in assessing provincial and territorial pricing mechanisms, any decision of the Governor in Council in this regard would be open to judicial review to ensure that it is consistent with the purpose of the GGPPA and with the specific constraints set out in ss. 166(2) and (3) and 189(1) and (2). In other words, although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance with the purpose for which it was given. The Governor in Council certainly does not, therefore, have "absolute and untrammelled 'discretion'": Vavilov, at para. 108, quoting *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140.

[117] In the absence of a legislative definition of a term, the Courts commonly begin with the dictionary definition to ascertain its meaning: the Oxford English Dictionary defines "stringency" as "the quality of being stringent; strictness; rigour." It defines "stringent" in relation to "regulations, procedure, requirements, obligations, etc." as "rigorous, strict, thoroughgoing; rigorously binding or coercive."

[118] Based on the record, I accept the Respondents' submission that the GIC interpreted "stringency" as meeting the standards of stringency set out in the federal Benchmark. Under the Benchmark, stringency means a Benchmark that begins with a minimum price of $10 per excess ton of carbon emissions in 2018 and increases incrementally each year. Imposing this minimum national standard meant that there would be a minimum threshold or "floor" of carbon pricing stringency on all Canadian provinces and territories, and coincidentally, resolved the issue of carbon leakage between the jurisdictions.

[119] The Respondents adduced compelling evidence that Parliament intended the word "stringency" to mean carbon pricing that increases incrementally over time, and that begins with a minimum price of $10 per excess tonne of carbon in 2018. That evidence includes the Preamble of the Act; the Regulatory Impact Analysis Statements , which set out how provincial systems were to be assessed against the Benchmark stringency criteria; and the two Supplementary Benchmark Guidance documents released by the Government of Canada in August and December 2017.

[120] This interpretation of stringency was reasonable in light of the text, context and purpose of the Act. It dovetails with the purpose of the Act to establish minimum national standards of GHG reduction to reduce nationwide GHG emissions. It also comports with the statutory grants of power in ss 166(3) and 189(2).

[121] Applying the reasonableness standard of review, judicial review of challenged regulations should not interfere with the decision-maker's interpretation of its power-granting authority unless unreasonableness can be shown. The Applicant has not done so here.

[122] On the record before the Court, the GIC's assessment that Manitoba's Plan was insufficiently stringent was also reasonable. This is because on October 3, 2018, twenty days before the GIC announced the results of its stringency assessment under Part 2 of the Act, the Premier of Manitoba withdrew the proposed GHG reduction plan. As a result, on the day on which the GIC began its stringency assessment for Manitoba, Manitoba had no carbon pricing scheme in place to assess. That this was done in an apparent response to comments attributed to the Federal Minister is irrelevant. In this context, the GIC's decision to conclude that Manitoba's non-existent carbon pricing scheme fell below the federal Benchmark was reasonable

> (6) Issue 3: Do the Impugned Decisions run constitutionally afoul of POGG? In particular, do they offend the POGG requirement, if one exists, that legislation promulgated under POGG must impose uniform national standards across Canada?

[123] As discussed above, the standard of review applicable to this question is correctness.

[124] Manitoba submits that the Impugned Decisions run constitutionally afoul of the POGG requirement to impose uniform minimum national standards for GHG reduction stringency across Canada. The Applicant contends that the Impugned Decisions illustrate that the GIC exercised its discretion arbitrarily to impose the fuel charge backstop unevenly in different parts of Canada, regardless of compliance with the minimum benchmark. This undercuts the requirement for uniformity which underlies POGG according to Manitoba.

[125] Manitoba acknowledges that the GIC benefits from the power given to it in s 166(1)(e) of the Act, which reads:

> **166 (1)** The Governor in Council may make regulations
>
> > **(e)** distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things; […]

[126] Despite this open-ended language, Manitoba contends that the Act can't be interpreted to allow the GIC to apply a different standard of stringency to different provinces as this would undermine the Act's purpose.

[127] The Respondents contend that the Impugned Decisions do not exceed the POGG power because POGG does not impose the requirement that the GIC impose an identical standard of stringency on all provinces it assesses under ss 166 and 189. It is not necessary that the provinces have "precisely uniform" carbon pricing systems to be characterized as establishing minimum national standards integral to reducing nationwide GHG emissions, or to meet the Act's national objectives. The minimum national standard imposed by the Act is that provincial pricing systems are sufficiently stringent. This is enough to satisfy the uniformity requirement under POGG.

[128] I agree with the Respondents that while POGG does impose a requirement for uniformity, the Act meets that requirement by imposing uniform minimum national standards of GHG reduction through the "sufficient stringency" terms of ss 166 and 189 of the Act. The standard, as set out in the federal Benchmark, begins with a minimum price of $10 per excess tonne of carbon emissions in 2018 and increases incrementally year by year.

[129] The Act achieves the necessary level of uniformity required under POGG whether or not provincial plans are sufficiently stringent, but it enforces this uniform standard of stringency by applying the backstop where necessary. So long as the GIC used the same barometer for stringency when assessing proposed provincial legislation under the Act, no constitutional infirmity arises with respect to POGG.

[130] I also agree with the Respondents that Manitoba's contention that the GIC arbitrarily assessed stringency as between the provinces is premised on a misunderstanding of the evidence. In its arguments, the Applicant has consistently confused the Benchmark with the backstop in assessing the GIC's decisions with respect to the provinces and territories. The minimum national standard for provincial carbon mitigation legislation is the standard articulated in the Benchmark. The backstop is simply a pricing scheme that is compliant with the Benchmark. The Benchmark does not demand that all provincial systems mirror one another and there can be significant differences between the plans adopted.

[131] There is no convincing evidence or argument before this Court that the GIC interpreted the "sufficiently stringent" standard in an arbitrary manner or applied it in a non-uniform way during its October 2018 assessments under ss 166 and 189.

VI. **Conclusion**

[132] I am satisfied that the Governor in Council exercised its discretion consistently with the purpose of the Act and the constraints set out in ss 166 and 189. The exercise of this discretion was not "open-ended and entirely subjective". The decisions were consistent with the statutory purpose of reducing GHG emissions by putting a price on them. The inclusion of Manitoba on the list was consistent with the statutory purpose and the guideline of ensuring that emissions pricing is applied broadly in Canada. At the time the decision was made, there was no GHG mechanism in place in Manitoba to be assessed for stringency.

VII. **Costs**

[133] Canada requests its costs, fixed in the amount of $10,000. It submits that Manitoba's insistence that the constitutional issues be pursued in this Court concurrently with the outstanding *Reference Decision* appeals produced substantial additional and highly complex work.

[134] I agree with Canada that Manitoba's insistence on maintaining the constitutional challenge until just a month before the hearing imposed an unnecessary burden on the Respondents. Canada shall be awarded its costs to be assessed on the ordinary scale for that additional work. Apart from that, the parties shall bear their own costs.

JUDGMENT IN T-685-19

THIS COURT'S JUDGMENT is that the application is dismissed with costs to the Respondents to be assessed on the ordinary scale for the additional and unnecessary work required to prepare for a hearing on the constitutional issues.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-685-19
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA v GOVERNOR IN COUNCIL and ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA and ASSEMBLY OF FIRST NATIONS
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE AT OTTAWA AND MANITOBA
DATE OF HEARING:	DECEMBER 7, 2020
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	OCTOBER 21, 2021

APPEARANCES:

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Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENTS
Assembly of First Nations Ottawa, Ontario	FOR THE INTERVENORS

APPENDIX: RELEVANT PROVISIONS / APPENDICE: PROVISIONS RÉLATIVES

Regulations	**Règlements**
166 (1) The Governor in Council may make regulations	**166 (1)** Le gouverneur en conseil peut, par règlement :
(a) prescribing anything that, by this Part, is to be prescribed or is to be determined or regulated by regulation;	a) prendre toute mesure d'ordre réglementaire prévue par la présente partie;
(b) requiring any person to provide any information, including the person's name, address, registration number or any information relating to Part 2 that may be required to comply with this Part, to any class of persons required to make a return containing that information;	b) obliger une personne à communiquer des renseignements, notamment ses nom, adresse, numéro d'inscription ou toute information liée à la partie 2 pouvant être requise pour se conformer à la présente partie, à une catégorie de personnes tenue de produire une déclaration les renfermant;
(c) requiring any person to provide the Minister with the person's Social Insurance Number;	c) obliger une personne à aviser le ministre de son numéro d'assurance sociale;
(d) requiring any class of persons to make returns respecting any class of information required in connection with the administration or enforcement of this Part;	d) obliger une catégorie de personnes à produire les déclarations relatives à toute catégorie de renseignements nécessaires à l'application ou à l'exécution de la présente partie;
(e) distinguishing among any class of persons, provinces, areas, facilities, property, activities, fuels, substances, materials or things; and	e) faire la distinction entre des catégories de personnes, des provinces, des zones, des installations, des biens, des activités, des combustibles, des substances, des matières ou des choses;
(f) generally to carry out the purposes and provisions of this Part.	f) prendre toute mesure d'application de la présente partie.
Amendments to Part 1 of Schedule 1	**Modifications à la partie 1 de l'annexe 1**
(2) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by regulation, amend Part 1 of Schedule 1,	**(2)** Afin d'assurer l'application étendue au Canada d'une tarification des émissions de gaz à effet de serre à des niveaux que le gouverneur en conseil considère appropriés, celui-ci peut, par règlement, modifier la partie 1 de l'annexe 1, notamment en

including by adding, deleting, varying or replacing any item or table.

ajoutant, supprimant, modifiant ou remplaçant un élément ou un tableau.

Factors

(3) In making a regulation under subsection (2), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

Facteurs

(3) Pour la prise de règlements en application du paragraphe (2), le gouverneur en conseil tient compte avant tout de la rigueur des systèmes provinciaux de tarification des émissions de gaz à effet de serre.

Amendments to Schedule 2

(4) The Governor in Council may, by regulation, amend Schedule 2 respecting the application of the fuel charge under this Part including by adding, deleting, varying or replacing a table.

Modifications à l'annexe

(4) Le gouverneur en conseil peut, par règlement, modifier l'annexe 2 relativement à l'application de la redevance sur les combustibles en application de la présente partie, notamment en ajoutant, supprimant, modifiant ou remplaçant un tableau.

Effect

(5) A regulation made under this Part is to have effect from the date it is published in the Canada Gazette or at such time thereafter as may be specified in the regulation, unless the regulation provides otherwise and

Effet

(5) Les règlements pris en application de la présente partie ont effet à compter de leur publication dans la Gazette du Canada ou après s'ils le prévoient. Un règlement peut toutefois avoir un effet rétroactif, s'il comporte une disposition en ce sens, dans les cas suivants :

(a) has a non-tightening effect only;

a) il n'augmente pas le fardeau de redevance;

(b) corrects an ambiguous or deficient enactment that was not in accordance with the objects of this Part;

b) il corrige une disposition ambiguë ou erronée, non conforme à un objet de la présente partie;

(c) is consequential on an amendment to this Part that is applicable before the date the regulation is published in the Canada Gazette;

c) il procède d'une modification de la présente partie applicable avant qu'il ne soit publié dans la Gazette du Canada;

(d) is in respect of rules described in paragraph 168(2)(f); or

d) il vise les règles prévues à l'alinéa 168(2)f);

(e) gives effect to a public announcement, in which case the regulation must not, except if any of paragraphs (a) to (d) apply,

e) il met en œuvre une mesure annoncée publiquement, auquel cas, si aucun des alinéas a) à d) ne s'applique par ailleurs, il ne

have effect before the date the announcement was made.

peut avoir d’effet avant la date où la mesure est ainsi annoncée.

Order and Regulations

Décrets et règlements

Amendments to Part 2 of Schedule 1

189 (1) For the purpose of ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may, by order, amend Part 2 of Schedule 1 by adding, deleting or amending the name of a province or the description of an area.

Modification de la partie 2 de l’annexe 1

189 (1) Afin d’assurer au Canada une application étendue d’une tarification des émissions de gaz à effet de serre à des niveaux que le gouverneur en conseil estime appropriés, celui-ci peut, par décret, modifier la partie 2 de l’annexe 1 par adjonction, suppression ou modification du nom d’une province ou de la description d’une zone.

Factors

(2) In making an order under subsection (1), the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.

Facteurs

(2) Pour la prise d’un décret en vertu du paragraphe (1), le gouverneur en conseil tient compte avant tout de la rigueur des mécanismes provinciaux de tarification des émissions de gaz à effet de serre.

Exclusive economic zone and continental shelf

(3) For greater certainty, an area referred to in subsection (1) may include a part of the exclusive economic zone of Canada or the continental shelf of Canada.

Zone économique exclusive et plateau continental

(3) Il est entendu qu’une zone visée au paragraphe (1) peut inclure toute partie de la zone économique exclusive du Canada ou du plateau continental canadien.