Court of Appeal File No. C65807

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*, *No. 1,* SC 2018, c. 12

FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA (MOTION FOR LEAVE TO FILE A RECORD)

(Returnable January 15, 2019)

Attorney General of British Columbia
1001 Douglas Street
Victoria, BC V8W 9J7

J. Gareth Morley
Gareth.morley@gov.bc.ca
Counsel for the Attorney General of British Columbia

Goddard Nasseri LLP
55 University Avenue, Suite 1100
Toronto, ON M5J 2H7

Justin H. Nasseri, LSO: 64173W
Tel: 647.351.7944
Fax: 647.846.7733
Email: justin@gnllp.ca

Toronto agent for the Attorney General of British Columbia

TO:

THE ATTORNEY GENERAL OF ONTARIO Constitutional Law Branch 720 Bay Street, 4th Floor Toronto, ON M7A 2S9 **Josh Hunter/ Padraic Ryan/ Thomas Lipton** LSO Nos.: 49037M / 61687J / 60776V Tel.: (416) 326-3840 / (416) 326-0131 / (416) 326-0296 Fax: (416) 326-4015 E-mail: joshua.hunter@ontario.ca / padraic.ryan@ontario.ca / thomas.lipton@ontario.ca Counsel for the Attorney General of Ontario	**DEPARTMENT OF JUSTICE CANADA** Prairie Regional Office (Winnipeg) 301-310 Broadway Winnipeg, MB R3C 0S6 **Sharlene Telles-Langdon** Tel.: (204) 983-0862 Fax: (204) 984-8495 E-mail: sharlene.telles-langdon@justice.gc.ca Counsel for the Attorney General of Canada
SASKATCHEWAN MINISTRY OF JUSTICE Constitutional Law Branch 820-1874 Scarth Street Regina, SK S4P 4B3 **P. Mitch McAdam, Q.C. / Alan Jacobsen** Tel.: (306) 787-7846 Fax: (306) 787-9111 Email: mitch.mcadam@gov.sk.ca / alan.jacobsen@gov.sk.ca Counsel for the Attorney General of Saskatchewan	**ATTORNEY GENERAL OF NEW BRUNSWICK** Chancery Place 675 King Street, Room 2078, Floor 2 P.O. Box 6000 Fredericton, NB E3B 5H1 **William E. Gould** Tel.: (506) 453-2222 Fax: (506) 453-3275 Email: william.gould@gnb.ca
ASSEMBLY OF FIRST NATIONS 55 Metcalfe Street, Suite 1600 Ottawa, ON K1P 6L5 **Stuart Wuttke / Jeremy Kolodziej** Tel.: (613) 241-6789 Fax: (613) 241-5808 Email: swuttke@afn.ca / jkolodziej@afn.ca Lawyers for the Proposed Intervener, the Assembly of First Nations	**ECOJUSTICE ENVIRONMENTAL LAW CLINIC** University of Ottawa 261-1 Stewart Street Ottawa, ON K1N 6N5 **Amir Attaran** Tel.: (613) 562-5800 x 3382 Fax: (613) 562-5319 Email: aattaran@ecojustice.ca

WOODWARD & COMPANY LAWYERS LLP 1022 Government Street, Suite 200 Victoria, BC V8W 1X7 **Matt Hulse** Tel.: (250) 383-2356 Fax: (250) 380-6560 Email: mhulse@woodwardcompany.com Lawyers for the Proposed Intervener, Athabasca Chipewyan First Nation	**UNIVERSITY OF OTTAWA, FACULTY OF LAW** 57 Louis Pasteur Street Ottawa, ON K1N 6N5 **Stewart Elgie** Tel.: (613) 562-5800 x 1270 Fax: (613) 564-5124 Email: stewart.elgie@uottawa.ca Lawyers for the Proposed Intervener, Canada's Ecofiscal Commission
CANADIAN ENVIROMENTAL LAW ASSOCIATION 1500 – 55 University Avenue Toronto, ON M5J 2H7 **Joseph F. Castrilli / Richard D. Lindgren** Tel.: (416) 960-2284 x 7218 / 7214 Fax: (416) 960-9392 Email: catrillij@sympatico.ca / r.lindgren@sympatico.ca Lawyers for the Proposed Interveners, Canadian Environmental Law Association, Environmental Defence, and the Sisters of Providence of St. Vincent de Paul	**GOWLING WLG (CANADA) LLP** 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5 **Jennifer L. King / Michael Finley / Liane Langstaff** Tel.: (416) 862-5778 / (416) 369-6990 / (416) 814-5637 Fax: (416) 862-7661 Email: jennifer.king@gowlingwlg.com / michael.finley@gowlingwlg.com / liane.langstaff@gowlingwlg.com Lawyers for the Proposed Intervener, Canadian Public Health Association
CREASE HARMAN LLP 800-1070 Douglas Street Victoria, BC V8W 2C4 **R. Bruce E. Hallsor, QC** Tel.: (250) 388-5421 Fax: (250) 388-4294 Email: hallsor@crease.com Lawyers for the Proposed Intervener, the Canadian Taxpayers Federation	**ECOJUSTICE ENVIRONMENTAL LAW CLINIC** University of Ottawa 216-1 Stewart Street Ottawa, ON K1N 6N5 **Joshua Ginsberg / Randy Christensen** Tel.: (613) 562-5800 x 3399 / (604) 685-5618 x 234 Fax: (613) 562-5319 Email: jginsberg@ecojustice.ca / rchristensen@ecojustice.ca Lawyers for the Proposed Intervener, the David Suzuki Foundation

MICHEL BÉLANGER AVOCATS INC. 454, avenue Laurier Est Montréal, QC H2J 1E7 **David Robitaille** Tel.: (514) 991-9005 Fax: (514) 844-7009 Email: david.robitaille@uottawa.ca Lawyers for the Proposed Interveners, Équiterre et le Centre québécois du droit de l'environnement	**GREG VEZINA** 1048 Springwater Court Mississauga, ON L5V 1G4 Tel.: (905) 501-0010 Email: gvezina@nh3fuel.com Proposed Intervener
RATCLIFF & COMPANY LLP 500-221 West Esplanade North Vancouver, BC V7M 3J3 **Nathan Hume / Emma K. Hume** Tel.: (604) 988-5201 Fax: (604) 988-1352 Email: nhume@ratcliff.com / ehume@ratcliff.com Lawyers for the Proposed Interveners, International Climate Coalition (Generation Squeeze, *et al.*)	**DEMARCO ALLAN LLP** 333 Bay Street, Suite 625 Toronto, ON M5H 2R2 **Lisa DeMarco / Jonathan McGillivray** Tel.: (647) 991-1190 / (647) 208-2677 Fax: (888) 734-9459 Email: lisa@demarcoallan.com / jonathan@demarcoallan.com
WESTAWAY LAW GROUP 55 Murray Street, Suite 230 Ottawa, ON K1N 5M3 **Cynthia Westaway** Tel.: (613) 722-9091 Fax: (613) 722-9097 Email: cynthia@westawaylaw.ca	**FACULTY OF LAW, UNIVERSITY OF OTTAWA** 57 Louis Pasteur Street Ottawa, ON K1N 6N5 **Nathalie Chalifour** Tel.: (613) 562-5800 x 3331 Fax: (613) 564-5124 Email: natchali@uottawa.ca Lawyers for the Proposed Intervener, the United Chiefs and Councils of Mnidoo Mnising

McLENNAN ROSS LLP 600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4 **Ryan Martin / Steven Dollansky / Justine Bell** Tel.: (780) 482-9200 Fax: (780) 482-9100 Email: rmartin@mross.com / sdollansky@mross.com / jbell@mross.com	

TABLE OF CONTENTS

PART I - OVERVIEW 1

PART II - FACTS 2

PART III- LAW AND ARGUMENT 2

ISSUE ON THIS MOTION 2

THE TEST FOR EVIDENCE ON A CONSTITUTIONAL REFERENCE 3

THE TEST FOR THE NATIONAL DIMENSIONS BRANCH OF "POGG" 4

THE AGBC'S RECORD IS NECESSARY FOR IT TO PROPERLY ADVANCE BRITISH COLUMBIA'S POSITION IN THE REFERENCE 5

MR. LESIUK'S EVIDENCE IS RELEVANT TO THIS REFERENCE AND WILL ASSIST THE COURT IN UNDERSTANDING THE IMPACT OF PROVINCIAL INACTION ON BRITISH COLUMBIA 6

SCHOLARLY ARTICLES APPENDED TO JUNE PARKER'S AFFIDAVIT 8

THE SASKATCHEWAN COURT OF APPEAL HAS GRANTED THIS RELIEF TO THE AGBC 9

THE REFERENCE PANEL CAN STILL WEIGH THE EVIDENCE OR RECONSIDER ADMISSIBILITY 9

PART IV – ORDER REQUESTED 10

SCHEDULE "A" LIST OF AUTHORITIES 1

SCHEDULE "B" RELEVANT STATUTES 2

PART I - OVERVIEW

1. The Attorney General of British Columbia ("**AGBC**") asks for leave to supplement the record in this reference with the following categories of information and materials:

   (a) Evidence of information possessed by the Government of British Columbia on the potential and actual impacts on British Columbia if other provinces fail to sufficiently price the emission of greenhouse gases; and

   (b) Scholarly articles in relation to the economics of federalism, public goods, externalities and the regulation and pricing of emissions.

2. The ordinary rules of evidence in a trial proceeding do not apply to social fact evidence in a constitutional reference. Evidence is admissible if it is relevant, not inherently unreliable and not contrary to public policy: it can sometimes be submitted in "Brandeis Brief" form.

3. Whether federal legislation – such as the *Greenhouse Gas Pollution Pricing Act* -- meets the "provincial inability" test under Parliament's general power to enact laws for the "peace, order and good government" depends primarily on answering the question of whether inaction in one or more provinces harms other provinces or countries. British Columbia's affidavit evidence contains information in its government's possession that demonstrates the answer for British Columbia is "yes."

4. The economics articles assist by providing conceptual resources for deciding when a "matter" beyond provincial competence has been defined in a way that has sufficient singleness, indivisibility and distinctness so as not to alter the basic federal balance. The articles show how economics distinguishes between price mechanisms and more intrusive command-and-control

regulation and between pollutants that have primarily intra-jurisdictional effects and those – like greenhouse gases – that are inherently global.

PART II - FACTS

5. The AGBC adopts the facts as described in the Factum of the Attorney General of Ontario on this motion.

6. By Order of The Honourable Mr. Justice MacPherson dated August 30, 2018, the Attorney General of British Columbia was given the right to intervene in this reference if it served and filed a Notice of Intervention. The AGBC now seeks leave of this Court to file evidence in the reference in the form of the exhibits to two affidavits:

(a) The Affidavit of Tim Lesiuk, who is the Executive Director of the Clean Growth Strategy in the Climate Action Secretariat of British Columbia's Ministry of Environment and Climate Change Strategy; and

(b) The Affidavit of June Parker which appends peer-reviewed publications that are relevant to this reference.

PART III- LAW AND ARGUMENT

ISSUE ON THIS MOTION

7. The issue before the Court is whether the AGBC should be allowed to file a record in this reference. The AGBC submits that it should be granted leave for the following reasons:

(a) The evidence is relevant.

(b) The evidence is not inherently unreliable.

(c) The unsworn evidence meets the test for "Brandeis brief" materials.

THE TEST FOR EVIDENCE ON A CONSTITUTIONAL REFERENCE

8. Constitutional challenges must not be determined in a factual vacuum or based on the unsupported hypotheses of counsel. A proper factual foundation is of fundamental importance.

> Reference: *MacKay v. Manitoba*, [1989] 2 SCR 357 at pp. 361, Brief of Authorities of the AGBC ("**AGBC BOA**"), Tab 1; *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086 at pp.1099, AGBC BOA, Tab 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, at para. 28, AGBC BOA, Tab 3.

9. The test for evidence on a constitutional reference was set out by Justice Dickson in the 1981 *Residential Tenancies Act*, which involved the question of the compatibility of that legislation with s. 96 of the *Constitution Act, 1867*.

> A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in Edwards and Others v. Attorney-General for Canada and Others. ***Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible***, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction
>
> Reference: *Reference re: Residential Tenancies Act* (Ontario), [1981] 1 SCR 714 at p. 723, AGBC BOA, Tab 4 (Emphasis added).

10. Evidence can either be sworn (by affidavit or *viva voce*) or in the form of a Brandeis brief (unsworn). The latter must be received through judicial notice. Judicial notice is interpreted flexibly in relation to social or legislative facts so long as they are not dispositive of the matter in issue. In that case, the question is whether the information contained in the Brandeis brief would be accepted by reasonable, informed people "for the particular purpose for which it is used."

Reference: *R. v. Spence*, 2005 SCC 71 at para. 65, AGBC BOA Tab 5. See also discussion in *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras. 106-127, AGBC BOA, Tab 6.

THE TEST FOR THE NATIONAL DIMENSIONS BRANCH OF "POGG"

11. The Attorney General of Ontario is correct that "efficacy", as such, is not the issue when deciding which level of government has legislative jurisdiction under the *Constitution Act, 1867*. Legislative authority is exhaustive: for any measure – effective or ineffective – Parliament or a provincial legislature must be competent to enact it.

12. However, it is simply wrong to say the *effects* of legislative action or inaction are irrelevant to the division-of-powers analysis. On the contrary, when it comes to the national concern or national dimensions branch of Parliament's authority over peace, order and good government, evidence of the effects of inaction in one province on the interests of other provinces or countries is determinative.

13. It is common ground among the Attorneys General that the definitive statement of the test for a "matter" that is within the national dimensions branch is found in the majority judgment of Justice Le Dain, upholding federal legislative authority over marine pollution in the *Crown Zellerbach* decision:

> In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

Reference: *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 at para. 33, AGBC BOA, Tab 7.

14. The question of the "effect on extra-provincial interests" of provincial failure is clearly a question of social fact. In *Schneider*, Justice Dickson for the Court rejected the argument that

opioid treatment is a matter to which the "national dimensions" branch applies on the grounds of a lack of material before the Court that failure of one province to provide addiction treatment (as opposed to curtail trafficking) would "endanger the interests of another province." The Court's conclusion was based on the evidence before it.

Reference: *Schneider v. The Queen*, [1982] 2 SCR 112 at p. 131, Dickson J, AGBC BOA, Tab 8.

15. In *Hydro-Québec*, Chief Justice Lamer and Justice Iacobucci, dissenting but not on this point, held that a crucial criterion of the national dimensions branch is "whether the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province", holding that this would be true of the regulation of diffuse, persistent and seriously toxic chemicals, such as PCBs, but not of all the substances regulated by the federal statute in issue in that case.

Reference: *R. v. Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*] at para. 76, AGBC BOA, Tab 9. Lamer CJ and Iacobucci J (dissenting). The majority upheld the impugned legislation under the criminal law power and found it unnecessary to address the national dimension branch: *Hydro Québec* at para. 110.

THE AGBC'S RECORD IS NECESSARY FOR IT TO PROPERLY ADVANCE BRITISH COLUMBIA'S POSITION IN THE REFERENCE

16. British Columbia's argument will be as follows:

(a) The "matter" or "pith and substance" of the *Act* is to set a minimum standard of adequacy for greenhouse gas pricing across Canada. This is a narrower statement of the "matter" than that proposed by the Attorney General of Canada.

(b) It is obviously outside the competence of any individual province to set standards of adequacy for Canada as a whole. Failure to set such a standard has significant negative implications for provinces that have set their own standards for greenhouse gas pricing, such as British Columbia. This "matter" is therefore beyond provincial competence.

(c) Setting minimum standards of adequacy for greenhouse gas pricing does not alter the fundamental distribution of legislative power under the Constitution. It should be distinguished both from pricing local pollutants (those whose predominant effects are in the same province as emission) and from command-and-control regulation of all activities that may cause emissions.

MR. LESIUK'S EVIDENCE IS RELEVANT TO THIS REFERENCE AND WILL ASSIST THE COURT IN UNDERSTANDING THE IMPACT OF PROVINCIAL INACTION ON BRITISH COLUMBIA

17. Mr. Lesiuk is Executive Director for Clean Growth Strategy of British Columbia's Climate Action Secretariat within British Columbia's Ministry of Environment and Climate Change Strategy. This is the body responsible for co-ordinating information within the BC Government in relation to climate change policy. He is therefore in a position to give evidence on the information available to the Government of British Columbia about the effects on its economic, social and environmental interests due to the failure of other provinces to price (or at least adequately price) greenhouse gas emissions.

18. Mr. Lesiuk's affidavit contains information available to the Government of British Columbia – found in governmental and intergovernmental reports and in peer-reviewed literature -- about specific, concrete harms that have been and will be faced by British Columbia as a result of the failure of other provinces to sufficiently price greenhouse gases:

(a) How climate change has led to longer and drier fire seasons and the impact on British Columbia;

(b) How climate change has led to melting of permafrost and will lead to further melting of permafrost, along with the impact on Northern British Columbia, especially remote communities and Indigenous Peoples;

(c) How ocean acidification has affected, and will affect bony fish and shell fish on the Pacific coast, and the impact on British Columbia;

(d) The impact of less snow and more rain on hydroelectric generation in British Columbia;

(e) The impact of sea level rise on British Columbia;

(f) The impact on competitiveness of British Columbia's industries of lower or non-existent greenhouse gas pricing in other provinces; and

(g) The impact on British Columbia of possible trade actions by Canada's trading partners if Canada does not meet its international greenhouse gas commitments.

19. This evidence is not about the policy merits of greenhouse gas pricing. Rather, it is about the specific impacts on British Columbia's people, resources, property and businesses (i.e., its property and civil rights) of failures to adequately price greenhouse gases in other provinces. This is the heart of the issue in this case.

20. The purpose of this evidence is not necessarily to establish as a fact that any of these particular concerns will come to pass. Rather, it is to establish that these are reasonable concerns of the Government of British Columbia and that addressing them is beyond its own sovereign authority as a province. Mr. Lesiuk is not – and does not purport to be – an expert in the vast array of scientific and technical disciplines relevant to these concerns. Rather, he is a public servant tasked with coordinating information within the Government of British Columbia relevant to climate policy. As such, he can give direct evidence on the nature of those concerns and that information.

21. The AGBC therefore submits that Mr. Lesiuk's evidence is relevant, not inherently unreliable for the purposes for which it is submitted and it would not be contrary to public policy to admit it.

SCHOLARLY ARTICLES APPENDED TO JUNE PARKER'S AFFIDAVIT

22. June Parker is a legal assistant working with the B.C. Ministry of Attorney General. Her unsworn affidavit appends published papers on the economics of externalities, public goods and federalism. The AGBC proposes to submit those articles, unsworn, as part of a "Brandeis Brief."

23. The Attorney General of Ontario argues forcefully that given the vast array of physical activities that emit greenhouse gases or could act as sinks for them, if the *Act* is found to be constitutional, it would fundamentally alter the federal-provincial balance. The AGBC has a unique perspective on this argument, as a province that submits its own ability to protect the property and civil rights of its residents is undermined if other provinces do not meet minimum standards of adequacy in pricing greenhouse gas emissions.

24. While economics literature is not dispositive of the constitutional issues in this case, it can be helpful background in assessing the Attorney General of Ontario's argument that holding the *Act* constitutional will upset the federal balance.

25. Key concepts set out in the economic literature include cross-border externalities (phenomena such as the emission of greenhouse gases that have local benefits but dispersed costs) and the scope of public goods (local, cross-boundary and global). The articles also discuss the difference between command-and-control regulation, and setting either a price or total quantity and allowing voluntary transactions to determine how a pollutant will be reduced.

26. The Attorney General of British Columbia will argue that these concepts can assist the courts in delimiting matters that are of national dimensions in a way that respects the fundamental principles of federalism, including the principles of (i) equality of the provinces,

(ii) jurisdictional balance – that both levels of government are equal, coordinate sovereigns; and (iii) subsidiarity – that matters should be left to the most decentralized level effectively able to deal with them. By assisting in carefully delineating the scope of the "matter" of the *Act*, these economic concepts will provide useful background for the Court.

THE SASKATCHEWAN COURT OF APPEAL HAS GRANTED THIS RELIEF TO THE AGBC

27. The Saskatchewan Court of Appeal granted the Attorney General of British Columbia's application to file the same evidentiary material that is the subject of this motion in the proceeding before it. There does not appear to be any principled basis for this Court reach a different conclusion. The Saskatchewan decision provides persuasive authority for this Court to do likewise.

28. Moreover, refusing AGBC's application to tender evidence on this reference could give rise to a risk of inconsistent factual findings based on different evidence.

THE REFERENCE PANEL CAN STILL WEIGH THE EVIDENCE OR RECONSIDER ADMISSIBILITY

29. At this stage, the AGBC simply asks that this Court grant leave to file the material, recognizing that the panel hearing the merits will have broad discretion as to the admissibility and weight to be accorded to its evidence based on all the arguments. There is therefore no prejudice to the Attorney General of Ontario in granting the motion, while there would be considerable prejudice in denying it if the evidence would have been considered relevant based on the view of the constitution taken by the division on the merits. .

PART IV – ORDER REQUESTED

30. The Attorney General of British Columbia therefore respectfully asks this Court for an order granting him leave to file a record as filed in draft form for this motion.

31. The Attorney General of British Columbia estimates that it will require 30 minutes of oral argument on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF JANUARY, 2019

Justin Nasseri per Gareth Morley

J. GARETH MORLEY, COUNSEL FOR THE ATTORNEY GENERAL OF BRITISH COLUMBIA
ATTORNEY GENERAL OF BRITISH COLUMBIA)

SCHEDULE "A"
LIST OF AUTHORITIES

1. *MacKay v. Manitoba*, [1989] 2 SCR 357
2. *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086
3. *British Columbia (Attorney General) v. Christie,* 2007 SCC 21
4. *Reference re: Residential Tenancies Act* (Ontario), [1981] 1 SCR 714
5. *R. v. Spence*, 2005 SCC 71
6. *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588
7. *R. v. Crown Zellerbach Canada Ltd*., [1988] 1 SCR 401
8. *Schneider v. The Queen*, [1982] 2 SCR 112
9. *R. v. Hydro-Québec*, [1997] 3 SCR 213

SCHEDULE "B"
RELEVANT STATUTES

None

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*, *No. 1,* SC 2018, c. 12

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Proceedings commenced at TORONTO

FACTUM OF THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Attorney General of British Columbia
1001 Douglas Street
Victoria, BC V8W 9J7
J. Gareth Morley
Gareth.morley@gov.bc.ca
Senior Counsel for the AG (British Columbia)

Goddard Nasseri LLP
55 University Avenue, Suite 1100
Toronto, ON M5J 2H7
Justin H. Nasseri, LSO: 64173W
Tel: 647.351.7944
Fax: 647.846.7733
Email: justin@gnllp.ca

Toronto agent for the Attorney General of British Columbia