

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

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I. PART I – OVERVIEW

1. The purpose of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12 (“Act” or “GGPPA”) is to “mitigate climate change” because greenhouse gas emissions [GHGE] “are at the highest level in history and present an unprecedented risk to the environment...biological diversity...human health and safety...and economic prosperity”. The Act’s mechanism to achieve this purpose, across all sectors of the Canadian economy, requires GHGE sources to pay a charge on fuel, or a levy on emissions, to induce change in their behaviour leading to emission reductions.

Attorney General of Ontario Factum (“OF”), Sch. B, Tab 2: Act, Declaration; Preamble, paras 1-16.

2. Parts 1 and 2 of the Act are *intra vires* Parliament under criminal law because they have a legitimate criminal law purpose, backed by prohibitions and sanctions. That purpose, mitigating climate change by pricing carbon to induce GHGE reductions, applies to GHG listed under the Act that also have been designated toxic substances under another federal law upheld under criminal law. Alternatively, Part 2 is *intra vires* Parliament under trade and commerce because it: (1) establishes in aid of the Act’s overall purpose, a market pricing system for trade in GHGE reduction credits; commodities of economic or commercial value to industry; and (2) seeks to protect that system from anti-competitive practices. Part 2 applies to trade as a whole, could not be enacted by the provinces, and would be jeopardized if all provinces were not included.

OF: paras 1, 49, 54; cf. **Intervenors’ Factum (“IF”), Sch. B:** *Const. Act, 1867*, ss. 91(2)(27); **Ontario/Canada Joint Book of Authorities (“JBOA”), Vol. III, Tab 41:** *R v. Hydro-Quebec*, [1997] 3 SCR 213, para 161; **JBOA, Vol. IV, Tab 53:** *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, paras 8-9, 41-42.

II. PART II – FACTS

3. The Intervenors adopt the facts set out by Canada. Part 1 requires liquid, gas, and solid fuel producers, distributors, importers, and final fuel users (carriers) in provinces that do not implement a carbon pricing system equivalent to that under the Act, to pay a GHGE charge. They must

register/report monthly charges to the Canada Revenue Agency (“CRA”) and remit the charges to Canada. There are prohibitions, offences (summary and indictable), and penalties for providing false information to CRA, or failing to register, report, remit, or provide information to CRA.

Attorney General of Canada Factum (“CF”): paras 7-47; **OF, Sch. B, Tab 2:** Act, Part 1, ss. 17-27, 28-35, 55-77, 123-140.

4. Part 2 of the Act establishes mandatory pricing for industrial facilities emitting 50 kt or more carbon dioxide (“CO₂”) equivalent GHG per year and allows other facilities to request coverage in lieu of being subjected to Part 1 charges. The pricing mechanism consists of: (1) a levy for a facility’s GHGE that exceed an annual prescribed threshold; and (2) emission credits for the quantity below the annual prescribed threshold not emitted by a facility, which can be transferred to other facilities. Environment and Climate Change Canada (“ECCC”) will establish/maintain a system to track emission credits, transfers, retirement, and cancellation of credits and levy payments for excess GHGE for facilities. A regime similar to Part 1’s prohibitions, offences, and penalties is established in Part 2, “inspired” by the enforcement provisions of the *Canadian Environmental Protection Act, 1999* (“CEPA”). The GHG subject to Part 2 also, with one exception, are designated toxic substances under *CEPA*.

OF, Sch. B, Tab 2: Act, Part 2, ss. 169-188, Sch. 3 (33 GHG listed) & Sch. 4 (excess emission charge rates), 185-186, 232-240; **IF, Sch. B:** *CEPA*, Sch.1 (6 GHG categories designated toxic substances correspond to 32 of the 33 GHG in Sch. 3; except item 5 of Sch. 3, nitrogen trifluoride, not included in Sch.1 of *CEPA*); **Attorney General of Canada Record (“CR”) Vol. 1, Tab 1:** Moffet Affidavit, para 116.

III. PART III – ISSUES

5. Subsumed in the reference question “Is the [Act] unconstitutional in whole or in part” are:
- (a) Issue 1: Whether Parts 1 and 2 of the Act are *intra vires* Parliament based on the criminal law power; and
 - (b) Issue 2: Whether, in the alternative, Part 2 of the Act is *intra vires* Parliament based on the trade and commerce power?

IV. PART IV – LAW

A. Characterizing the Pith and Substance of the Act

6. The purpose and legal effect of the Act demonstrate that its pith and substance, dominant purpose, or true character is climate change mitigation to be achieved by GHGE sources paying charges on fuel, or levies on emissions, to induce them to reduce GHGE.

OF, Sch. B, Tab 2: Act, Declaration; Preamble, paras 1-16, Part 1, ss. 17-27, 28-35, 55-77, 123-140, Part 2, ss. 169-188, Sch. 3 & 4, 185-186, 232-240; **JBOA, Vol. III, Tab 41:** *Hydro-Quebec*, para 113.

1. Purpose of the Act

7. The problem or “mischief” Parliament seeks to remedy by enactment of the *GGPPA* is the need to mitigate climate change impacts on the environment, biological diversity, human health and safety, and economic prosperity by placing a price on carbon fuels and emissions such that GHG fuel sources and emitters modify their behaviour and reduce emissions.

OF, Sch. B, Tab 2: Act, Declaration; Preamble, paras 1-16; **JBOA, Vol. III, Tab 46:** *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, paras 17, 21.

2. Legal Effects of the Act

8. The legal effects of the Act are consistent with its purpose, suggesting nothing colourable about the federal regime. The fuel charges under Part 1, and the emission levies under Part 2, are designed to modify behaviour so as to reduce GHGE and mitigate climate change. The measures in Part 1 (e.g. registry) and Part 2 (e.g. emission credit system) are in aid, not of regulating property, but of contributing to the Act’s overall purpose of protecting the environment and the Canadian public through reductions in GHGE that, if not achieved, could lead to further climate disruption.

CR Vol. 1, Tab 1: Moffet Affidavit, paras 6, 8, 17-26, 101-116; **JBOA, Vol. III, Tab 46:** *Firearms Reference*, paras 18-19, 24, 38, 42, 50-51.

9. Even if certain provisions could, in pith and substance, be viewed as outside the power of Parliament, they should still be upheld on the basis of the ancillary powers doctrine because they

are connected to, and integrated with, a valid federal scheme of climate change mitigation.

JBOA, Vol. III, Tab 45: *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, paras 187-189.

B. Classifying the Act: Issue 1 – Parts 1 and 2 of the Act are *Intra Vires* Parliament Based on the Criminal Law Power

10. The *Constitution Act, 1867*, confers on Parliament the exclusive and plenary power to legislate in relation to criminal law. Its reach is broadly defined, not “frozen in time”, stands on its own as federal jurisdiction, and is not restricted to the *Criminal Code*, R.S.C. 1985, c. C-46.

IF, Sch. B: *Const. Act, 1867*, s. 91(27); **JBOA, Vol. III, Tab 41:** *Hydro-Quebec*, paras 119-122, 161; and **Tab 46:** *Firearms Reference*, paras 28-29 (laws on food, drugs, tobacco, firearms, toxic substances upheld).

11. This Court should construe the *Constitution Act, 1867* in a manner consistent with the precautionary principle. Upholding the Act under the criminal law power would be consistent with this principle. Canada has a mandate in law to act consistently with its international law obligations, including the precautionary principle that requires governments to pursue environmental measures that “anticipate, prevent and attack the causes of environmental degradation”. The Act aims to prevent environmental ills that pose threats of serious or irreversible damage and has a “clear and preventive purpose”. Its validity should be interpreted in this context.

JBOA, Vol. 1, Tab 2: *114957 Canada Ltee (Spraytech Societie d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, paras 30-32; **Intervenors’ Book of Authorities (“IBOA”), Tab 1:** *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 SCR 323, para 20; **IBOA, Tab 2:** C. Cote, “Applying International Law to Canadian Environmental Law”, *Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage*, Calgary (2012), 1, 8; **IBOA, Tab 3:** *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 1999, para 41 (criminal law power contains preventive branch).

12. The Act is valid criminal law because it: (1) is founded on a “legitimate public purpose” associated with an “evil” that Parliament seeks to suppress, or with threatened interests it seeks to safeguard; (2) stipulates a prohibition combined with a sanction; and (3) does not colourably invade areas of exclusively provincial legislative competence.

IBOA, Tab 3: *RJR-MacDonald*, para 28; **JBOA, Vol. III, Tab 41:** *Hydro-Quebec*, paras 121, 123.

13. An evil to suppress, combined with a prohibition and a penalty, permits Parliament to make laws regarding new realities, such as pollution, that are considered undesirable. It allows Parliament to prohibit conduct it considers reprehensible and to prevent the undesirable effects of such conduct. GHGE that produce climate change are such new “evil” realities under the Act.

JBOA, Vol. III, Tab 45: *AHR Reference*, paras 233, 235; **JBOA, Vol. IV, Tab 53:** *Synchrude* para 51; **CR Vol. 1, Tab 1:** Moffet Affidavit, paras 6, 8, 17-26, 101-116; **OF, Sch. B, Tab 2:** Act, Declaration, Preamble, paras 1-16.

1. Parts 1 and 2 Have a Legitimate Criminal Law Purpose

14. The substantive component of the definition of criminal law requires as an essential element a real evil and a reasonable apprehension of harm. *Hydro-Quebec* recognized environmental protection as a criminal law purpose because “pollution is an evil” Parliament can legitimately seek to suppress. It is a public purpose of superordinate importance recognized as a legitimate basis for criminal laws controlling toxic substances generally, reducing emissions of GHG (that also have been designated toxic substances), and protecting species at risk.

JBOA, Vol. III, Tab 45: *AHR Reference*, paras 234, 237, 240, 248-251 (substantive component assumes particular importance given liberal interpretation of formal component; certain sections of law not upheld because not meet substantive component; some activities beneficial, not evil/reprehensible); **JBOA, Tab 41:** *Hydro-Quebec*, paras 85, 123; **JBOA, Vol. IV, Tab 53:** *Synchrude*, paras 8-9, 41-42, 49, 62; **IOA, Tab 4:** *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2018 FC 643, paras 110, 114-116, 118.

15. The characterization of the Act’s pith and substance (that its purpose and effect is to mitigate climate change by imposing charges on GHGE sources to induce them to change their behavior/reduce emissions, and penalize them if they do not), is consistent with suppressing an “evil”. In exercising its criminal law power, Parliament can “determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard”. In this reference, the evil addressed by the Act is climate change-inducing GHGE requiring mitigation. “Stewardship of the environment is a fundamental value...and...Parliament may use its criminal law power to underline that value...and keep pace with and protect our emerging values”.

OF, Sch. B, Tab 2: Act, Declaration, Preamble, paras 1-16, Part 1, ss. 17-27, 28-35, 55-77, 165, 123-140, Part 2, ss. 169-188, Sch. 3 & 4, 185-186, 232-240; **JBOA, Vol. III, Tab 41:** *Hydro-Quebec*, paras 119, 123-125, 127.

16. In *Syncrude*, a criminal law purpose in protecting the environment from GHGE was found for a federal regulation under *CEPA* that required diesel fuel to contain a small percentage (2%) of renewable fuel, thus reducing the burning of fossil fuels and GHGE by increasing the consumption of renewable fuel. The Court noted: “All criminal law seeks to deter or modify behavior, and it remains a valid use of the power if Parliament foresees behavioural responses, either in persons or in the economy”. The charges imposed on fossil fuels in the *GGPPA* are designed to induce a similar result (behavioural change leading to GHGE reductions).

JBOA, Vol. IV, Tab 53: *Syncrude*, paras 61-70.

17. The *GGPPA* regime is linked to the criminal law power in another way. The GHG listed in Part 2’s Schedule 3, with one exception, since 2005 have been designated toxic substances under *CEPA*, whose focus on toxic substances was upheld in *Hydro-Quebec* under the criminal law power. Like *CEPA*, which carefully targeted a small number of toxic substances to avoid unnecessarily broad prohibitions and their impact on the exercise of provincial powers, the *GGPPA* targets a small number of GHG. Schedule 2 also targets a small number of fuel types that are subject to the Part 1 charge because their use or combustion produces GHGE.

JBOA, Vol. III, Tab 41: *Hydro-Quebec*, paras 145-147, 161 (majority); **JBOA, Vol. IV, Tab 53:** *Syncrude*, paras 8-9, 41-42; **OF, Sch. B, Tab 2:** Act, Sch. 3 (33 GHG); **IF, Sch. B:** *CEPA*, Sch. 1 (6 GHG categories designated toxic substances correspond to 32 of 33 GHG in Sch. 3; except item 5, Sch. 3, nitrogen trifluoride, not included in *CEPA* Sch.1); Act, Sch. 2 (22 fuel types listed);

2. Parts 1 and 2 Contain Prohibitions Backed by Sanctions

18. The formal component of the definition of criminal law requires that it contain a prohibition backed by a penalty. Thus, a law is considered to fall within Parliament’s criminal law power when it stipulates a prohibition combined with a sanction, and the prohibition is founded on a “legitimate public purpose” associated with an “evil” that Parliament seeks to suppress. Parliament may also

delegate to the executive branch power to define or specify conduct that could have, or be exempt from, criminal consequences, and authorize establishment of detailed, precise, and highly complex regulatory systems. These principles apply to, and exist within, the regime established in the Act, further justifying the interpretation that it is supported by the criminal law power. It does not stray beyond the types of prohibition and penalty that can be imposed under that power.

OF: para 54; cf. **IBOA, Tab 3: *RJR-MacDonald***, para 28 (legitimate public purpose - suppression of evil or safeguarding interest threatened must underlie prohibition), 52-57 (criminal law may contain exemptions for certain conduct without losing criminal law status, including delegating power to province to create exemptions from law; exemption helps define crime by clarifying contours); **JBOA, Vol. III, Tab 41: *Hydro-Quebec***, paras 130, 150, 152 (highly detailed requirements), 153 (authority to exempt where equivalent provincial law); **JBOA, Vol. III, Tab 46: *Firearms Reference***, paras 37 (that law complex not necessarily detract from its criminal nature), 39 (exemptions not preclude law from being prohibitive and, therefore, criminal; where essential focus of law on safety, prohibition should not be viewed as designed to enforce fee payment/regulatory scheme separate from safety focus); **JBOA, Vol. III, Tab 45: *AHR Reference***, paras 233-234, 237 (formal component of prohibition/penalty supports finding regulatory scheme, even one that exempts from prohibitory scheme, falls within criminal law if substantive component - justifiable criminal law purpose such as suppression of an evil and protection of legitimate societal interests also present).

19. The prohibition need not be total to be upheld as a valid exercise of criminal law. Evil associated with: (1) tobacco has been addressed not by prohibiting tobacco consumption, but tobacco advertising; (2) guns has been addressed not by prohibiting gun possession, but gun possession without a licence; and (3) GHG has been addressed not by totally prohibiting their presence in fuel, but by a 2 per cent renewable fuel requirement. The Act's fuel and emission charges are consistent with this approach; they do not prohibit GHGE but using or emitting GHG without paying a charge. That Parliament chose a "circuitous path" to accomplish its goal of climate change mitigation does not in any way lessen the constitutional validity of the goal.

IBOA, Tab 3: *RJR-MacDonald*, paras 34-44, 50-51 (circuitous path acceptable); **JBOA, Vol. III, Tab 46: *Firearms Reference***, para 39; **JBOA, Vol. IV, Tab 53: *Syncrude***, paras 71-77; **OF, Sch. B, Tab 2: Act**, Part 1, e.g. ss. 17-27, 55-77, 135-136, & Sch. 2 (Charge Rates); Part 2, e.g. ss. 169-188, 232-240, Sch. 3 & 4.

20. Finally, the regime established under the *GGPPA* is consistent with that of other federal laws upheld under the criminal law power that have: (1) a registration system; or (2) eliminated provincial ability to not have any regulation of a particular subject matter.

OF: paras 32, 41, 44; but compare **JBOA, Vol. III, Tab 46:** *Firearms Reference*, paras 46-47, 57 (registration system serves Parliament’s purpose in promoting public safety), 52 (double aspect doctrine allows Parliament to address safety issue even if provinces choose not to have such a law).

3. Parts 1 and 2 are not Colourable

21. The Act is designed to combat deleterious effects of GHG and mitigate climate change by placing a charge on fossil fuels, and a levy on emissions, to induce behavioural change and reduce overall GHGE. Canada’s uncontroverted evidence on “carbon leakage” (i.e. an increase in carbon emissions in one jurisdiction as a result of a reduction in emissions in another jurisdiction with a stricter climate change policy) indicates it is a phenomenon that may occur if, for reasons of cost, emitting industries transfer production from a jurisdiction with a carbon price to a jurisdiction that does not price carbon. This concern is reflected in the preamble and in the body of the Act where the federal cabinet is authorized to list in Schedule 1 provinces where the Act will apply, based on the primary factor “the stringency of provincial pricing mechanisms for [GHGE]”.

CR Vol. 1, Tab 1: Moffet Affidavit, paras 65, 67, 85, 102, 122; **OF, Sch. B, Tab 2:** Act, Preamble, paras 14-16; Part 1, s. 166(2)(3); Part 2, s. 189(1)(2).

22. Ontario agrees with Canada that: “climate change is real and that human activities are a major cause...and that climate change is already having a disruptive effect across Canada, and [if] left unchecked, its potential impact will be even more severe”. However, Ontario disagrees that putting a price on carbon “is an appropriate way to combat climate change, given the adverse impact carbon prices have on families and businesses”, and points to its recently released climate change plan as the preferable approach to dealing with the problem.

OF: paras 6-11.

23. This policy disagreement is not about colourability, but efficacy. Colourability cannot be a backdoor to reconsideration of the wisdom or efficacy of a law. Efficacy does not determine a law’s constitutionality. It is not relevant to the Court’s division of powers analysis.

JBOA, Vol. IV, Tab 53: *Syncrude*, para 88; **JBOA, Vol. III, Tab 46:** *Firearms Reference*, para 18.

24. A high standard is required to establish colourability. It requires Parliament's declared valid purpose to be a mere pretense for incursion into provincial jurisdiction. It is not lightly inferred. The valid use of the criminal law power to protect the environment may have consequential economic effects. However, that managing economic effects plays even a large role in a law does not mean the law is a colourable attempt to pursue an unconstitutional objective.

OF: paras 51, 58; **JBOA, Vol. IV, Tab 53:** *Synchrude*, paras 66, 83, 86-93.

25. The legitimate use of the criminal law in no way constitutes encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. The criminal law power also in no way precludes provinces from exercising their powers under s. 92 of the *Constitution Act, 1867* to control pollution independently or to supplement federal action.

JBOA, III, Tab 41: *Hydro-Quebec*, paras 129, 131, 154.

26. Under the pith and substance doctrine, a matter may fall within one level of government's jurisdiction for one purpose and in one aspect and fall within another level of government's jurisdiction for another purpose and another aspect. Thus, under the double aspect theory, even if there is duplication, so long as there is not actual conflict or contradiction between a federal and provincial law, both may operate. Where there is an operational conflict between two laws enacted on the same matter by each level of government, or where there is frustration of purpose by a valid provincial law that is incompatible with a federal legislative purpose, federal paramountcy allows the federal law to prevail, to the extent of the conflict. Ontario repealed/replaced its climate change law and is consulting on a new plan. Duplication or conflict with the Act is theoretical, not actual.

JBOA, Vol. I, Tab 15: *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, paras 30, 69-73; **IBOA, Tab 5:** *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, paras 47-48; **JBOA, Vol. I, Tab 2:** *Spraytech*, paras 34-36; **JBOA, Vol. III, Tab 46:** *Firearms Reference*, para 52; **OF, Sch. B, Tab 12:** *Cap and Trade Cancellation Act, 2018*, SO 2018, c.13 (minister to establish GHGE reduction targets, prepare/report on plan); **OR, Vol. 1, Tab 4:** Ontario, *Preserving and Protecting Our Environment for Future Generations: A Made in Ontario Plan* (November 2018) at 26 (plan may establish offset credits for GHGE performance standards for large emitters).

C. Classifying the Act: Issue 2 – In the alternative, Part 2 of the Act is *Intra Vires* Parliament Based on the Trade and Commerce Power

27. If Part 2 is not *intra vires* Parliament under criminal law, it is *intra vires* under trade and commerce. The purpose of Part 2, like Part 1, is to induce behavioural change in GHGE sources to mitigate climate change. Part 2 achieves this by introducing economic value to GHGE credits and a market for facilities to trade those credits if they reduce their emissions below prescribed levels. Part 2 creates an industry-wide market for the trading and regulation of emission credits.

IF, Sch. B: *Const. Act, 1867*, s. 91(2); **OF, Sch. B, Tab 2:** Act, ss. 173-188, Sch. 3 & 4.

28. The Constitution confers on Parliament the power to make laws in relation to “the regulation of trade and commerce”. Parliament can enact legislation in relation to general trade and commerce affecting the whole country based on five indicia: (1) the legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities would jeopardize the successful operation of the scheme in other parts of the country. These indicia are not exhaustive, nor must they be present in every case. The first two indicia identify the required formal structure; a federal regulatory scheme under the oversight of a regulator. The final three indicia identify whether federal regulation is constitutionally appropriate, of genuine national importance and scope going to trade as a whole distinct from provincial concerns allowing Parliament to deal effectively with economic issues.

IF, Sch. B: *Const. Act, 1867*, s. 91(2); **JBOA, Vol. II, Tab 23:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641, at pp. 661-663; **JBOA, Vol. IV, Tab 50:** *Reference re Securities Act (Canada)*, [2011] 3 S.C.R. 837, paras 80, 84, 108; **JBOA, Vol. IV, Tab 48:** *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, para 103.

1. Part 2 is Part of a General Regulatory Scheme

29. Part 2 meets the first indicium because it is part of a general regulatory scheme necessary to implement elaborate economic measures for facilitating emissions trades.

OF, Sch. B, Tab 2: Act, ss. 173-188, Sch. 3 & 4.

2. Part 2 is Continually Monitored by an Agency

30. Part 2 meets the second indicium because ECCC must establish and maintain a system that tracks emission credits, transfers, retirement, and cancellation of credits and levy payments for excess GHGE for each covered industrial facility.

OF, Sch. B, Tab 2: Act, ss. 185-186.

3. Part 2 is Concerned with Trade as a Whole

31. Part 2 is trade law, not just environmental law, because it turns emissions reductions into a marketable commodity with economic value to a wide spectrum of industries across the country. In *General Motors*, the Supreme Court of Canada (“SCC”) found federal competition legislation met the third indicium because it was aimed at improving the economic welfare of the nation as a whole, and Parliament and the provinces both had the constitutional power to regulate the intraprovincial aspects of competition because it, like “pollution”, is not a single matter.

JBOA, Vol. II, Tab 23: *General Motors*, at pp. 680-682.

32. In *Hydro-Quebec*, the dissent rejected the view that the trade and commerce power could justify federal control of the use and release of toxic substances in the course of commercial activities because the law in question, the predecessor to *CEPA*, did not concern trade and commerce, even if trade and commerce were affected by provisions controlling toxic substances. The majority was silent on the issue. Neither judgment examined a Part 2-like scheme because *CEPA* did not contain emissions trading authority when *Hydro-Quebec* was decided. It does now.

JBOA, III, Tab 41: *Hydro-Quebec*, paras 80-82; **IF, Sch. B:** *CEPA*, ss. 326-327; **JBOA, Vol. IV, Tab 53:** *Syncrude*, paras 5, 76, 79-80 (renewable fuels regulation authorizing acquiring compliance units by trade).

33. The Intervenors make four submissions why Part 2 meets the third indicium. First, pollution has an important economic dimension in its impact on trade and commerce. There is little incentive for company A to clean up in one province if company B in another province can continue to pollute and thereby obtain an economic advantage over company A. By not responding with effective legislation, or by imposing lower environmental standards, it is possible for provinces to subsidize existing, and attract new, businesses to their jurisdictions, thus creating competitive, commercial, and trade imbalances (as well as pollution haven and carbon leakage problems) across the country. This suggests the need for federal law to address the economic, trade, and commercial dimensions of the pollution problem through the trade and commerce power. This also explains reliance by the US Supreme Court on the Commerce Clause as constitutional justification for upholding federal environmental law in the United States.

IBOA, Tab 6: Paul Emond, *The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution*, 10 Osgoode Hall L.J. 647, 648-649 (1972); **IBOA, Tab 7:** *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 US 264, 281-283 (1981). **CR, Vol. 1, Tab 1:** Moffet Affidavit, paras 65, 67, 85, 110 (need to avoid carbon leakage).

34. Second, even if, as the *Hydro-Quebec* dissent suggests, traditional environmental regulation does not concern trade and commerce because it limits trade and commerce for non-trade or non-commercial reasons, Part 2 emissions trading is a different regime. It adopts economic or market approaches to environmental pollution by turning an emissions credit into an article of trade; that is, a commodity that has economic value to industry.

OF, Sch. B, Tab 2: Act, Part 2, ss. 173-188.

35. Third, the SCC has recognized that environmental protection, “one of the major challenges of our time” is an “abstruse matter which does not comfortably fit within” the division of powers “without considerable overlap and uncertainty”. This requires the Constitution to be “interpreted

in a manner that is fully responsive to emerging realities and the nature of the subject matter sought to be regulated”, given the particular difficulties posed by the “pervasive and diffuse nature of the environment”. The result is that different parts of an environmental statute may attract different heads of power, and the fact that certain provisions of a statute have a connection with the criminal law does not mean the entire statute need be justified on that basis. For example, the *Food and Drugs Act* has three distinct parts, one of which, on marketing, was recognized in *Wetmore* as falling under trade and commerce not criminal law. Accordingly, the Intervenors submit the: (1) SCC is signaling that complex environmental legislation may attract a more flexible pith and substance analysis than that afforded by the dissent in *Hydro-Quebec*; and (2) challenges posed by climate change, GHGE that cause it, and measures necessary to address it, warrant such flexibility.

JBOA, III, Tab 41: *Hydro-Quebec*, paras 86, 112; **JBOA, Vol. II, Tab 22:** *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at pp. 16, 63-64; **IBOA, Tab 8:** *R. v. Wetmore*, [1983] 2 SCR 284, para 9; **JBOA, Vol. III, Tab 45:** *AHR Reference*, para 242.

36. Fourth, the *Securities Reference* treated securities as a “particular industry” and found the “main thrust” of the proposed law to be regulation of that industry. Despite the acceptable “larger national goals” of the statute of control of systemic risk and data collection, the federal law completely displaced the long-existing provincial securities regulatory schemes. That is not the case under Part 2; it does not target any particular industry. Instead, it applies to a broad array of GHGE sources that emit over 50 kt or more of CO₂ equivalent GHG per year. Furthermore, Part 2 is specifically aimed at minimizing “competitiveness risks for emissions-intensive, trade exposed industrial facilities, while retaining the carbon price signal and incentive to reduce [GHGE]”. Overall, Part 2 meets the third indicium because carbon pricing, including emissions trading: (1) is not a “particular industry”; (2) is concerned with trading emission reductions, a commodity of economic value to trade as a whole; and (3) meets “larger national goals” of minimizing a systemic

risk of loss of industrial competitiveness and market share for industrial facilities that are emissions intensive and trade exposed, to industries in jurisdictions that do not price carbon.

JBOA, Vol. IV, Tab 50: *Securities Reference*, paras 116-117; **JBOA, Vol. IV, Tab 48:** *Pan-Canadian*, paras 87, 90, 92, 95-97, 106-107, 111-112, 116 (stamping out risks/practices unhealthy to Canadian economy); **JBOA, Vol. II, Tab 23:** *General Motors*, at p. 678 (deleterious effects of anti-competitive practices transcend provincial boundaries); **OF, Sch. B, Tab 2:** Act, Preamble, para 2; ss. 169-188; **OF, Sch. B., Tab 3:** *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, s. 3; **CR, Vol. 1, Tab 1:** Moffet Affidavit, paras 95, 100, 110, 114-115; Exh. “Y”, pages 821-822, 824-825 (oil and gas, pulp and paper, chemicals, nitrogen fertilizers, lime, cement, base metal smelting and refining, potash, iron ore pelletizing, mining, iron and steel, food processing); Exh. “AA”, page 844; **CR, Vol. 3, Tab 3:** Goodlet Affidavit, para 5; **OF:** para 52 (38 industries subject to Part 2 trading).

4. Part 2 Could not be Enacted by Provinces

37. In the *Securities Reference*, the portions of the proposed *Securities Act* dealing with systemic risk and data collection passed the fourth indicium, and were upheld in the federal statute under review in *Pan-Canadian*, in part because, although the provinces could in theory collaborate towards such goals, their “inherent prerogative to resile from an interprovincial scheme...limits their constitutional capacity to achieve the truly national goals of the proposed federal act”. The same logic holds true for emissions trading under Part 2. Regardless of whether provinces could enact emissions trading regimes and synchronize them, their inability to bind one another to such a regime is inescapable. The concern in the *Securities Reference* was that the federal securities regime would have completely displaced provincial securities laws, whereas Part 2 leaves provinces wide latitude to maintain equivalent or complementary GHG pricing regimes. Thus, there is no legislative “overreach” in Part 2 of the type found in the *Securities Act*.

JBOA, Vol. IV, Tab 50: *Securities Reference*, paras 120-122; **JBOA, Vol. IV, Tab 48:** *Pan-Canadian*, paras 113-114.

5. Part 2 Would be Jeopardized if all Provinces not Included

38. The *Securities Reference* found that the portions of the proposed *Securities Act* deemed acceptable under the fourth *General Motors* indicium, also passed the fifth indicium because “fair, efficient and competitive markets” and the other national goals addressed by that proposed law of

prevention of systemic risk and national data collection in connection therewith, were “genuine national goals” rather than “lesser regulatory matters”. Therefore, they were upheld in the federal statute under review in *Pan-Canadian* because effective management of systemic risk requires market-wide regulation, such that any one jurisdiction’s failure to participate would jeopardize the scheme’s successful operation. Emission trading under Part 2 raises analogous fairness and competition issues, and the prevention of GHGE is also a valid national goal, as reviewed under the third indicium. The opt-in feature criticized in the *Securities Reference* as undermining the federal argument that success of the law required participation by all provinces, was in fact opt-in by provinces, not by individual facilities as is the case in Part 2. Part 2 opt-in is ancillary to the Act’s objectives because if facilities do not opt-in they are still subject to Part 1, thereby ensuring GHGE pricing applies across Canada.

JBOA, Vol. IV, Tab 50: *Securities Reference*, para 123; **JBOA, Vol. IV, Tab 48:** *Pan-Canadian*, para 115. **OF, Sch. B, Tab 2:** Act, s. 172(1); **CR, Vol. 1, Tab 1:** Moffet Affidavit, para 111.

39. Reliance on trade and commerce to support Part 2 allows concurrent/compatible provincial law to apply intraprovincially even with Part 1 upheld under the criminal law power.

JBOA, Vol. II, Tab 23: *General Motors* at pp. 680-682; **IBOA, Tab 8:** *Wetmore*, para 9; **JBOA, Vol. III, Tab 45:** *AHR Reference*, para 242.

V. PART V – ANSWER REQUESTED

40. The Intervenors request the reference question posed by Ontario be answered: “No”.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

February 26, 2019



Joseph F. Castrilli

per 

Richard D. Lindgren

Counsel for the Intervenors,
Canadian Environmental Law Association,
Environmental Defence, and Sisters of Providence of St. Vincent de Paul

INTERVENORS' CERTIFICATE

1. An order under subrule 61.09(2) is not required.
2. The Canadian Environmental Law Association, Environmental Defence, and the Sisters of Providence of St. Vincent de Paul estimate that 10 minutes will be required for their oral argument.

February 26, 2019



Joseph F. Castrilli

Counsel for the Intervenors,
Canadian Environmental Law Association,
Environmental Defence, and the Sisters of Providence of St. Vincent de Paul.

SCHEDULE “A” - LIST OF AUTHORITIES

Tab	Cases	Para(s)
	<i>R. v. Hydro-Quebec</i> , [1997] 3 SCR 213, paras 80-82, 85-86, 112-113, 119-125, 127, 129-131, 145-147, 150, 152-154, 161 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. III, Tab 41]	2, 6, 10, 12, 14-15, 17-18, 25, 32, 35
	<i>Synchrude Canada Ltd. v. Canada (Attorney General)</i> , 2016 FCA 160, paras 5, 8-9, 41-42, 49, 51, 61-77, 79-80, 83, 86-93 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. IV, Tab 53]	2, 13, 14, 16-17, 19, 23-24, 32
	<i>Reference re Firearms Act (Can.)</i> , [2000] 1 SCR 783, paras 17-19, 21, 24, 28-29, 37-39, 42, 46-47, 50-52, 57 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. III, Tab 46]	7-8, 10, 18-20, 23, 26
	<i>Reference re Assisted Human Reproduction Act</i> , [2010] 3 SCR 457, paras 187-189, 233-235, 237, 240, 242, 248-251 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. III, Tab 45]	9, 13-14, 18, 35, 39
	<i>114957 Canada Ltee (Spraytech Societie d’arrosage) v. Hudson (Town)</i> , [2001] 2 SCR 241, paras 30-32, 34-36 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. I, Tab 2]	11, 26
1	<i>Castonguay Blasting Ltd. v. Ontario (Environment)</i> , [2013] 3 SCR 323, para 20	11
3	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 SCR 1999, paras 28, 34-44, 50-57	11-12, 18-19
4	<i>Groupe Maison Candiac Inc. v. Canada (Attorney General)</i> , 2018 FC 643, paras 110, 114-116, 118	14
	<i>Canadian Western Bank v. Alberta</i> , [2007] 2 SCR 3, paras 30, 69-73 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. I, Tab 15]	26
5	<i>Multiple Access Ltd. v. McCutcheon</i> , [1982] 2 SCR 161, paras 47-48	26
	<i>General Motors of Canada Limited v. City National Leasing</i> , [1989] 1 SCR 641, pp. 661-663, 678, 680-682 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. II, Tab 23]	28, 31, 36, 39
	<i>Reference re Securities Act (Canada)</i> , [2011] 3 S.C.R. 837, paras 80, 84, 108, 116-117, 120-123 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. IV, Tab 50]	28, 36-38

Tab	Cases	Para(s)
	<i>Reference re Pan-Canadian Securities Regulation</i> , [2018] SCJ No. 48, paras 87, 90, 92, 95-97, 103, 106-107, 111-116 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. IV, Tab 48]	28, 36-38
7	<i>Hodel v. Virginia Surface Mining & Reclamation Association</i> , 452 US 264, 281-283 (1981)	33
	<i>Friends of the Oldman River Society v. Canada (Minister of Transport)</i> , [1992] 1 SCR 3, pp. 16, 63-64 [Joint Book of Authorities of the Attorneys General of Ontario and Canada, Vol. II, Tab 22]	35
8	<i>R. v. Wetmore</i> , [1983] 2 SCR 284, para 9	35, 39

Tab	Secondary Sources	Para(s)
2	Charles Cote, “Applying International Law to Canadian Environmental Law”, Address at <i>A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage</i> , U. Calgary (2012), at 1, 8	11
6	Paul Emond, <i>The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution</i> , 10 Osgoode Hall L.J. 647, 648-649 (1972).	33

SCHEDULE “B” - LIST OF STATUTES

Factum Page	Statute/Constitutional Document	Para(s)
	<i>Greenhouse Gas Pollution Pricing Act</i> , being Part 5 of the <i>Budget Implementation Act, 2018, No. 1</i> , SC 2018, c. 12 [Factum of the Attorney General of Ontario, Sch. B, Tab 2]	1, 3-4, 6-7, 13, 15, 17, 19, 21, 27, 29-30, 34, 36
20	<i>Constitution Act, 1867</i> , 30 & 31 Victoria, c. 3 (UK), ss. 91(2), 91(27)	2, 10, 27-28
21-22	<i>Canadian Environmental Protection Act, 1999</i> , SC 1999, c. 33, ss. 326-327; Sch. 1 (List of Toxic Substances, items 74-79 being GHG)	4, 17, 32
	<i>Cap and Trade Cancellation Act, 2018</i> , SO 2018, c.13 [Factum of the Attorney General of Ontario, Sch. B, Tab 12]	26
	Ontario, <i>Preserving and Protecting Our Environment for Future Generations: A Made in Ontario Plan</i> (November 2018) [Record of the Attorney General of Ontario, Vol. 1, Tab 4]	26
	<i>Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures</i> , SOR/2018-213, s. 3 (promulgated under Act) [Factum of the Attorney General of Ontario, Sch. B, Tab 3]	36

1. *Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK), ss. 91(2), 91(27):*

...

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament

Legislative Authority of Parliament of Canada

...

91. It shall be lawful for the Queen, and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

2. The Regulation of Trade and Commerce.

...

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

...

2. *Canadian Environmental Protection Act, 1999, SC 1999, c. 33, ss. 326-327, and Sch. 1 (List of Toxic Substances, items 74-79 being GHG):*

PART 11

MISCELLANEOUS MATTERS

Regulations for tradeable units systems

326. The Governor in Council may, in the exercise of a regulation-making power under section 93, 118, 140, 167, 177 or 209, make regulations respecting systems relating to tradeable units, including regulations providing for, or imposing requirements respecting,
- (a) the substance, product containing a substance or quantity or concentration of the substance that is released or activity in relation to which the system is established;
 - (b) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring under the system;
 - (c) the description and nature of a tradeable unit, including allowances, credits or coupons;
 - (d) the baselines to be used for comparison or control purposes in relation to the system and the maximum limits applicable to the system and the manner of determining those baselines and maximum limits;
 - (e) the conditions related to the creation, distribution, exchange, sale, use, variation or cancellation of a tradeable unit;
 - (f) the creation, operation and management of a public registry related to the system;
 - (g) the conditions for the use of and participation in the system, including environmental and temporal limits;
 - (h) reports and forms related to the system; and
 - (i) the maintenance of books and records for the administration of any regulation made under this section.

Ministerial orders

327. Despite any regulation made under section 326, the Minister may issue an order setting conditions in respect of the trading or suspend or cancel trading of tradeable units or invalidate any trade of tradeable units where the Ministers are of the opinion that the trade or use of a tradeable unit
- (a) has or may have an immediate or long-term harmful effect on the environment;
 - (b) constitutes or may constitute a danger to the environment on which human life depends;
 - or
 - (c) constitutes or may constitute a danger in Canada to human life or health.

.....

SCHEDULE 1**LIST OF TOXIC SUBSTANCES**

...

74. Carbon dioxide, which has the molecular formula CO_2
75. Methane, which has the molecular formula CH_4
76. Nitrous oxide, which has the molecular formula N_2O
77. Hydrofluorocarbons that have the molecular formula $\text{C}_n\text{H}_x\text{F}_{(2n+2-x)}$ in which $0 < n < 6$
78. The following perfluorocarbons:
 - (a) those that have the molecular formula $\text{C}_n\text{F}_{2n+2}$ in which $0 < n < 7$; and
 - (b) octafluorocyclobutane, which has the molecular formula C_4F_8
79. Sulphur hexafluoride, which has the molecular formula SF_6

...

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

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