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 INTERVENOR, THE ATTORNEY GENERAL OF BRITISH COLUMBIA (for Reference returnable April 15-18, 2019)

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

J. Gareth Morley
Gareth.morley@gov.bc.ca
Lawyer 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:

PARTIES:

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 Additional e-mails for service: Brooke.sittler@justice.ca; Mary.matthews@justice.gc.ca; Ned.djordjevic@justice.gc.ca; Neil.goodridge@justice.gc.ca; Marla.mckitrick@justice.gc.ca; Pamela.fraser@justice.gc.ca Counsel for the Attorney General of Canada

INTERVENORS:

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 Counsel for the Attorney General of New Brunswick

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 Additional email : awilliamson@afn.ca Counsel for 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 Additional emails: ebillard@ecojustice.ca Counsel for the 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 Additional email : Nathalie Chalifour (nathalie.chalifour@uottawa.ca) Counsel for 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 Counsel for the 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 Additional email: anne.jones@gowlingwlg.com Counsel for the 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: bhallsor@crease.com Counsel for the Canadian Taxpayers Federation
MICHEL BÉLANGER AVOCATS INC. 454, avenue Laurier Est Montréal, QC H2J 1E7 **Marc Bishai/David Robitaille** Tel: 514-991-9005 Fax: 514-844-7009 Email: marc.bishai@gmail.com / David.robitaille@uottawa.ca Counsel for the Centre québécois du droit de l'environnement (CQDE) and Équiterre	**ECOJUSTICE ENVIRONMENTAL LAW CLINIC** University of Ottawa 216-1 Stewart Street Ottawa, ON K1N 6N5 **Joshua Ginsberg / Randy Christensen/Emily Billard** Tel.: (613) 562-5800 x 3399 / (604) 685-5618 x 234 Fax: (613) 562-5319 Email: jginsberg@ecojustice.ca / rchristensen@ecojustice.ca/ ebillbard@ecojustice.ca Counsel for the David Suzuki Foundation

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 Additional emails : jyarschenko@ratcliff.com; jpowell@ratcliff.com Counsel for the 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 Counsel for the International Emissions Trading Association
WESTAWAY LAW GROUP 55 Murray Street, Suite 230 Ottawa, ON K1N 5M3 **Cynthia Westaway/Dawn Misner** Tel.: (613) 722-9091 Fax: (613) 722-9097 Email: cynthia@westawaylaw.ca / dawn@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 Counsel for 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 Counsel for the United Conservative Association

TABLE OF CONTENTS

PART I - OVERVIEW

1. Greenhouse gases might pose the most difficult collective action problem the world has ever faced. The benefits of emissions are local, but the costs are global. When people burn fossil fuels in the production or consumption of goods and services, each jurisdiction – national or subnational – exports its greenhouse gases to every other. And they all import the consequences: for all practical purposes, without regard to the extent of their own part in creating the problem.

2. The prospect of uncontrolled climate change requires that we treat the capacity of the atmosphere to hold greenhouse gases like the scarce, valuable resource it is. If total temperature increases are to be kept to 1.5˚C or 2˚C above pre-industrial averages -- or indeed to any target at all -- the world must ultimately reduce net emissions to zero. The global stock of greenhouse gases that can permissibly be added in the meantime is finite and must somehow be allocated. Those allocations have an economic value that individuals, industries, sub-national jurisdictions and nation states can be expected to quarrel over.

3. Under Canada's Constitution, provinces have legislative authority to regulate or price emissions by individuals and businesses within their borders. In 2008, British Columbia enacted one of the first carbon pricing schemes. In the intervening decade, emissions were reduced compared to what they would have been, while the province enjoyed the highest economic growth in the country. But because greenhouse gases do not respect borders -- while provincial legislation must -- British Columbia's actions will only counteract the negative effects of climate change on the property and civil rights of its residents if other jurisdictions follow suit. While British Columbia has no need to have other jurisdictions adapt its precise model, if they do not enact measures of comparable stringency, British Columbia's carbon price will do no good.

4. The world as a whole has no solution to this problem, except the uncertain process of international negotiation. Canada, on the other hand, is not a treaty arrangement between independent states, but a federation with two levels of co-ordinate sovereign governments. Section 91 of the *Constitution Act, 1867* gives Parliament the power 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." This general power authorizes Parliament to address matters the provinces cannot, thereby ensuring that legislative jurisdiction under our Constitution is exhaustively distributed.

5. Long ago, the courts recognized dangers to provincial autonomy if this general power were given too broad a reading. They insisted that a "matter" must be defined narrowly. To be eligible for federal authority under the general power, it must have a "singleness, distinctiveness and indivisibility" that clearly distinguishes it from matters of provincial concern. The scale of the impact of assigning it to federal jurisdiction must be reconcilable with the fundamental distribution of legislative power under the Constitution. But they also insisted that all sovereign power is exhaustively distributed in Canada, so matters truly beyond provincial competence because of collective action dynamics must lie with Parliament. The people of Canada are not left without a means to address joint threats because one region might defect: our division of powers is not a suicide pact.

6. British Columbia intervenes to argue that the "matter" of the *Greenhouse Gas Pollution Pricing Act* should be defined as the cumulative dimensions of greenhouse gas emissions in Canada. These dimensions include setting target emissions for the country as a whole and establishing a principle by which these emissions can be allocated within the country. So defined, this "matter" is single, distinct and indivisible. It is narrow. It is beyond provincial

competence. And it targets extra-provincial harms of provincial inaction. Assigning the matter of the *Act* to Parliament is consistent with the general federal-provincial balance.

7. While the *Act* could have been enacted under Parliament's authority over "any mode or method of taxation" under s. 91(3) of the *Constitution Act,* as a tax it would not apply to provincial governments and their agents – some of which are among the biggest emitters in the country. In *Johnny Walker,* the Privy Council decided that while provinces are immune from taxes, they are not immune from price measures aimed at furthering valid federal regulatory objectives, even if those measures generate revenue. The *Act*'s backstop greenhouse gas prices recover the value of access to the scarce resource of the global atmosphere's capacity to absorb greenhouse gas emissions. Provincial governments can therefore be required to pay.

PART II - FACTS

THE ATMOSPHERE'S GREENHOUSE GAS CAPACITY IS A GLOBAL COMMONS

8. Greenhouse gases are so characterized because their presence in the atmosphere tends to increase average global temperature by absorbing and re-emitting infrared radiation from the sun. Greenhouse gases mix in the global atmosphere, so that emissions anywhere raise concentrations everywhere. The most common greenhouse gas is carbon dioxide, which is a by-product of burning fossil fuels for energy.[1]

9. In a 2018 Special Report, the Intergovernmental Panel on Climate Change concluded that, in order to keep global warming to 1.5°C over pre-industrial levels, global emissions of carbon dioxide would need to fall to 45% of 2010 levels by 2030 and reach "net zero" (as much

[1] UN Framework Convention on Climate Change, 1992, Art. 1, para. 5, Book of Authorities of the Attorney General of British Columbia ("**BOA**") Tab 40; Moffet Affidavit at para. 8 and Exhibits C, p. 4 and H, p. 3.; Record of the AG (Canada), Tabs 1, 1C, 1H. ("**AGCR**").

leaving the atmosphere as entering it) by 2050. Canada committed to pursue efforts to meet the 1.5°C target in the 2015 Paris Agreement.[2]

10. While less ambitious targets would allow for more emissions and a later date to reach "net zero", the IPCC has said with "high confidence" that any target whatsoever (other than a baseline implying warming between 3.7 and 4.8°C by 2100) requires limiting cumulative greenhouse gas emissions, such that they eventually reach net zero and are constrained in the intervening decades.[3]

11. Any control on climate change therefore requires a greenhouse gas *budget*. There is no free lunch. Every tonne of carbon dioxide equivalent emitted by one entity or jurisdiction is one less that can be emitted by others. This finite budget principle operates globally and nationally. The valuable nature of the ability to add to the remaining stock of permissible greenhouse gas emissions means Canada must ultimately agree with other countries on the terms on which each country takes its share. Equally, whatever Canada's budgeted contribution to twenty-first century greenhouse gas emissions, the lower the price in one part of Canada, the higher in the rest.

12. In 2005, total Greenhouse Gas Emissions in Canada were 732 Megatonnes (Mt) carbon dioxide equivalent. Canada has committed to a target of 30% below this level (or 512Mt) by 2030. In 2016, they were 704 Mt, with about 60 Mt emitted in British Columbia. So even if British Columbia ceased – immediately – to emit any greenhouse gases at all, Canada would not meet the target.[4]

---

[2] Moffet Affidavit, Ex. D, p. SPM-15 and Ex. I, p. 22, AGCR Tabs 1D , 1I, ; Paris Agreement, Art. 2, para 1(a) BOA Tab 38.
[3] Moffet Affidavit, Ex. C, p. 19, AGCR, Tab 1C.
[4] Blain Affidavit, para. 20-21, AGCR, Tab 2; Moffett Affidavit, para. 44, AGCR, Tab 1.

ECONOMICS OF LOCAL AND GLOBAL POLLUTANTS

13. Economic analysis views pollution through the lens of the concept of "externalities." An externality arises when the entity that enjoys the benefit of an activity does not pay the cost. From the perspective of economics, pollution is an externality carried through an environmental medium (be it groundwater, lakes and rivers, oceans or the atmosphere) from the party who controls and benefits from it to the parties who suffer the costs. If it is not practical for all these parties to bargain or otherwise reach a cooperative solution, externalities lead to a "collective action problem" in which the total losses can exceed the private gains of the polluters. In the case where everyone both causes the pollution and suffers from it, this collective action problem can make almost everyone worse off. A price paid by the polluter equivalent to the pollution's "social cost" has the effect of "internalizing" this externality.[5]

14. This can be done either by setting a price per unit of pollution and allowing the market to determine the quantity of pollution (a "pollution charge") or setting a total amount of pollution and allowing the market, through trading, to set a price (a "cap-and-trade" system). Policy preferences for a particular pricing system depend on a number of factors: economists emphasize relative "nonlinearities" in the marginal cost or marginal benefit of greenhouse gas reductions (it is less costly to target price if the marginal benefits of emissions are relatively constant and less costly to target quantity if the marginal costs are relatively constant), along with political acceptability and administrative simplicity of each kind of scheme.[6]

15. Using this framework of "internalizing" "externalities", economists have considered the

---

[5] William Baumol, "On Taxation and the Control of Externalities" 62: 3 *Am. Econ. Rev.* 307 (1972) Parker Affidavit, Ex. A, Record of the Attorney General (British Columbia) ("**AGBCR**"), Tab 2A; Maureen Cropper & Wallace Oates, "Environmental Economics: A Survey" 30 *J. of Econ. Lit.* 675 (1992), AGBCR, Tab 2B.

[6] See M. Weitzman article, AGBCR, Tab 2C; W. Nordhaus article, AGBCR, Tab 2D.

question of how the division of authority within a federation enables or frustrates finding an appropriate solution to pollution. Internalizing an externality is a public good of varying geographic scope. The crucial question is whether the jurisdiction internalizes both the costs and benefits of the pollution. When that happens, smaller jurisdictions will likely adopt more efficient policies – but when the costs are felt outside the jurisdiction that experiences the economic benefits, larger jurisdictions or binding agreements are necessary.[7]

16. The economic literature on federalism therefore distinguishes between *local* pollutants (where the harms occur in the same jurisdiction as the emissions), *cross-border* pollutants (where the harms occur in one or two "downstream" jurisdictions) and *global* pollutants (where the harms occur everywhere, uncorrelated with the location of emissions). Global pollutants create the same type of collective action problem between states that is faced by individuals in relation to local pollutants: the effect of altruistic self-sacrifice can be undermined by free riders. As compared with cross-border pollutants, a negotiated solution is more difficult because a small number of holdouts can undermine it. According to the literature submitted by British Columbia, sub-national governments will generally be better at setting a price for local pollutants, but without a centrally-imposed minimum, they will underprice global pollutants.[8]

BRITISH COLUMBIA WILL BE HARMED IF OTHER JURISDICTIONS DO NOT PRICE GHGS

17. British Columbia has reason to believe it has suffered, and will suffer, concrete harms as a result of climate change. A prominent instance is the pine beetle epidemic that devastated

---

[7] Wallace Oates and Robert Schwab article, AGBCR Tab 2E; Richard Revesz, "Federalism and Interstate Environmental Externalities" 144 *U. Penn. L. R.*: 2341 (1996) BOA Tab 39; Daniel Farber, "Environmental Federalism in a Global Economy" 83 *Virginia L. R.* 1283 (1997) BOA Tab 35; Robert Cooter & Neil Siegel, "Collective Action Federalism: A General Theory of Article 1, Section 8" 63 *Stanford L.R.* 115 (2010) BOA Tab 34.

[8] Cropper & Oates at pp. 695-5, AGBCR, Tab 2B; Roland Magnusson article, AGBCR, Tab 2F.

British Columbia's forest industry in the early part of this century, an example of changes in ecosystem ecology as a result of climate change leading to resource loss. There is also reason to think climate change has resulted in longer and drier fire seasons, which risk public and private property and human life, while exposing provincial and local governments to the expense of fighting these fires. Melting of permafrost as a result of climate change may damage infrastructure in Northern British Columbia, especially for remote communities and Indigenous Peoples. Ocean acidification caused by carbon dioxide emissions poses risks to bony fish and shell fish resources on the Pacific coast, as does changes in temperature in spawning rivers and ocean surfaces. Less snow and more rain could affect hydroelectric generation. Sea level rise poses risk of unquantified property losses for coastal British Columbia.[9]

18. In addition to rendering their own actions incapable of effectively addressing the harm of climate change, the failure to have minimum national price standards for greenhouse gas emissions can be expected to damage the competitiveness of industries located in jurisdictions – like British Columbia – that have more stringent prices. British Columbia has provided evidence that the competitiveness of its cement industry has been hurt by the difference between its carbon price and pricing in other provinces. This creates a real potential of a "race to the bottom" if there is no federal action: each jurisdiction responds to competitive pressure by setting greenhouse gas prices below the level it would choose if others also took action.[10]

PART III- LEGAL ISSUES ON THIS REFERENCE

19. By Order-in-Council 1014/2018, the Lieutenant Governor in Council referred to this Court the following question:

[9] Lesiuk Affidavit, Ex. B, pp. 20-43, AGBCR, Tab 1B. See also Exhibits C-H, AGBCR, Tabs 1C-1H.
[10] Magnusson, AGBCR, Tab 2F; Moffet Affidavit, Ex. P at pp. 34-36, AGCR Tab 1P; Lesiuk Affidavit, Exhibits J and K, AGBCR, Tabs 1J, 1K.

Is the Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No. 1, SC 2018, c. 12, unconstitutional in whole or in part?

20. British Columbia respectfully submits that the answer to this question is "no":

(a) The *Act* is a valid exercise of Parliament's authority to make laws for the Peace, Order and Good Government of Canada in relation to natters not coming within the Class of Subjects assigned exclusively to the provincial legislatures by reason of the matter's national dimensions.

(b) The *Act* can be validly applied to provincial governments and their agents, because the backstop pricing mechanisms do not impose a tax.

PART IV – LAW & ARGUMENT

CUMULATIVE DIMENSIONS OF GHGS "MATTER" OF NATIONAL CONCERN

21. Before it enumerates specific federal powers, section 91 of the *Constitution Act, 1867* gives Parliament legislative authority over all matters not within the class of subjects assigned exclusively to provincial legislatures and not otherwise within federal legislative authority. This "general power" is a solution to the desire of the confederating provinces, set out in the Preamble to the *Constitution Act, 1867*, to be "federally united" under a constitution "similar in principle to that of the United Kingdom." This was a historically-unprecedented mix of a *federal* division of sovereignty between central and sub-national governments with a *British* system of parliamentary supremacy. according to which the legislature can make or unmake any law..

22. As a result of the federal principle, Parliament and the provincial legislatures are supreme only with respect to matters that fall within their respective spheres of jurisdiction. As a result of the principle of parliamentary sovereignty, legislative authority is *exhaustively* distributed: the whole of legislative power, whether exercised or merely potential, is distributed between Parliament and the provincial legislatures. The framers of Confederation determined that, in

contrast to the United States under the Tenth Amendment, the general power for matters not otherwise distributed would be vested in the Dominion Parliament.

Reference: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras. 53-56, Brief of Authorities of the AG (British Columbia) ("**BOA**"), **Tab 1**; *Hodge v. The Queen* (1883), 9 AC 117 (JCPC) at p. 11-12, **BOA Tab 2**; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 2004 SCC 79 at para. 34, **BOA Tab 3**; Speech of the Hon. John A. Macdonald to the Legislative Assembly of the Province of Canada, 6 February 1865 in ed. P.B. Waite, *The Confederation Debates in the Province of Canada, 1865.* McLelland and Stewart, 1963, p. 44, **BOA, Tab 33.**

23. The opening phrase of section 91 implements this principle of exhaustiveness by assigning to Parliament legislative jurisdiction over matters that are not within the enumerated powers of section 91 and are also not within the scope of provincial authority. Canadian jurisprudence has identified three "branches" of the general power: first, the "emergency branch" (over temporary emergencies beyond provincial competence to address); second, the "residual branch" (over matters that simply cannot be classified under any enumerated powers, even "property and civil rights"); third, the "national concern" or "national dimensions" branch.

Reference: *Ontario (A.G.) v. Canada (A.G.),* [1896] UKPC 20 (JCPC) [*Local Prohibition*], pp. 6-7, **BOA Tab 4.**

24. The national concern/dimensions branch arises because provincial legislative authority operates "in the province." The Privy Council therefore recognized that matters that have or obtain a "national dimension" such that they are not in any specific province must be within the general power. This is a direct corollary of the principle of exhaustiveness: since there is no gap in the overall legislative sovereignty of the Canadian state, as a matter of logical necessity and democratic accountability alike, Parliament must be able to do so.

Reference: *Local Prohibition*, **BOA Tab 4.**

25. Properly understood, this branch of the general power cannot negatively affect provincial sovereignty since it can only be used to enact laws that provinces cannot. But it was recognized early on by the Privy Council in the *Local Prohibition* case that the general power could threaten provincial autonomy if the matters to which it applied were not defined narrowly.

Reference: *In the Matter of the Board of Commerce Act and the Combines and Fair Prices Act of 1919,* [1920] 60 SCR 456 at 470, **BOA Tab 5**; *Canada (A.G.) v. British Columbia (A.G.),* [1930] AC 111at para. 9, **BOA Tab 6**.

26. In the *Anti-Inflation Reference*, Justice Beetz, writing on behalf of the majority on this issue, adopted the views of Professors Le Dain and Lederman in two articles that argued that a "matter" said to be within the general power as a result of the national dimensions branch must be defined narrowly. Justice Beetz rejected the idea that broad areas of policy such as "inflation" should be thought of as a "matter." That same caution has been consistently applied to other broad designations such as "culture" or "the environment."

Reference: Gerald LeDain, "Sir Lyman Duff and the Constitution" 12:2 *Osgoode Hall L.J.* 261 (1974) **BOA Tab 36**; W. Lederman, "Unity and Diversity in Canadian Federalism", 53 *Can. Bar. Rev.* 596 (1975) **BOA Tab 37**; *Anti-Inflation* **CBA Tab 26**; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para. 51, **BOA Tab 7**; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, at p. 37, **BOA Tab 8.**

27. In division-of-powers analysis, the first stage in analyzing the validity of a law is identifying its "matter": what the law is about in "pith and substance." This can obviously be done at varying levels of generality. The same law can be said to be "about" (a) the future of the world, (b) the environment, (c) global climate change, (d) pollution, (e) greenhouse gases, (f) pricing of greenhouse gases, and (g) setting minimum standards of stringency for pricing

greenhouse gas emissions. Any of these could be argued to be matters beyond the competence of the provinces. But in the *Anti-Inflation Reference*, Justice Beetz held that broad definitions would endanger the system of federalism as one with co-ordinate, equal sovereigns.

28. The definitive statement of the test for a "matter" that is within the national concern/dimensions branch is found in the majority judgment of Justice Le Dain, upholding federal legislative authority over marine pollution in the *Crown Zellerbach* decision:

> For a matter to qualify as a matter of national concern […] it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
>
> 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 401at 431-432, **BOA Tab 9.**

29. The analysis under the *Crown Zellerbach* test can be broken down as follows:

(a) *Singleness:* the matter should be characterized as specifically and narrowly as possible. The description should be at the lowest level of abstraction and generality consistent with the fundamental purpose and effect of the statute.

(b) *Distinctness*: the matter must be one that is beyond the practical or legal capacity of the provinces under s. 92 because of the limitation of provincial authority to the province.

(c) *Indivisibility*: the matter must not be an aggregate of matters within provincial competence, but have its own integrity. This normally occurs where the failure of

one province to take action primarily affects "extra-provincial interests", i.e., the interests of other provinces, other countries and aboriginal and treaty rights.

(d) *Preservation of the Federal-Provincial Balance:* assigning the matter to the federal Parliament must not disrupt the fundamental distribution of power that characterizes Canadian federalism.

30. As a "matter", the cumulative dimensions of greenhouse gases can be distinguished from the general matter of greenhouse gases or atmospheric pollution because what matters for the former is the *total* amount of emissions from Canada or its constituent units. This is a distinct matter because the effects of greenhouse gases depend only on total emissions, regardless of location. Each particular unit of emissions is fungible, so how these are allocated within the province is not part of this matter. What matters is the overall budget.

31. Measures addressing cumulative dimensions can be implemented as a total quantity or as a minimum price. These are equivalent. The economic principle of the law of demand: means the amount demanded declines with price based on the commodity's demand elasticity.

32. There are two aspects of the cumulative dimensions of greenhouse gases:

(a) *National Greenhouse Gas Budget*: This aspect involves setting the total maximum emissions from Canada as a whole or – equivalently – a minimum value for the right to add to that total.

(b) *Intra-National Allocation of Greenhouse Gas Budget*: This aspect involves developing a principle for the allocation of the maximum between the provinces

and territories that make up Canada. This is equivalent to setting a minimum standard of stringency for that province or territory to price greenhouse gases.

33. The principle for allocation of the national greenhouse gas budget is a matter of policy, for Parliament. It could be based on population, which would create problems for provinces with low population densities or industries more reliant on fossil fuels. It could be based on historic emissions, which would create problems for provinces that have already taken measures to reduce emissions. The most economically efficient way to allocate the greenhouse gas budget is to set a minimum standard for the *value* of greenhouse gas emissions, since this ensures that the economic cost of emission reductions is the same everywhere and the overall cost is minimized. For constitutional purposes, these are all *means* of addressing the same *matter*.

34. Since the cumulative dimensions of greenhouse gases do not encompass the specific way a province or territory might arrange its greenhouse gas emissions to meet the intra-national allocation, Parliament's authority to reach into the province and regulate or price specific emissions derives from the "ancillary power" principle. Serious intrusions into provincial jurisdiction are valid if they are necessary for the core legislative scheme aimed at the cumulative dimensions of greenhouse gases, while less serious intrusions are valid as long as they are functionally connected to the overall federal scheme.

Reference: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641at p. 671-2, **BOA Tab 10**; *Quebec (AG) v. Lacombe*, 2010 SCC 38 at paras. 32-46. **BOA Tab 11.**

THE MATTER OF THE *ACT* IS THE CUMULATIVE DIMENSIONS OF GREENHOUSE GASES

35. In British Columbia's submission, the pith and substance of the *Act* – its core -- is not "climate change" or even "greenhouse gases" *in general*, but the discrete and indivisible matter

of the cumulative dimensions of greenhouse gas emissions, including a national budget and intra-national allocation of that budget. The *Act* has chosen to do the latter by requiring minimum standards of stringency for greenhouse gas pricing across Canada based on the Governor in Council's judgment of what will enable Canada to meet its targets.

36. The backstop pricing mechanisms of the *Act* have a legal effect on the residents of a province only if the Governor in Council lists that province under Schedule 1 (in which case Part 1 applies) or Schedule 2 (in which case Part 2 applies). In deciding whether to list a province, the Governor in Council acts for the purpose of "ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" and must consider, as the primary factor, "the stringency of provincial pricing mechanisms for greenhouse gas emissions."[11]

37. In making this determination, the Governor in Council receives information from the provinces about their emissions and pricing mechanisms and from Environment Canada about the likely effect of those schemes on Canada's targets. The Governor in Council's decision is subject to judicial review in the Federal Court for fairness and reasonableness. Since a failure to be adequately stringent causes concrete damage to other provinces, while there are multiple ways a province can attain any given level of stringency, *someone* must have the authority to determine whether an adequate stringency. Parliament has chosen the Governor in Council to make this decision, as the body that is both politically accountable to the Canadian people and legally accountable to the courts.

38. The backstop pricing mechanisms are necessary to the integrity of the scheme. The

[11] See *Act,* s. 3 "listed province", s. 169 "covered facility". See also ss. 166, 189.

Governor in Council cannot require the legislature of a province with inadequate greenhouse gas pricing to enact particular measures in its own name. The only effective remedy for a failure to meet a minimum level of stringency is a backstop system of greenhouse gas pricing. The bulk of Parts 1 and 2 of the *Act* set out such systems in detail But the *Act* would have its desired effect if the backstop systems were never applied. In that case, all sub-national jurisdictions would have adequately stringent systems of pricing to meet the federal goal of minimizing harm to extra-provincial interests.

39. If some provinces or territories choose to use the federal backstop – for any reason -- those jurisdictions have not lost sovereignty. Adopting a uniform solution is as legitimate an exercise of provincial autonomy as developing a unique one. "Off the rack" may make more sense for a jurisdiction than a bespoke approach. It is only if a province or territory would prefer not to have its own adequately stringent pricing system *or* adopt the federal one that the issue of intrusion into provincial jurisdiction is reached.

Reference: *Reference re Pan-Canadian Securities,* 2018 SCC 48, **BOA Tab 1.**

40. In British Columbia's submission, therefore, the "matter" of the *Act* is confined to the cumulative dimensions of greenhouse gases.

41. Backstop measures applied to provinces that have decided against pricing greenhouse gas emissions with adequate stringency are justified intrusions into provincial jurisdiction based on the ancillary powers doctrine. The intrusion into provincial authority is *minimal*, since it can be avoided by a province willing to set its own, adequately stringent, pricing scheme. The intrusion is *necessary*, since if there is neither an adequately stringent provincial/territorial scheme nor a federal backstop, Canada could not meet national targets or could only do so by allocating the

national budget in a way that imposed greater cost on cooperating provinces than defecting ones. Since ancillary powers can either be minimal and functional or be serious and necessary, an ancillary power that is both minimal and necessary is doubly justified.

THE CUMULATIVE DIMENSION OF GHGS ARE BEYOND PROVINCIAL ABILITY

42. Cumulative dimensions of greenhouse gases are clearly single and distinct. Whether they are "indivisible" depends primarily on whether a failure of a province to meet it will have primarily extra-provincial effects. A national standard for a provincially-regulated activity where the principal effects of inaction are felt within the boundaries of the province – whether motivated by a desire for uniformity or by a desire to see a particular policy result -- would not do what provinces were *unable* to do, but what they have *decided* not to do. It would, to use Justice Beetz's words in the *Anti-Inflation Reference,* be a mere "aggregate" of provincial standards. So national standards for curriculum, investor protection, residential development, or local pollutants, for example, would not be matters of national concern.

Reference: *Anti-Inflation Reference,* p. 458, **CBA Tab 26.**

43. However, where " the failure of one province to enact effective regulation would have adverse effects on interests exterior to the province," a minimum standard is no longer an aggregate of individual provincial standards, but becomes an indivisible "unity" necessary to protect the federation from devolving into a war of all against all. Provinces limited to legislating within their own borders are *unable* to address such a collective action problem.

Reference: *Schneider v. The Queen.*, [1982] 2 SCR 112 at p. 131, **BOA Tab 12.**

44. The issue is not the importance of the policy issue, but whether inaction in one province

has a significant effect on others. So opioid *treatment*, although obviously of vital importance, is not a matter to which the national dimensions/concern branch applies. The failure of one province to provide addiction treatment would not demonstrably "endanger the interests of another province." (As this example suggests, the question is not whether inaction has incidental effects on other provinces, but whether these are outweighed by the primary impact on the non-acting province.) By contrast, a failure to prevent opioid *trafficking* from one province does endanger the interests of others, and was therefore found to be within the national dimensions branch in the days before it was considered to be within the criminal law power.

Reference: *Schneider; R. v. Hauser*, [1979] 1 SCR 984, **BOA Tab 13.**

45. The relationship between local pollutants and global pollutants is analogous to the relationship between drug treatment and disrupting drug trafficking. The collective action problem inherent in global pollutant makes the lack of a minimum standard an indivisible matter. This has been found by *all* Supreme Court justices who have opined on the issue.

46. The 1976 *Interprovincial Co-operatives* case arose in the context of toxic discharges into interprovincial rivers. Manitoba enacted a statute allowing damages for and injunctions against discharges in upstream provinces, whether those provinces authorized the discharge or not. Justice Ritchie, for the Court, held that a downstream province can create civil liability for the consequences of such discharges only if authorization under the law of the upstream province is a defence. All justices agreed that provincial jurisdiction lay at the mercy of the common law conflicts-of-law rules (although they disagreed about what those were). All also agreed that the federal Parliament could change those rules under the national dimensions branch.

Reference: *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477, **CBA Tab 17.**

47. In *Crown Zellerbach,* despite splitting in the result, all justices on the court agreed that the general power provides a basis for federal authority in relation to global pollutants. Justice Le Dain allowed a permitting scheme for any dumping into marine waters. Justice La Forest, in dissent, held that dumping of *toxic* chemicals that would affect the oceans would be within federal authority, but drew the line at a permitting scheme for inert wood waste. However, it was common ground that true global pollutants (which is what greenhouse gases clearly are) would create a collective action problem that Parliament could resolve through the general power.

48. 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." They held that regulation of diffuse, persistent and seriously toxic chemicals, such as PCBs, would have such effects, but that not all the substances regulated by the federal statute in issue in that case were diffuse, persistent and seriously toxic. Justice La Forest for the majority upheld the impugned legislation under the criminal law power and found it unnecessary to address the national dimension branch. Justice La Forest subsequently stated for a unanimous court that the national dimensions branch embraced the power to address conflicts in provincial policies that crossed territorial boundaries in the context of provincial laws relating to the use of records in civil litigation.

Reference: *R. v. Hydro-Québec*, [1997] 3 SCR 213 [*Hydro- Québec*], at paras. 76, Lamer CJ and Iacobucci J (dissenting) and 110, **BOA Tab 14;** *Hunt v. T & N PLC*, [1993] 4 SCR 289 at para. 60, **BOA Tab 15.**

49. While competent to restrict or price greenhouse gas emissions that take place within its

borders, British Columbia is constitutionally powerless to price emissions that take place in Saskatchewan or Ontario. In the case of local pollutants, this inability would accord with the fundamental design of a federal system. Since British Columbians would not be materially affected by health or environmental effects of local pollution discharges in those provinces, it should be up to the residents of Saskatchewan or Ontario to decide what, if anything, ought to be done. The case of global pollutants is different. British Columbians cannot hold Saskatchewan or Ontario's government to account, but are affected anyway.

50. This division between global and local pollutants corresponds to the principle of subsidiarity, defined by Justice L'Heureux-Dubé as "the proposition that law-making and implementation are often best achieved at a level of government that is not only *effective*, but also *closest to the citizens affected.*" Provincial governments are most effective and closest to the citizens affected in relation to local pollutants. But collective action problems make them ineffective at addressing the cumulative problems of cross-border or global pollutants. And provincial governments can affect the resident of other provinces without fear of accountability to them. Only in Parliament are all the Canadian citizens affected by Ontario's refusal to price greenhouse gases to national standards of stringency represented.

Reference: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at para. 3, **BOA Tab 16.**

PROVINCIAL JURISDICTION OVER EMISSION-REDUCTION MEASURES REMAINS INTACT

51. There is no contradiction between an aspect of an issue being within federal competence under the national concern/dimensions branch of the general power and other aspects being within provincial competence. Indeed, the "double aspect doctrine" was first declared in relation

to the general power, which was the basis for federal temperance legislation. Parliament shares jurisdiction with provinces over land use decisions in the capital region, advertisements on radio and television, drinking on airplanes and use of documents in cross-jurisdictional litigation.

Reference: *Munro v. National Capital Commission*, [1966] SCR 663, **BOA TAB 17**; *Re Regulation & Control of Radio Communication in Canada,* [1932] 2 DLR 81 (JCPC) **BOA Tab 18**; *Irwin Toy Ltd. v. Quebec (AG),* [1989] 1 SCR 927 **BOA Tab 19**; *Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292 **BOA Tab 20**; *Air Canada v. Ontario (LCB)*, [1997] 2 SCR 581 **BOA Tab 21; *Ontario (AG) v. Canada Temperance Federation*, [1946] 2 DLR 1 (PC), p. 5, BOA Tab 22** citing *Russell v. The Queen* (1882), 7 AC 829 (PC), *Hodge v. The Queen*, and *Ontario (AG) v. Canada (AG)*.

52. It is true that where a matter falls within the general power, Parliament's authority *over that matter* has been said to be "plenary and exclusive, including with respect to intra-provincial aspects of that matter." But this is not unique to the general power. With the exceptions of immigration and agriculture, legislative authority over *all* matters distributed by the *Constitution Act, 1867* – including criminal law, trade and commerce or property and civil rights -- are"exclusive." And all heads of power are also "plenary", which just means that the legislature in question has the sovereign authority of the British Parliament in relation to that matter. This is perfectly compatible with a large degree of effective concurrency under the double aspect doctrine, because what is exclusive and plenary is authority over the abstract "matter", not over concrete persons, things, acts or omissions. Just as Parliament and the legislatures can both use their plenary and exclusive powers to regulate driving, Parliament and legislatures can regulate carbon emissions: Parliament with an eye to their cumulative dimensions, provincial legislatures as an aspect of property and civil rights in the province or direct taxation.

Reference: *Crown Zellerbach* at p. 432-433, **BOA Tab 9; *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 30, BOA Tab 23.**

THE FEDERAL/PROVINCIAL BALANCE

53. Ontario paints an alarming picture of the consequences for provincial autonomy if the *Act* is found to be constitutional. On Ontario's account, if Canada has jurisdiction over greenhouse gases, it will be able to micromanage every activity that involves or offsets the emission of greenhouse gases. This would amount to federal authority over almost everything. Ontario makes comparisons to 1970s-era federal wage-and-price controls, which would have given the federal government authority over the terms of every private-sector transaction in the country.

54. These fears are unfounded. The *Act* itself has the mildest of effects on provincial jurisdiction. It provides for a backstop pricing scheme, which only takes effect if the province's own measures are inadequate. The better analogy to measures to control inflation would not be wage-and-price controls, but rather the Bank of Canada's control over interest rates and aggregate money supply or the way federal and provincial authority have been reconciled – by agreement – in the area of agricultural supply management, by providing federal authority to set overall production quotas while provinces allocate them.

Reference: *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 SCR 292, 2005 SCC 20 at paras. 4-8, **BOA Tab 24.**

55. If a future Parliament were to attempt to use authority over the cumulative dimensions of greenhouse gases to micromanage matters within provincial jurisdiction, it would be constrained by the ancillary powers doctrine. Since they can potentially be offset by reductions elsewhere, specific acts of combustion are not themselves "in pith and substance" subject to federal authority confined to the cumulative dimensions of greenhouse gases. To establish that command-and-control regulation of individual transactions is within federal competence, Canada

would either have to show that the intrusion into provincial jurisdiction is not serious and the measure is functionally related to cumulative dimensions or, if the intrusion is serious, that the measure is *necessary* to address cumulative dimensions of greenhouse gases. Either way, the federation is not imperilled by assigning the matter to federal competence.

56. Indeed, *not* recognizing federal competence to address cumulative dimensions of greenhouse gases would imperil Canadian federalism. It would give those provinces seeking to do something about climate change through pricing mechanisms no forum in which to obtain comparably stringent measures from other provinces, rendering their own attempts ineffective. The distribution of legislative authority would no longer be exhaustive, because there would be critical measures that no legislature could enact.

57. This is the fundamental reason we have a federal level of government. The framers of Confederation could not predict the impact of industrialization on the global climate system. But they did anticipate that there would be matters no province could address itself. They were committed to the "British" principle that *some* legislative body could "make or unmake any law whatsoever." This was why they gave Parliament authority over matters not falling within provincial competence because they were not matters "in the province." If the cumulative dimensions of a global pollutant that threatens human life do not qualify, nothing would.

A PRICE FOR ACCESS TO A SCARCE RESOURCE IS NOT A TAX

58. With the exception of section 2, the *Act* could have been enacted under s. 91(3) of the *Constitution Act, 1867* (any mode or method of taxation). Ontario's arguments that the *Act* violates s. 53 are without merit. The *Act* was introduced in the House of Commons on royal recommendation. Section 53 is not offended if Parliament (or a legislature) delegates "details and

mechanism" of a tax so long as the delegation is "express and unambiguous." A "detail and mechanism" has been defined by the Supreme Court of Canada to include everything other than the "structure of the tax, the tax base, and the principles for its imposition." The *Act* sets out the structure of the backstop, what it will be charged on and the principles for its imposition. Delegating the finding that a province's own pricing mechanisms are not adequately stringent is no different from an assessment authority determining the value of land.

Reference: *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, at para. 74, **BOA Tab 25**; *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, at paras. 88, 91, **BOA Tab 26**; *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49, at para. 127, **BOA Tab 27.**

59. The real problem with considering the *Act* a tax statute is s. 2 of the *Act,* which purports to bind the provincial Crown. Section 125 of the *Constitution Act, 1867* protects each level of government from having the revenues from its assets being appropriated by the other level of government for that level's own fiscal purposes. But section 125 does not permit a level of government to undermine the objectives of another level of government's valid regulatory levies. So in *Johnny Walker,* the Privy Council ruled that the Federal Parliament could make provincial Crown agents pay excise duties – which it recognized had both revenue and protectionist purposes. Otherwise a province could have undermined federal tariff policy by setting up a publicly-owned retailer.

Reference: *British Columbia (AG) v. Canada (AG)*, [1923] 4 DLR 669, **CBA Tab 4.**

60. The key issue in determining whether a levy is a "tax" or a "regulatory charge" is whether its dominant purpose is appropriately connected to a regulatory scheme. Connection can

come in a number of forms: cost recovery is only one, and therefore a regulatory charge may generate net revenue (as excise duties obviously do). Canada points out that the backstop pricing schemes are primarily aimed at modifying behaviour to further a regulatory goal – a form of connection recognized by the Supreme Court of Canada as characterizing regulatory levies.

Reference: *Westbank First Nation v. B.C. Hydro*, [1999] 3 SCR 134, at para. 29, **BOA Tab 28.**

61. The *Act* also fits into another form of connection, namely the recovery of the value of access to a right, privilege or resource made scarce for regulatory (i.e., non-revenue) reasons. Where the right to a scarce good is a traditional property right, this is called a "proprietary charge." No one has ever doubted that the federal government must pay to access provincial timber or oil and gas, and that the charge can generate revenue. But the use of pricing to allocate access to inherently scarce public resources is not limited to property in the traditional, legal sense. So in *620 Connaught,* the Supreme Court of Canada upheld a business licence fee charged as a condition of operating in a national park was not strictly a proprietary charge, but could validly recover the benefit to the holder of the competitive advantage it received as a result of the inherent scarcity of business opportunities as a result of the limited development of the park. The Federal Court of Appeal followed up on this aspect of *Connaught* and upheld Part II fees under the Broadcast Licensing Fee Regulations on the grounds that access to broadcasting was limited and valuable for reasons that were ultimately regulatory. It did not matter that these revenues by definition exceeded those required for cost recovery (the basis for Part I fees): what made them regulatory levies, rather than taxes, was not the *cost* of the regulation, but the *value* of the regulatory scarcity.

Reference: *620 Connaught Ltd., v. Canada,* 2008 SCC 7 at para. 34, **BOA Tab 29**; *Canadian Assn. of Broadcasters* v. *Canada*, 2008 FCA 157 at para. 64, Ryer JA, ¶103, Letourneau JA,, at paras. 109-110. **BOA Tab 30.**

62. The *Act* requires provinces and territories to adequately price access to a scarce and valuable global commons, and sets backstop pricing if they do not. Because this commons is global, cumulative access is within federal authority. Because that access is scarce, it has a value that must be paid for. This is the "polluter pays" principle the Supreme Court of Canada has pointed out is a fundamental aspect of environmental law. Just as the federal Crown would have to pay to access (and use up) a provincially-regulated resource, so too must provincial governments and their agents pay to access (and use up) a global one. Section 125 ensures governments can use their own resources for their own purposes. It does not give them the right to get something for nothing.

Reference: *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58 at para. 24, **BOA Tab 31**; *Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5, at para. 29,, **BOA Tab 32**.

PART V – ORDER REQUESTED

63. British Columbia therefore respectfully asks that the question referred to this Court by OIC 1014/2018 be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th OF FEBRUARY, 2019

_____

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

SCHEDULE "A"
LIST OF AUTHORITIES

TAB IN BOA	DOCUMENT
	CASES
1.	*Reference re: Pan-Canadian Securities Regulation*, 2018 SCC 48
2.	*Hodge v. The Queen* (1883), 9 AC 117 (JCPC)
3.	*Reference re Same-Sex Marriage*, 2004 SCC 7
4.	*Ontario (A.G.) v. Canada (A.G.)*, [1896] UKPC 20 (JCPC)
5.	*In the Matter of the Board of Commerce Act and the Combines and Fair Prices Act of 1919,* [1920] 60 SCR 456
6.	*Canada (A.G.) v. British Columbia (A.G.),* [1930] AC 111
7.	*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31
8.	*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3
9.	*R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401
10.	*General Motors of Canada Ltd. v. City National Leasing,* [1989] 1 SCR 641
11.	*Quebec (Attorney General) v. Lacombe,* [2010] 2 SCR 453, 2010 SCC 38
12.	*Schneider v. The Queen*, [1982] 2 SCR 112
13.	*R. v. Hauser,* [1979] 1 SCR 984
14.	*R. v. Hydro-Québec,* [1997] 3 SCR 213
15.	*Hunt v. T & N PLC*, [1993] 4 SCR 289
16.	*14957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40
17.	*Munro v. National Capital Commission*, [1966] SCR 663
18.	*Re: Regulation & Control of Radio Communication in Canada,* [1932] 2 DLR 81

TAB IN BOA	DOCUMENT
	(JCPC)
19.	*Irwin Toy Ltd. v. Quebec (AG)*, [1989] 1 SCR 145
20.	*Air Canada v. Ontario (LCB)*, [1997] 2 SCR 581
21.	*Johannesson v. Municipality of West St. Paul*, [1952] 1 SCR 292
22.	*Ontario (AG) v. Canada Temperance Federation,* [1946] 2 DLR 1 (PC)
23.	*Canadian Western Bank v. Alberta*, 2007 SCC 22
24.	*Fédération des producteurs de volailles du Québec v. Pelland*, 2005 SCC 20
25.	*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General),* 2001 SCC 15
26.	*Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68
27.	*Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49
28.	*Westbank First Nation v. B.C. Hydro*, [1999] 3 SCR 134
29.	*620 Connaught Ltd., v. Canada,* 2008 SCC 7
30.	*Canadian Assn. of Broadcasters v. Canada*, [2008] FCA 157
31.	*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58
32.	*Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5
SECONDARY SOURCES	
33.	Speech of the Hon. John A. Macdonald to the Legislative Assembly of the Province of Canada, 6 February, 1865 in ed. P.B. Waite *Confederation Debates in the Province of Canada, 1865*. McLelland and Stewart, 1963, p. 44.
34.	Cooter, Robert & Siegel, Neil, "Collective Action Federalism: A General Theory of Article 1, Section 8" 63 *Stanford L.R.* 115 (2010)
35.	Farber, Daniel, "Environmental Federalism in a Global Economy" 83 *Virginia L.R.* 1283 (1997)
36.	LeDain, Gerald, "Sir Lyman Duff and the Constitution", 12:2 *Osgoode Hall L.J.* 261 (1974)
37.	W. Lederman, "Unity and Diversity in Canadian Federalism", 53 *Can. Bar. Rev.* 596

TAB IN BOA	DOCUMENT
	(1975)
38.	Paris Agreement, Art. 2, para 1(a)
39.	Revesz, Richard, "Federalism and Interstate Environmental Externalities" 144 U. *Penn. L.R.*: 2341 (1996)
40.	United Nations Framework Convention on Climate Change, 1992, Art. 1

SCHEDULE "B"
RELEVANT STATUTES

The *Greenhouse Gas Pollution Pricing Act* is already before the Court.

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

Court of Appeal File No. C65807

COURT OF APPEAL FOR ONTARIO

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