

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

FACTUM

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FACTUM

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PART I - NATURE OF THE MOTION

1. Pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*, the Canadian Environmental Law Association (“CELA”), Environmental Defence (“ED”), and Sisters of Providence of St. Vincent de Paul (“SP”) (collectively “CELA”, “ED”, and “SP” or “proposed Intervenor”) seek leave to intervene as friends of the court for the purpose of rendering assistance to the court by way of argument in the within Reference in respect of the issue whether the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12 (“Act”) is *intra vires* the Parliament of Canada.

Motion Record (“MR”), Tab 1: Notice of Motion, pages 1-3.

2. To assist the court, the argument of the proposed Intervenor is set out in the draft factum contained in Schedule “C” herein, and addresses whether: (a) Parts 1 and 2 of the Act are *intra vires* Parliament under the criminal law power, and whether so holding is consistent with the precautionary principle; or, in the alternative (b), Part 2 of the Act is *intra vires* Parliament under the trade and commerce power.

MR, Tab 1: Notice of Motion, page 2; **MR, Tab 2:** Affidavit of Ramani Nadarajah, [RN Aff], para 17; **Intervenor’s Factum (“IF”), Sch. “C”:** paras 2, 6.

PART II – FACTS

3. The proposed Intervenor are non-government organizations that: (a) take varying approaches to achieving environmental protection goals; (b) have broad interest, experience, and expertise, in climate change issues; (c) have written extensively on legal, scientific, and policy matters pertaining to climate change; (d) have appeared before Parliamentary and legislative standing committees on the issue; and/or (e) possess a long record of involvement in constitutional issues before the courts pertaining to environmental protection.

MR, Tab 2: RN Aff, paras 2(a)-(d), 3-14 and Exhibits “A” and “B”; **MR, Tab 3:** Affidavit of Timothy Gray [TG Aff], paras 2(a)-(d), 3-12 and Exhibits “A” and “B”; **MR, Tab 4:** Affidavit of Bridget Doherty, [BD Aff], paras 2(a)-(d), 3-6 and Exhibits “A”, “B”, and “C”.

4. The proposed Intervenors collectively possess over eighty years of experience in the areas of environmental law, science, or policy. Their perspectives on the legal issues in the Reference are unique, broader, and materially different from those represented by the Parties. The submissions of the proposed Intervenors will assist the Court, not duplicate those of the Parties, nor cause undue delay or injustice to the Parties given their intended arguments are set out in Schedule “C” below, thereby affording the Parties ample time to respond.

MR, Tab 2: RN Aff, paras 17-19; **MR, Tab 3:** TG Aff, paras 2(a), 15; **MR, Tab 4:** BD Aff, para 2(b), 10.

PART III - ISSUES AND LAW

Issue: Whether this Honourable Court should grant leave to the proposed Intervenors to intervene as friends of the court for the purpose of rendering assistance to the court by way of argument in the within Reference?

A. Rule 13 Intervention Authority

5. The Court may grant leave to any person to intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

IF, Sch. B: Rule 13.02, *Rules of Civil Procedure*.

6. Leave to intervene in the Court of Appeal as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

IF, Sch. B: Rule 13.03(2), *Rules of Civil Procedure*.

B. Factors to be Considered

7. There is greater latitude (or a lower threshold) for intervention in public interest cases than in private interest cases. Where applicants for leave to intervene have no direct interest in the outcome of a matter, an intervention will still be permitted where they have an interest in the

public law issues involved and are able to make a useful contribution to the resolution of those issues, without injustice to the immediate parties.

Intervenors' Book of Authorities ("IBOA"), Tab 1: *MacMillan Bloedel Ltd. v. Mullin* (1985), 50 C.P.C. 298 (B.C.C.A.) 300-301; **IBOA, Tab 2:** *John Doe v. Ontario (Information and Privacy Commissioner)* (1991), 7 C.P.C. (3d) 33 (Ont. Ct. - Gen. Div.) 36; **IBOA, Tab 3:** *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (Ont. C.A.) para 23; **IBOA, Tab 4:** *Groia v. Law Society of Upper Canada*, 2014 ONSC 6026 (S.C.J. – Div. Ct.) para 4.

8. On a motion for intervenor status, the matters to be considered include: (1) the nature of the case; (2) the issues which arise; (3) the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties; and (4) the ability to offer submissions that are useful and different from those of the parties.

IBOA, Tab 5: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (Ont. C.A.) 167; **IBOA, Tab 6:** *2016596 Ontario Ltd. v. Ontario (Minister of Natural Resources)* (2003), 2 C.E.L.R. (3d) 1 (Ont. C.A.) para 6; **IBOA, Tab 7:** *Her Majesty the Queen in Right of Ontario v. Kingston (City)* (2003) Docket No. M30049, (Ont. C.A.) para 1; **IBOA, Tab 4:** *Groia*, para 4; **IBOA, Tab 8:** *Richmond Hill (Town) v. Elginbay Corporation*, 2015 ONSC 4979 (S.C.J. – Div. Ct.) para 8.

9. A friend of the court need not be “impartial”, “objective”, or “disinterested” in the outcome of the case. The fact that a proposed intervenor is not indifferent to the outcome of the reference is not a reason to deny it the right to intervene. Nor is the fact that the position of a proposed intervenor is generally aligned with the position of one of the parties a bar to intervention if the intervenor can make a useful contribution to the analysis of the issues before the court.

IBOA, Tab 4: *Groia*, para 4; **IBOA, Tab 9:** *Oakwell Engineering Limited v. Enernorth Industries Inc.*, [2006] O.J. No. 1942 (Ont. C.A.) para 9; **IBOA, Tab 10:** *Childs v. Desormeaux* (2003) 67 O.R. (3d) 385 (Ont. C.A.) paras 13-16; **IBOA, Tab 8:** *Richmond Hill*, para 8.

10. The proposed Intervenors consider the issue of whether the Act is *intra vires* Parliament of profound public interest and importance, in that it will have far-reaching environmental and constitutional law implications that will impact the Canadian public. The resolution of this issue may fundamentally impact the ability of Parliament to act under the *Constitution Act, 1867* to effectively address climate change for the protection of public health and environmental quality.

MR, Tab 2: RN Aff, para 16; **MR, Tab 3:** TG Aff, para 14, **MR, Tab 4:** BD Aff, para 9.

11. While Ontario frames the issues as whether the Act can be supported under any federal head of power (and submits it cannot be), both Canada and Ontario mainly address whether the Act can be upheld under the national concern branch of Peace, Order, and Good Government of s. 91 of the *Constitution Act, 1867*, and do not adequately deal with two other federal heads of power: criminal law and trade and commerce. Thus, the Court may be assisted by the argument (in draft) of the proposed Intervenors contained in Schedule “C” herein, which argues that the Act is *intra vires* Parliament under the criminal law power (which would also be consistent with the precautionary principle under international law), or, in the alternative, that Part 2 of the Act is *intra vires* Parliament under the trade and commerce power. Given the proposed Intervenors’ longstanding interest, experience, and expertise in environmental and constitutional issues relevant to the subject matter of this Reference, hearing the argument of the proposed Intervenors will provide a useful and distinct perspective that will be of assistance to the Court and make a useful contribution to resolution of the matter without causing injustice to the Parties.

MR, Tab 1: Notice of Motion, pages 2-3; **MR, Tab 2:** RN Aff, para 19 and Exhibit “C”; **MR, Tab 3:** TG Aff, para 15; **MR, Tab 4:** BD Aff, para 10; **Attorney General of Ontario Factum:** paras 48-49; **IBOA, Tab 6:** *2016596 Ontario*, para 14; **IBOA, Tab 11:** David Scriven and Paul Muldoon, *Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure* (1985), 6 Advocates’ Q 448 at 467.

C. Conditions That May Be Imposed

12. The terms and conditions for granting leave to intervene as a friend of the court have included that the intervenor: (1) take the record as it is and not be permitted to adduce further evidence; (2) deliver its factum promptly; (3) allow the Parties the opportunity to file a Reply factum up to a certain page length as they deem necessary; (4) be limited as to time for oral argument; and (5) not seek, nor be subject to, any award of costs, on the appeal (reference) or the motion. These potential terms and conditions are acceptable to the proposed Intervenors.

IBOA, Tab 12: *Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.* (2011), 62 C.E.L.R. (3d) 171 (Ont. C.A.) para 9; **IBOA, Tab 4:** *Groia*, paras 11-12.

PART IV - ORDER REQUESTED

13. The proposed Intervenors respectfully request an Order of this court pursuant to Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure* on the following terms:

- (a) That CELA, ED, and SP be granted leave to intervene as friends of the court for the purpose of rendering assistance to the Court by way of argument in the within Reference;
- (b) That CELA, ED, and SP take the record as it is and shall not file further evidence;
- (c) That CELA, ED, and SP be permitted to submit a factum substantially in the form attached hereto as Schedule "C", with any amendments they deem necessary, but the factum as amended is not to exceed 10 pages, and they shall serve and file five copies of the factum, as well as an electronic copy of the factum, by February 27, 2019;
- (d) That the Parties may file a Reply factum up to 10 pages in length as they deem necessary;
- (e) That CELA, ED, and SP be allocated up to 20 minutes for oral argument at the hearing of the Reference; and
- (f) That costs of this motion and the Reference shall not be awarded to or against CELA, ED, or SP.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 12, 2018



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per 

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SCHEDULE “A”

LIST OF AUTHORITIES

Tab	Cases	Para(s)
1	<i>MacMillan Bloedel Ltd. v. Mullin</i> (1985), 50 C.P.C. 298 (B.C.C.A.) 300-301	7
2	<i>John Doe v. Ontario (Information and Privacy Commissioner)</i> (1991), 7 C.P.C. (3d) 33 (Ont. Ct. - Gen. Div.) 36	7
3	<i>Jones v. Tsige</i> (2011), 106 O.R. (3d) 721 (Ont. C.A.) para 23	7
4	<i>Groia v. Law Society of Upper Canada</i> , 2014 ONSC 6026 (S.C.J. – Div. Ct.) paras 4, 11-12	7-9, 12
5	<i>Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada</i> (1990), 74 O.R. (2d) 164 (Ont. C.A.) 167	8
6	<i>2016596 Ontario Ltd. v. Ontario (Minister of Natural Resources)</i> (2003), 2 C.E.L.R. (3d) 1 (Ont. C.A.) paras 6, 14	8, 11
7	<i>Her Majesty the Queen in Right of Ontario v. Kingston (City)</i> (2003) Docket No. M30049, (Ont. C.A.) para 1	8
8	<i>Richmond Hill (Town) v. Elginbay Corporation</i> , 2015 ONSC 4979 (S.C.J. – Div. Ct.) para 8	8-9
9	<i>Oakwell Engineering Limited v. Enernorth Industries Inc.</i> , [2006] O.J. No. 1942 (Ont. C.A.) para 9	9
10	<i>Childs v. Desormeaux</i> (2003) 67 O.R. (3d) 385 (Ont. C.A.) paras 13-16	9
12	<i>Ontario (Minister of the Environment) v. Castonguay Blasting Ltd.</i> (2011), 62 C.E.L.R. (3d) 171 (Ont. C.A.) para 9	12

Tab	Secondary Sources	Para(s)
11	David Scriven and Paul Muldoon, <i>Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure</i> (1985), 6 Advocates’ Q 448 at 467	11

SCHEDULE “B”**LIST OF STATUTES****1. Rules 13.02 and 13.03(2) of the *Rules of Civil Procedure*:**

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

13.03(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

SCHEDULE “C”

Court of Appeal File No. C65807

DRAFT

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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PART I - INTRODUCTION

1. The purpose of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12 (“Act”) is declared to be 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”.

Attorney General of Ontario Factum (“OF”), Sch. B, Tab 2: Act, Declaration; Preamble, paras 1-5, 11-13.

2. The Intervenors submit the Act is *intra vires* Parliament under the criminal law power but if Part 2 of the Act is not, Part 2 is *intra vires* Parliament under the trade and commerce power.

Intervenors’ Factum (“IF”), Sch. B: *Const. Act, 1867*, ss. 91(27) and 91(2).

PART II - THE FACTS

3. Part 1 of the Act requires various liquid, gas, and solid fuel producers, distributors, importers, and final fuel users (carriers) to pay a GHGE charge. They must register and report monthly charges to the Canada Revenue Agency (“CRA”) and remit the charge 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.

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 two components: (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. The credits 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, 1999"). The GHG subject to the Part 2 regime also are designated toxic substances under *CEPA, 1999*.

OF, Sch. B, Tab 2: Act, Part 2, ss. 169-188, Sch. 3 (GHG) & Sch. 4 (excess emission charge rates), 185-186, 232-240; **IF, Sch. B:** *CEPA, 1999*, Sch.1 (List of Toxic Substances that are GHG); **Attorney General of Canada Record [Saskatchewan Reference] ("CR") Vol. 1, Tab 1:** Affidavit of John Moffet, affirmed October 25, 2018, para 116.

PART III - ISSUES AND LAW

A. ISSUE 1: PARTS 1 AND 2 OF THE ACT ARE *INTRA VIRES* PARLIAMENT ON THE BASIS OF THE CRIMINAL LAW POWER

5. 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); **Attorney General of Ontario Book of Authorities ("OBOA"), Tab 24:** *R v. Hydro-Quebec*, [1997] 3 SCR 213, paras 119-122; **OBOA, Tab 3:** *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, paras 28-29 (federal laws on food, drugs, tobacco, firearms, toxic substances upheld under criminal law power).

6. As a matter of statutory interpretation, this Court should construe the *Constitution Act, 1867* in a manner consistent with international law's 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 and, in particular, with the branch of 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 ought to be interpreted in the context of this principle.

Attorney General of Canada Book of Authorities [Saskatchewan Reference] ("CBOA"), Tab 1: *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:** Charles Cote, “Applying International Law to Canadian Environmental Law”, Address at *A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage*, U. Calgary (2012), at 2, 8.

7. A law is considered to be valid under the criminal law power when 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 Inc. v. Canada (Attorney General)*, [1995] 3 SCR 1999, para 28; **OBOA, Tab 24:** *Hydro-Quebec*, paras 121, 123.

1. Legitimate Public Purpose

8. Environmental protection is recognized as a criminal law purpose because “pollution is an evil” Parliament can legitimately seek to suppress.

OBOA, Tab 24: *Hydro-Quebec*, paras 85, 123 (public purpose of superordinate importance).

9. A characterization of the pith and substance of the Act is that its purpose and effect is to mitigate climate change by imposing charges on GHGE sources to induce them to change their behaviour (reduce emissions) and to penalize them if they do not.

OF, Sch. B, Tab 2: Act, Declaration, Preamble (paras 1-5, 11-13), Part 1, ss. 17-27, 28-35, 55-77, 165, 123-140, Part 2, ss. 169-172, 173-188, Sch. 3 & 4, 185-186, 232-240.

10. This aligns with the view that the Act seeks to suppress an “evil” within the meaning of the criminal law. 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”. Here the evil 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”.

IF: para 1; **OBOA, Tab 24:** *Hydro-Quebec*, paras 119, 123-125, 127.

11. A criminal law purpose in protecting the environment from GHGE also was found for federal regulations which required diesel fuel to contain a percentage of renewable fuel, thus

reducing the burning of fossil fuels and GHGE. This requirement is not unlike the charges imposed on fossil fuels in the Act to induce behavioural change and reduce GHGE.

CBOA, Tab 37: *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, paras 61, 69-70.

12. Finally, GHG identified in Part 2's Schedule 3 also are designated toxic substances under *CEPA, 1999*; a statute upheld as *intra vires* Parliament under the criminal law power.

OF, Sch. B, Tab 2: Act, Sch. 3 (GHG); **IF, Sch. B:** *CEPA, 1999*, Sch. 1 (excerpts from List of Toxic Substances of GHG); **OBOA, Tab 24:** *Hydro-Quebec*, para 161.

2. Contains Prohibitions Backed by Sanctions

13. 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, thus further justifying the interpretation that it is supported by the criminal law power.

IBOA, Tab 3: *RJR-MacDonald*, para 28; **OBOA, Tab 24:** *Hydro-Quebec*, paras 150, 153 (exemption where equivalent provincial law); **OBOA, Tab 3:** *Firearms Reference*, para 37; **CBOA, Tab 37:** *Syncrude*, paras 73-74; **OBOA, Tab 12:** *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, paras 233-234, 237 (prohibition and penalty supports finding that regulatory scheme, even one that takes form of exemptions from prohibitory scheme, falls within criminal law field as long as substantive component - justifiable criminal law purpose such as suppression of an evil and protection of legitimate societal interests also present).

14. The regulatory prohibition also need not be total in order 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 a total prohibition on their presence in fuel, but by a 2 per cent renewable fuel requirement. The fuel

charge (Part 1), and the emission charge (Part 2), are consistent with this approach; they prohibit not emitting GHG but using or emitting them without paying a charge.

IBOA, Tab 3: *RJR-MacDonald*, paras 34-44; **OBOA, Tab 3:** *Firearms Reference*, para 39; **CBOA, Tab 37:** *Syncrude*, paras 71-77; **OF, Sch. B, Tab 2:** Act, Part 1, e.g. ss. 17-27, 55-77, & Sch. 2 (Charge Rates); Part 2, e.g. ss. 169-188, Sch. 3 & 4.

3. Not Colourable

15. 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.

OBOA, Tab 24: *Hydro-Quebec*, paras 129, 131, 154.

16. 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 this double aspect theory, even if there is duplication, as 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, this engages the principle of federal paramountcy, allowing the federal law to prevail to the extent of the conflict.

CBOA, Tab 11: *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, paras 30, 69-72; **IBOA, Tab 4:** *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161, paras 47-48; **CBOA, Tab 1:** *Spraytech*, paras 34-36.

17. Ontario has repealed/replaced its climate change mitigation law and released its new climate plan for consultation; thus, conflict with the Act is theoretical, not actual. Furthermore, a high standard is required to establish colourability; it is not lightly inferred. The Act is designed to combat the deleterious effects of GHG by placing a charge on fossil fuels to induce behavioural change and reduce overall GHGE; not colourably invade provincial powers.

OF, Sch. B, Tab 12: *Cap and Trade Cancellation Act, 2018*, SO 2018, C.13; **OR, Vol. 1, Tab 4:** Ontario, *Preserving and Protecting Our Environment for Future Generations: A Made in Ontario Plan* (November 2018); **CBOA, Tab 37:** *Synchrude*, paras 87-93.

B. ISSUE 2: IN THE ALTERNATIVE, PART 2 OF THE ACT IS *INTRA VIRES* PARLIAMENT ON THE BASIS OF THE TRADE AND COMMERCE POWER

18. 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 is nation/industry-wide, market facilitation and regulation of emission trades.

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

19. 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. The 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); **CBOA, Tab 13:** *General Motors of Canada Limited v. City National Leasing*, [1989] 1 SCR 641, para 47; **OBOA, Tab 2:** *Reference re Securities Act (Canada)*,

[2011] 3 S.C.R. 837, paras 80, 84, 108; **OBOA, Tab 1: Reference re Pan-Canadian Securities Regulation**, 2018 SCC 48, para 103.

1. Part 2 Part of a General Regulatory Scheme

20. 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 Continually Monitored by Agency

21. 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 Concerned with Trade as a Whole

22. 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.

CBOA, Tab 13: *General Motors*, paras 63, 66.

23. In *Hydro-Quebec*, the dissent rejected the view that the trade and commerce power, relying on *General Motors*, 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, 1999*, 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.

OBOA, Tab 24: *Hydro-Quebec*, paras 80-82.

24. The Intervenors make four submissions why the Part 2 emissions trading regime is valid under trade and commerce. 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 (and pollution havens) 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 5: 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 6: *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 US 264, 281-283 (1981).
CR, Vol. 1, Tab 1: Affidavit of John Moffet, paras 65, 67, 85 (need to avoid carbon leakage).

25. 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.

26. Third, the SCC has said 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”, and requires that the Constitution 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”. 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.

OBOA, Tab 24: *Hydro-Quebec*, paras 86, 112; **OBOA, Tab 23:** *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, paras 1, 93-94.

27. Fourth, in the *Securities Reference* (“SR”), the SCC treated securities as a “particular industry” and found the “main thrust” of the proposed law to be regulation of that industry, but noted that control of systemic risk and data collection were acceptable “larger national goals”. In the case at bar, Part 2 meets the third indicium because emission trading: (1) is not a “particular industry”; (2) is concerned with trading emission reductions, a commodity of economic value to industrial trade as a whole; and (3) meets “larger national goals” of GHGE reductions.

OBOA, Tab 2: *Securities Reference*, paras 116-117; **OBOA, Tab 1:** *Pan-Canadian*, paras 87, 90, 92, 95-97, 106-107, 111-112, 116; **OF, Sch. B, Tab 2:** Act, s. 169; **OF, Sch. B., Tab 3:** *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, s. 3.

4. Part 2 Could not be Enacted by Provinces

28. In the *SR*, the portions of the proposed *Securities Act* (“SA”) dealing with systemic risk and data collection passed the fourth indicium 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 *SR* 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 *SA*.

OBOA, Tab 2: *Securities Reference*, paras 120-122; **OBOA, Tab 1:** *Pan-Canadian*, paras 113-114.

5. Part 2 Jeopardized if all Provinces not Included

29. The *SR* found that the portions of the proposed *SA* 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 were “genuine national goals” rather than “lesser regulatory matters”. 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 *SR* 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.

OBOA, Tab 2: *Securities Reference*, para 123; **OBOA, Tab 1:** *Pan-Canadian*, para 115.

30. Finally, reliance on the trade and commerce power to support Part 2 allows concurrent/compatible provincial legislation to apply intraprovincially and is permissible even with Part 1 being upheld under the criminal law power.

OBOA, Tab 24: *Hydro-Quebec*, paras 115-116 (determining subject matter of national concern results in matter falling within exclusive power of Parliament); **CBOA, Tab 13:** *General Motors*, paras 63, 66; **IBOA, Tab 7:** *R. v. Wetmore*, [1983] 2 SCR 284, para 9.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 12, 2018

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SCHEDULE “D”

LIST OF AUTHORITIES

Tab	Cases	Para(s)
	<i>R. v. Hydro-Quebec</i> , [1997] 3 SCR 213, paras 80-82, 85-86, 112, 115-116, 119-125, 127, 129, 131, 150, 153-154, 161 [Book of Authorities of the Attorney General of Ontario, Tab 24]	5, 7-8, 10, 12-13, 15, 23, 26, 30
	<i>Reference re Firearms Act (Can.)</i> , [2000] 1 SCR 783, paras 28-29, 37, 39 [Book of Authorities of the Attorney General of Ontario, Tab 3]	5, 13-14
	<i>114957 Canada Ltee (Spraytech Soci�t� d’arrosage) v. Hudson (Town)</i> , [2001] 2 SCR 241, paras 30-32, 34-36 [Book of Authorities of the Attorney General of Canada (Saskatchewan Reference), Tab 1]	6, 16
1	<i>Castonguay Blasting Ltd. v. Ontario (Environment)</i> , [2013] 3 SCR 323, para 20	6
3	<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 SCR 1999, paras 28, 34-44	7, 13-14
	<i>Syncrude Canada Ltd. v. Canada (Attorney General)</i> , 2016 FCA 160, paras 61, 69-77, 87-93 [Book of Authorities of the Attorney General of Canada (Saskatchewan Reference), Tab 37]	11, 13-14, 17
	<i>Reference re Assisted Human Reproduction Act</i> , [2010] 3 SCR 457, paras 233-234, 237 [Book of Authorities of the Attorney General of Ontario, Tab 12]	13
	<i>Canadian Western Bank v. Alberta</i> , [2007] 2 SCR 3, paras 30, 69-72 [Book of Authorities of the Attorney General of Canada (Saskatchewan Reference), Tab 11]	16
4	<i>Multiple Access Ltd. v. McCutcheon</i> , [1982] 2 SCR 161, paras 47-48	16
	<i>General Motors of Canada Limited v. City National Leasing</i> , [1989] 1 SCR 641, paras 47, 63, 66 [Book of Authorities of the Attorney General of Canada (Saskatchewan Reference), Tab 13]	19, 22, 30
	<i>Reference re Securities Act (Canada)</i> , [2011] 3 S.C.R. 837, paras 80, 84, 108, 116-117, 120-123 [Book of Authorities of the Attorney General of Ontario, Tab 2]	19, 27-29
	<i>Reference re Pan-Canadian Securities Regulation</i> , [2018] SCJ No. 48, paras 87, 90, 92, 95-97, 103, 106-107, 111-116 [Book of Authorities of the Attorney General of Ontario, Tab 1]	19, 27-29
6	<i>Hodel v. Virginia Surface Mining & Reclamation Association</i> , 452 US 264, 281-283 (1981)	24

Tab	Cases	Para(s)
	<i>Friends of the Oldman River Society v. Canada (Minister of Transport)</i> , [1992] 1 SCR 3, paras 1, 93-94 [Book of Authorities of the Attorney General of Ontario, Tab 23]	26
7	<i>R. v. Wetmore</i> , [1983] 2 SCR 284, para 9	30

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 2, 8	6
5	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).	24

SCHEDULE “E”

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, 9, 12, 14, 18, 20-21, 25
24	<i>Constitution Act, 1867</i> , 30 & 31 Victoria, c. 3 (UK), ss. 91(2), 91(27)	2, 5, 18-19
25	<i>Canadian Environmental Protection Act, 1999</i> , SC 1999, c. 33, Sch. 1 (List of Toxic Substances, items 74-79 being GHG)	4, 12
	<i>Cap and Trade Cancellation Act, 2018</i> , SO 2018, C.13 [Factum of the Attorney General of Ontario, Sch. B, Tab 12]	17
	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]	17
	<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]	27

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, Sch. 1 (List of Toxic Substances, items 74-79 being GHG):***

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

FACTUM

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